DESAI'S

All India Century Digest

(CIVIL)

1811-1912.

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A

BY

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1912.

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DEDICATED.

With feelings of gratitude

To

The members the Legal Profession.

Whose warm appreciation

and

Substantial Patronage

Has emboldened me to undertake this publication.

PREF

The absence of a truly comprehensive and exhaustive Digest of Indian Case-law has been felt somewhat more keenly in the last decade than ever before. The circumstances that have created this want are but too well-known to all lawyers to require detailed notice. Years after the want was felt, I put to myself the question whether I should not undertake to supply the want, but the gigantic dimensions of the task staggered me notwithstanding that by that time I had acquired considerable experience in the line—I mean the publication of compiled works. It was only in 1908, that I was able to make up my mind--but having decided, I at once applied myself to the first and –in case of all works of reference—the most important part of my task, viz , the plan or the arrangement of the Digest. With an ambitious programme before my eyes, I looked upon the question of arrangement as one of prime importance and accordingly I devoted a good deal of time to the consideration of various plans of arrangement. But when the plan was finally settled, the work of compilation progressed satisfactorily enough, and I announced the Digest publicly. The ever appreciative public responded to my invitation to subscribe so cordially that it at once removed from my mind the last vestige of a doubt as to the success of my Digest and their continued patronage has since served to cheer my toils. I should have been able to put before the public the result of my labours in a tangible form long before this, had not my other Digests that were passing through the press at the time distracted my attention. As it is, I am today able to put before the public the first Volume of my Digest and it is now for them to Judge of it.

While I was passing through the period of indecision and uncertainty, I heard that the veteran law publisher of Trichinopoly, Mr. Sanjiva Row was also going to publish a similar Digest It is, indeed, unfortunate, that Mr. Sanjiva Row passed away from amongst us before his Digest saw the light of day. His energetic nephew is now carrying on the work, and the public have the advantage of having before them two sets of Digests to choose from.

Speaking of the other Digests it may be said that there is not one that can be truly called either comprehensive or exhaustive. Until recently a lawyer had to refer to not one, not two, but a dozen or more Digests of different Law Reports by different compilers before he could fairly acquaint himself with the authorities touching a particular law-point He must first go to " Woodman" for cases reported in the authorised Law Reports (for, of Private Reports, few have the honour of being recognised in it), then he must patiently take up one by one, the independent Digests of ten or eleven different private Law Reports and passing on with a sigh of regret for the absence of digests pertaining to other private Law Reports that have not yet published their digests, he must finally go to Digests of printed but unreported cases and rulings. Add to this the vexation caused by the different arrangements adopted by different

compilers in their various digests and the reader will not stand in need of any apology on my part for ushering a new Digest in the field, which being comprehensive and exhaustive is not merely an addition to the number of already existing digests, but is an improvement in every possible way upon all the existing digests put together and much more besides.

It was originally intended to publish a mixed Digests of Civil and Criminal Cases; but an esteemed friend of mine, Mr. Ratanlal Ranchhoddas B. A. LL. B., Vakil High Court Bombay, and one of the able editors of the Bom. Law Reporter made a timely and valuable suggestion of separating the Civil and Criminal Cases and consolidating them in independent Civil and Criminal Digests. The suggestion was readily accepted for obvious reasons. My heartfelt thanks are due to Mr. Ratanlal for his valuable suggestion.

SOME SPECIAL FEATURES :--

(1) **This is the only Digest which brings the Indian Case-law down to the end of 1912 in a consolidated form.**

(2) **This is not a mere Digest,** for in it, every case that has been the subject of Judicial notice at all, has its whole history given under it, while previous cases on the point are also referred to in the head-note itself The reader is thus enabled to find, at a glance, the whole case-law on a given point collected at one place and has not to go into the several head-notes of all the cases thereon, which again are given in their proper places without any omission, notwithstanding that they are repeated in the historical notes of other cases. In other words this Digest is a consolidation of the Digest and the Index of cases judicially noticed-**a feature, the value of which cannot be overrated.**

(3) **Arrangement of Cases**-Cases are arranged in a connected form instead of throwing them together in a confused mass

All the cases belonging to a particular subject are divided into Principal Headings and sub-headings and the catch words of every single case or group of cases are noted down under the sub-heading to which it belongs with the number of that case.

In other words every subject is preceded, as it were, by a short digest of its own. This will enable the busy prectitioner to find out a required case at a moment's notice without going through the head-notes *in extenso* of hundreds of cases under a particular heading.

(4) **Tables of contents**—Very often the reader does not remember the section relating to a particular subject and has therefore to go to the Act to find it out and then only he can refer to the Digest. To avoid this inconvenience tables of contents of big Acts are given.

(5) **Tables showing the corresponding sections**–In order to avoid similar inconvenience as regards the corresponding sections of the new and old Civil Pro. Codes, and the Limitation Acts, comparative tables of such sections are also given.

(6) **Names of parties**—are given at the end of every case summarised in this Digest.

(7) **As to cross-references**–In almost all the other digests cross-references are made merely by vol and page of the report. This mode of giving cross-references is circuitous and therefore inconvenient to a busy practitioner.

A practical illustration will best give an idea of the inconvenience:—

Thus, a Cross-reference to a case under "Hindu Law-Alienation" is given in other digests in some such way as this—"Hindu Law-Alienation" see "Mortgage" "9 C. P. L. R. 35; 19 Bom. 363."

Now on goingito the heading of "Mortgage" the reader is confronted by a long series of cases, perhaps more than 800, out of which he has to hunt out the two cases referred to viz 9 C. P L. R. 35 and 19 Bom 363. If he, in the course of his attempt to do so forgets either the Vol or the page of either of the cases, he finds himself in the position of a mariner who has lost his compass. The difficulty increases in proportion to the number of cases referred to.

In order to avoid such a circuitous and troublesome mode of giving cross-references, I have numbered consecutively all the cases under a general heading and a cross-reference is made by referring simply to the number of the case under that heading. Thus in my Digest the above cross-reference will appear as under :—

"Hindu Law-Alienation" see "Mortgage" case No. (251) 19 Bom 363, and so on.

(8) **The classification**—adopted in this Digest is better suited to a busy practitioner than that adopted in other Digests. In the latter, the various cases that could be arranged under one convenient general heading are scattered at as many places as there are Imperial or Provincial Acts touching the subject.

(9) **Overruled cases**—As a general rule overruled cases and cases on repealed statutes are also included on the ground that by way of historical interest these are as useful as the living case-law.

I will consider myself highly obliged if members of the legal profession would inform me of any errors or omissions in this Digest.

I cannot conclude this preface without expressing my sense of obligation to the learned editors of the Bom. L. R: *C. L. J*; *A. L. J.* & *M. L. T.* for their kind permissions accorded to me to utilize their head-notes for my Digests and also to my brother pleaders Messrs *C.* J. Sutaria B. A. LL. B; G. H. *Zimye* B A LL B M.V. Desai B A LL B; P. V. Patel M A LL B for rendering me valuable assistance in various ways in the preparation of this Digest.

I owe a special acknowledgment to my printers for their services and I wish to put on record here my sense of satisfaction at the prompt, neat and careful work done by them. The credit belongs, of course, to the diligent and hard-working manager Mr. M V Shah of the Vidya Vilas Printing Press.

15th July, 1912.

BARODA.

B. R. DESAI.

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DESAI'S

ALL INDIA CENTURY DIGEST

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1811—1912.

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C. C. III

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DESAI'S

ALL INDIA CENTURY DIGEST

(CIVIL)

1811-1912.

VOL. I.

Abadi.

See also cases under:—

(1) **Landlord and Tenant.**
(2) **Common Land.**
(3) **Co sharers.**
(4) **Punjab Tenancy Act.**
(5) **Partition.**

1—Building house with consent:—Right of transfer.

A person who builds a house in the village abadi with the consent of the proprietor acquires no right to the site. Such a person has no right of transferring his house and the site thereof when he leaves the village. **Thakur Nihal Singh v Thakur Sardar Singh & Hira Lal. 3 C P L R 7.**

2—Land-holder and tenant—Rights of tenants in village abadi-Wajibularz-Suit to remove building created by tenant without permission of the Zamindars.

In the courtyard of a tenant lawfully in possession of a house site in the Village abadi was "some sort of a thatched shed" used in fact by the tenant and other Muhammadans of the village for the purpose of religious observances. The wajibularz of the village provided that "no cultivator can build a new house outside the compound of his dwelling house without the permission of the Zamindar. He is at liberty to do so in his compound" Held that the tenant in question was not at liberty to convert the thatched shed in his court-yard into a "pacca" mosque without the permission of the Zamindars. **Basa Mal and others v Ghayasuddin. 1904 A W N 176=2 A L J 27=27 All 556.**

Abadi-(*Contd.*)

3—Abadi—Building sites—Town. There is nothing in the Wajibularz to show that the owner of a house in a place like Harda may not transfer it and purchaser may not enlarge it or rebuild it. **Debi Parsad v Shalig Ram. 5 C P L R 124.**

4—Non-agriculturists resident—Ground belonging to a house—Malguzar's right.

A non-agriculturist resident of a village sold a strip of the ground belonging to his house to a person living in his immediate neighbourhood. The Malguzar sued them both for possession of the site. *Held* that in the absence of anything to show that the Malguzar was entitled to curtail the defendants' enjoyment of the land he could not claim possession. (8 C P L R 29; 3 C P L R 7; 5 C P L R 76, ref.) **Bhondusao v Jagat Ram 12 C P L R 146.**

5—Adverse possession—Landlord and tenant—House in abadi.

The fact that a tenant built a house in the abadi of a village and occupied it for over 12 years, is not sufficient to establish a title against the Zamindar by adverse possession. 1 A L J R 479, dis-

Abadi-(*Contd.*)

tinguished. **Jaikishun Singh v Motichand 3 A L J 627=(1906) A W N 258**

6—Tenant—Occupying room in the abadi ouster—Adverse-possession.

Where a tenant has been occupying a room in the abadi for a period of thirty years he cannot be ejected therefrom by the Zamindar. If the room is appurtenant to his holding, he cannot be ousted during the continuance of the tenancy, and if not appurtenant thereto, he must be taken to have acquired a right of occupying it by adverse possession. **Nazir Hasan v Shibba. 1 A L J 479=(1905) A W N 90= 27 All 556.**

7—Village homestead land. Rights of landholders in-Sale by tenant-Acquiescence-Principal and Agent Per Knox A C J.

A person, agriculturist or agricultural tenant who is allowed by a Zamindar to build a house for his occupation in the abadi, obtains, if there is no special contract to the contrary, a mere right to use that house for himself and his family so long as he maintains the house and does not abandon it by leaving the village ; he has no interest which he can sell by private sale, except his interest in the timber, roofing and wood work of the house. 1 A W N 114 F B. and I L R 20 All 248 referred to.

The property of or rights in the property of an absentee minor cannot be given away by an agent looking on and allowing tenant to spend money. Unless it can be brought home to a principal that he knew that person dealing with his agent so dealt in consequence of their believing that all statements made by him had been warranted by the principal, and, knowing this, the latter allowed the persons so dealing to expend money in the belief that the agent had an authority which in fact, he had not, those persons can enforce no equity against the principal. L. R. 1 E and 7 All 129 followed Per Aikman J. Where the defendant at great expense reconstructed the house he had brought believing that he had a right to do so, and the plaintiff or his agent must have known that the defendant was spending money in this belief and yet allowed him to do so the plaintiff could not years after the house was finished sue for possession of the house or its removal. The dictum in L. R. 20 All 241 at 258 declaring a custom permitting tenant to transfer houses on

Abadi-(*Concld.*)

village homestead land to be bad, is *obiter* and has been dissented from more than one Judge of the High Court. **Rajnarain Mitter v Budh Sen. 1 A L J 673=27 All 338 =A W N (1904) 420.**

Abadi—Land in the city of Lucknow obtained by Nuzal under a settlement decree Renunciation of right of Government, as to.—See **9 O C 249.**

Abandonment.

See cases under.

(1) Bengal Acts (Tenancy S. 87)
(2) Landlord and Tenant.
(3) Limitation Act S. 14 arts 142, 144.
(4) Mortgage (Relinquishment).
(5) Possession.
(6) Right of Occupancy.
(7) Occupancy holdings.

1—S. 92, Proviso (f)—Registered partition deed—Subsequent disposal of property mentioned therein—Oral evidence to prove it admissible -Land suit-Long delay in suing no abandonment in law—The Punjab Courts Act XVIII of 1884, Ss. 3 and 70—The Punjab Tenancy Act XVI of 1887 S. 4-Indian Contract Act IX of 1672, Ss. 44, 62, and 63-Admissibility of evidence in question of law within S. 70.

169 P R 1883 ; 30 P R 1884. 14 P R 1889. 9 All 249; 11 Bom 47. 14 Bom 472, Fol. By Chatterji Dist. By Johonstone; 22 Mad 264 ; 26 Mad 195 27 Mad 368, Fol. By Johnstone and Diss. By Chatterji ; 5 C W N 296 Fol. By Johnstone : 62 P R 1879 Ref By Chatterji; P L R (1900), 459, Ref By Johnstone. 20 P R 1894 : C A 1190 of 1906 (unpublished), Fol 31 P R 1906, Dist 85 P R 1892: 51 P R 1898 43 P R 1901 Fol.

Choudhri Bhagwan Singh v Choudhri Narain Singh, 129 P W R 1908

See also (1) "Practice"
(2) Pleadings.

Abandonment by managing Khot.

See Co-sharers.

Abandonment Notice of.

See (1) Insurance—Marine Insurance.
(2) Utabandi Tenancy.

Abandonment of Appeal.

See Withdrawal of suit.

Abandonment of claim.

See (1) Relinquishment or omission to sue for portion of claim.
(2) Pleadings,
(3) Landlord and tenant—Abandonment, relinquishment, or surrender of tenure,

Abandonment of Easement

See (1) Limitation Act (IX of 1908) S. 26.
(2) Easements.
(3) Easement Act S. 28.

Abandonment of excess claim.

See Vendor and purchaser.

Abandonment of holding

See (1) Landlord and tenant-abandonment, relinquishment or surrender of tenure.
(2) Right of Occupancy.

Abandonment of issue.

See Pleadings.

Abandonment of part of claim.

See Cases under Relinquishment of, or omission to sue for, Portion of claim

1—C. P. C. S. 47 (1882) S. 244)—Party—Person against whom claim has been abandoned.

A person against whom the plaintiff abandons the claim, not being able to serve him with notice, is not a party to the suit within the meaning of S. 244 C P C. **Venkatapathy Naidu v Subraya Mudali.** 17 M L J 416.

2—A deed of abandonment executed in reliance upon the generosity of the party benefited was held to be without consideration.
Ismail Khan v Imtiazunnissa. 4 A L J 792.

Abandonment of partnership

1—Advance agreement to—A money—Refusal—Abandonment of partnership by laches.

That a mere refusal by a partner in an undertaking to advance further sums for the purpose of the taking in terms of the partnership agreement is not an abandonment by him of the undertaking and does not amount to a dissolution of the partnership. Even assuming that the subject-matter of the partnership was as precarious as a mining speculation, it is a matter of inference to be drawn from the facts of each case whether or not there has been abandonment or loss of interest by laches 19 Ves 144 (1812) ref to. **Moung Tha Hnyin v Mah Thein Myah.** 5 C W N 114=28 Cal 53=27 I A 189.

Notes.—Dist 11 M L J 353=25 Mad 149.

See also cases under.

(1) Partnership.
(2) Contract Act, Ss. 239—266.

Abandonment of Point.

1—Counsel abandoning a point. The suit was brought by the sons of the reversioner S of the last male owner G on the death of G's widow M. P for possession of immoveable property.

The last male owner died 40 years before suit, the widow in 1896, and the plaintiff's father through whom the plaintiffs claimed in 1889. The whole question in the case was one of plaintiff's father relationship to the last male holder. The defendant was the nephew of the last male holder who took possession of the properties on the widow's death. The first Court found that the plaintiffs had proved the pedigrees filed by them and gave a decree. On appeal the Judicial Commissioner held as follows—"The oral evidence to prove the pedigree in the plaint is in my opinion of as little value as the documentary evidence on which the plaintiffs relied and at the hearing of the appeal practically no attempt was made to support the finding of the Subordinate Judge.

The only contention was that accepting the pedigree filed by the appellant Mathura Prashad, the plaintiffs are heirs of G and according to it they are Samanodakas and therefore in the absence of other nearer heirs they exclude the defendant" and gave a decree for possession of the property on the ground that there were other

Abandonment of Point-(*Concld.*)

persons in the same degree of relationship to the last male owner. Held that in the circumstances the plaintiffs were not estopped by what happened before the Judicial Commissioner.

Kelka Pershad v Mathura Pershad 8 C L J 447=11 C W N 340=(1908) 5 A L J 701=18 M L J 424=10 Bom L R 1088=13 C W N 1=35 I A 166=30 All 510

See also cases under.

(1) Plerder
(2) Pleadings
(3) Counsel
(4) Practice

2—Abandonment of plea in lower appellate Court—Effect in second appeal. It is not open to a litigant to practically abandon a portion of his contention in one Court, and then at his convenience to resuscitate it in another. Where the Judge of the lower appellate Court expressly stated that a plea of *res judicata* was not pressed on him, that plea was disallowed in the second appeal. **Dalip Rai v Deoki Rai. 20 All 471 =A W N 1898, 116; on appeal 21 All 204.**

Abandonment—What amounts to—See **13 P W R 1910=5 Ind Cas 840=48 P L R 1910.**

3—Authority of, to bind client, abandoning issue. A vakil's general powers in the conduct of a suit include the abandonment of an issue, which, in his discretion, he thinks it inadvisable to press. **Raja Venkata Narasimha v Bhashyakarlu.** (4 Bom L R 543.)

Abandonment of Proceedings.

See Civil Pro Code O. 9, r. 9.

See Resjudicata—Judgments on preliminary points.

Abandonment of right.

See Estoppel—Estoppel by conduct.

„ Trade, mark.

„ Damages—Measure and assessment of damages—Torts.

Abandonment of tenancy.

See—Landlord and tenant—Abandonment, relinquishment and Surrender of tenure.

Abandonment of tenure.

See Cases under Landlord Tenant—Abandonment, Relinquishment, and Surrender of Tenure.

See Cases under Right of Occupancy—Transfer of Right.

Abandonment of User.

1—Abandonment of user—Dedication, implied—Dedication to public use as burial ground-Title to land, no necessity for passing—Reversion to owner. An implied dedication arises by operation of law from the acts of the owner and is really founded upon the principle of estoppel: it proceeds not upon the principle that a grant has actually been made but rather on the principle that the owner having allowed the public to enjoy the same for any particular purpose is estopped from denying the right of the public to the enjoyment of such use. Exclusive and continuous user by the public, with the owner's knowledge and acquiescence for the prescriptive period will raise the presumption of a grant and dedication to the public. It is one of the essential elements of a good declaration that it be made to the public, that it be irrevocable, and that the land be for ever dedicated for the designated public use. 8 C B N., S. 848; 42 Cal 541, ref. to. An owner may appropriate land to public use and yet retain in himself all such rights in the soil as are compatible with the full exercise and enjoyment of the public use to which the property has been devoted. It is not essential to constitute a valid dedication that the legal title should pass from the owner; nor is it inconsistent with an effectual dedication that the owner should continue to make any and all uses of the land which do not interfere with the uses for which it is dedicated. **See** 79 Bom 47; 9 Cal 75. But after a valid dedication has been made, if the use for which the property is dedicated becomes impossible of execution, or if the object of the use wholly fails, there is an abandonment in consequence of which the rights of the public therein fail and a reversion takes place, as the dedication has spent its force when the use ceases. If

Abandonment of User-(*Concld.*)

land is dedicated for cremating or burial purposes, and there is subsequently an abandonment, the property reverts to the dedicator or his heirs. 24 I A 177 dist. **Chairman Howrah Municipality v Khettra Krist Mitter. 10 C W N 1044= 4 C L J 342=33 Cal 1290.**

See also cases under:

(1) Limitation Act art, 144.
(2) Adverse Possession.

Abandonment of Wife.

See cases under:

(1) Husband & Wife.
(2) Restitution of conjugal rights.
(3) Hidnu Law (Maintenance.)
(4) Marriage.

Abandonment of wordly affairs

1—Abandonment of wordly affairs—Custom-Succession—Abandonment of wordly affairs—Gossains.

A broad distinction is to be drawn as regards the powers of inheriting property between *faqirs* or members of a religious order who have, and those who have not, entirely renounced the world the latter class not being disqualified from succession in their natural families.

In a case where it appeared that the plaintiff, though he left his village and joined a religious order (*Gossains*), had not renounced the world, but, on the contrary, was the father of three children who appeared to be grown up, *held*, that plaintiff had never reached the stage of complete asceticism which would disqualify him from inheritance, and that he was entitled to succeed to the estate of his nephew in preference to the defendant, who, if a relation at all, was a distant one. **Sadhu v Misri. 92 P R 1898.**

2—Udasi faqir——Abandonment of civil rights. A man who has become an Udasi faqir, though he generally renounces worldly affairs and loses his civil rights, may yet show that though he became a faqir, he did not intend to give up worldly affairs and his civil rights. **Badhawa Singh and Sochet Singh v Anaukha. 7 P R 1892.**

See also cases under.

(1) Custom (Punjab) Inheritance.
(2) Gossain.
(3) Hindu Law (Inheritance.)

Abandonment, Relinquishment or surrender of tenure.

1—Abandonment, relinquishment or surrender of tenure—Abandonment—Joint holders—Survey number—Surrender—Tenancy Act s. 35-Land Revenue Act s. 67 A—67 1—Relinquishment—Merger.

The abandonment by one of two joint holders of a survey number does not necessarily enure in favour of the other joint holder. **Nanha Bairagi v Mansing Gond. 15 C P L R 28.**

See also.

(1) "Landlord & Tenant"
(2) Rights of Occupancy.

Abated suit or Appeal.

See costs.

Abatement of Appeal.

See (1) Abatement of Suit—Appeals.
(2) Costs—Abated Suit or Appeal
(3) Civil Procedure Code (1908) O XXII.

Abatement of Rent.

(1) Grounds of Abatement 1—33
- **(a) General (1)**
- **(b) Dilluvion (2—13)**
- **(c) Damage to land by Vis-major (14)**
- **(d) Mis-statements as to the measurement of the land (15—19)**
- **(e) Mis-representation and Fraud (20—23)**
- **(f) Breach of Contract (24)**
- **(g) Reduction of rent allowed to Landlord by Government (25)**
- **(h) Loss of portion of land (26)**
- **(i) Land acquired by Govt for public purposes (27—33)**

(2) Effect of former suit for abatement (34)
(3) Claim to Abatement (35)

Abatement of Rent (Grounds of Abatement)-(*Cont'd.*)

(4) Who can sue (36—38)
  (a) Patnidar (36)
  (b) Howaldar (37)
  (c) Tenant not entitled to occupancy (37A)
  (d) Under-tenant (38)
(5) Form of suit (39—41)
(6) Rate of reduction (42—43).
(7) Procedure (44 & 45—47)
(8) Civil Court's decree effect of, on Revenue court's decree (48—49)

(1) GROUNDS OF ABATEMENT.

(a) GENERAL.

1 Ground of Abatement-Causes beyond control—Act X of 1859, s. 18.

The real meaning of s. 18, Act X of 1859, is that the grounds for which an abatement of rent may be claimed by a raiyat must have resulted from causes beyond his control. **Munsoor Ali v. Harvey. 11 W R 291.**

(b) DILUVION.

2—Diluvion—Act X of 1859, s 18 (Bengal Act VIII of 1869, s. 19)—Deduction in suit for arrears of rent.

Rent of a talukh may be abated if a portion of the talukh be washed away Independently of s. 18, Act X of 1859, a suit for abatement of rent will lie by a talukhdar on the ground that part of the talukh has been washed away. A deduction may be made on such ground in a suit for arrears of rent. **Afsuroodeen v Shorooshee Bala Dabea Marsh 558 Savi v Obhoy Nath Bose 2 W R Act X 27.**

3 -Mokurari lease—Abatement of rent—Diluvion—Bengal Tenancy Act (VIII of 1885), Ss, 52 178, 779.

A tenant holding under a permanent *mokurari* lease is not entitled to get abatement of rent by reason of a portion of the land in his occupation having been diluviated by the action of a river. **Nunda Lal Mukherjee v Kymuddin Sardar. 9 C W N 886.**

4-Onus probandi.-The onus lies on thedefendant in a suit for arrears of rent of proving to what deduction he is entitled, and of showing precisely what lands have disappeared. **Savi v Obhoy Nath Bose 2 W R Act X 27**

5—Landlord and Tenant—Partial eviction if operates to suspend entire rent—Diluvion loss of tenant's land by—Reformation and settlement with stranger—Eviction.

Where land forming part of a tenant's holding was lost by diluvion, but subsequently reformed and was settled by the landlord with third parties.

Held—That there was no eviction of the tenant by the landlord, and the tenant could not claim a suspension of the whole rent.

The tenant in such a case may claim a proportionate abatement of the rent.

Per *Mookerjee J.*—The rule that when a landlord is responsible for the partial eviction of his tenant from the demised premises, there is a suspension of the entire rent, has been adopted in England, not without considerable divergence of opinion. It would not be right to extend the application of such a rule, which may often operate harshly to cases to which the principle on which it is founded is clearly inapplicable. (3 Camp 513 (n); 1 Hudson and Brooke 449; I Cr M & R 3; 1 F & F 636, 17 Com Bench 30, 24 Cal 296, 28 Cal 188; 34 Cal 191 Ref. **Rai Churn Das Mazumdar v Administrator General of Bengal. 13 C W N 853=9 C L J 578=36 Cal 856 =2 Ind Cas 169.**

6. -Diluvion—Right of occupancy—A tenant, whether with or without a right of occupancy, is entitled to abatement of rent for land washed away unless precluded by the term of his kabuliat from claiming any abatement. **Enayutoolah v Elahebuksh. W R 1864 Act X 42.**

7.—Cause of action—When a diluvion takes place a right of suit to obtain an abatement of jumma accrues from the time when the plaintiff is compelled to pay the rent named in his pottah without the allowance of the abatement claimed by him. **Barry v Abdool Ali. W R 1864. Act X 64.**

8.—Talukh created before 1790.—Quære—Whether the proprietor of a talukh created before the Permanent Settlement cannot claim abatement of rent on the ground of diluvion. **Ram Churn Bysack v Lucas. 16 W R 279.**

Abatement of Rent (Grounds of Abatement-(*Contd.*)

9—Holding over, effect of — Rent kept in abeyance in kabulyat—Omission to specify reason — Oral evidence, admissibility of, to prove reason——Evidence Act (I of 1872), S. 92 and proviso (2).—

Where a tenant holds over upon the expiration of the term of his lease and pays rents, the tenancy is renewed upon the same conditions as those contained in the expired lease.

Therefore, the mere circumstance that the term of a lease has expired does not entitle the tenant to contend successfully that he has been absolved from the obligation which he may have undertaken at that time.

In a lease the rent was stated to be a certain sum, but a deduction on account of rent in suspense was allowed and a lesser sum was actually payable. The plaintiff sued upon the lease and alleged that the deduction was allowed because a quantity of land was not at that time fit for cultivation, but that there was an oral agreement to the effect that the rent in suspense would be revived as soon as the quality of the land improved.

Held, that under proviso 2, S. 92, of the Evidence Act, the oral agreement could be proved, because the lease omitted to specify the reasons for which the rent was kept in suspense and the period during which it was to continue in abeyance, and that the plaintiff might establish that the contingency upon which the rent was agreed to be revived had happened. 28 Cal 227, Ref: 11 Cal 486; 12 C L R 163 and 9 C L R 301, Ref.

Satish Chandra Basu Mallik v. Kamini Mohan Goswami, 7 Ind Cas 721.

10—Waiver of right to deduction. In a suit for arrears of rent of land adjacent to a river where defendant claims deduction on account of diluvion, and it is found that the agreement under which he holds requires measurement to be made once in three years, no account being taken of accretion or decretion occurring within that period: if the tenant has waived his right of measurement and has held over, it must be presumed that he elects to continue to hold at the same jumma as before and his claim to deduction cannot be allowed. **Kristo Kinkur Puramanick v. Ramdhun Chettangia. 24 W R., 326**

Abatement of Rent (Grounds of Abatement-(*Contd.*)

11—Kabuliat—Sale by tenant of his tenure—Suit against the purchaser—In a suit against the purchaser at an auction sale of a tenure under a kabuliat, by which it was agreed that the former tenant should not be entitled to abatement of rent on any ground and should be liable for interest at a particular rate for all arrears of rent, the defendant pleaded that as auction purchaser he was not bound by the terms of the kabuliat; that he was entitled to abatement on the ground of diluvion of portion of the demised lands, and only bound to pay interest at a reasonable rate upon arrears of rent. *Held*, that defendant was bound by the terms of the kabuliat entered into by his predecessor. **Ishan Chunder Chowdhry v. Chunder Kant Roy. 13 C L R 55.**

Notes.—Fol; 21 Cal 383. Dist: 24 Cal 37.

12—Right of tenant's transferee to abatement—A tenant has a right to claim an abatement of rent, where the area of the land under tenure, has been diminished by diluvion, and when the tenure is sold, the right passes to the purchaser. 23 W R 275 distinguished. **Kali Prasanna Rai v. Dhananjai Ghose 11 Cal 625.**

13-Bengal Act VIII of 1869, S.18—A raiyat cannot sue for abatement of rent simply because the lands which he holds are rated higher than those of the same description and with similar advantages held by raiyats of the same class in the vicinity. Bengal Act VIII of 1869 s 18, refers to an alteration of area owing to a portion of the land having gone away by diluvion or otherwise—not to some difference in the length of the measuring pole in use at different periods. **Babun Mundle v. Shib Koomaree Burmonee 21 W R 404.**

Appr:-**Pertab Chunder Banerjee v. Omur Sirdar 25 W R 89.**

Affirmed in **Omur Sirdar v. Pertab Chunder Banerjee 25 W R 212.**

(C) DAMAGES TO LAND BY VIS MAJOR.

14—Damage to land by Cyclone—Right of under-tenant to get remission of rent.—A landlord receiving remission from Government on account of damage done to his estate by a cyclone is not on that account bound to allow a remission to his under-tenants, unless he received the former on the understanding or agreement

Abatement of Rent (Grounds of Abatement—(*Contd.*)

that he would allow it in turn. **Goluck Chunder Mytee v. Parbutty Churn Dass. 15 W R 167**

(D) MISSTATEMENTS AS TO THE MEASUREMENT OF THE LAND.

15—Apportionment of rent—Decree—Mukurari lease—Lessee getting possession of less land than stated in lease—Act XI of 1859 S. 54—Abatement of rent—Right of lessee-A decree had determined that lands leased in mokurari to a lessee with a fixed rent, were less in area than specified in pottahs that comprised them, the lessors not being entitled to the whole; the less estate was possessed by the lessor:—*Held*, that lessee was entitled to a corresponding abatement of the rent reserved. The revenue paying mehal within which were lands subject to a mokurari, such lands being shares of mouzahs therein, was afterwards sold for arrears, under Act X of 1859. The purchaser at that sale was sued by mokuraridar to make good her incumbrance under S. 54 of the Act. The decree that followed maintained the lease but only as to part of the shares specified in the pottahs, and the lessee for possession of that part only In this suit for mesne profits brought by the lessee against the heir of the purchaser who filed a cross suit against her for rent, it held that, as the lessee had not proved that she having had possession under the leases, had been dispossessed by the purchaser, there had not been an eviction in the proper sense of the term. But when, in her suit for possession, part only was decreed to her and she was precluded by the result from getting a substantial part, her position was the same as if she had been evicted. She, therefore had the same equity for an apportionment, as on eviction. On the facts it was rightly judged by the Court of first instance the leases were not taken with knowledge on the part of the lessee that the title was doubtful **Imambandi Begum v Kamleswari Pershad 21 Cal 1005; L R 21 I A 118 PC.**

Notes:—Ref: 10 C L J 570.

16—Landlord and tenant—Abatement of rent of portion of which tenant did not obtain possession—Bengal Tenancy Act (VIII of 1885)

Abatement of Rent (Grounds of Abatement—(*Contd.*)

ant who did not obtain possession of a portion of the lands let out to him, pleaded that he was not bound to pay rent of that portion.

Held,—that he was entitled to say so and it was not necessary for him to bring a separate suit for abatement of rent.

That a suit under Ss. 38 and 52 of the Bengal Tenancy Act was not necessary, as those sections do not apply where the tenant has never been put into possession by the landlord. **Siba Kumari Debi v. Biprodas Pal Chowdhury. 12 C W N 767.**

17—Error in measurement of land—Land found to be less than stated.—A lease providing for enhancement if the lands are found on measurement to exceed the quantity stated in the lease, does not necessarily give the right to abate if the lands are found to be less than that stated in the lease. **Ram Kant Chowdhry v. Bindabun Cnunder Gope 2 W R Act X, 71**

18 - Construction of pottah—Default of tenant.

Though a pottah provided for an abatement of defendant's rent if on measurement the land was found to be less than 145 bighas, yet it was held that if defendant came to be in possession of that less quantity by his own default and not that of the lessor, the mere fact of defenant having been in possession of less than 145 bighas would not entitle him to an abatement.

Seetanath Bose v. Shamchand Mitter 17 W R 418.

19—Raiyat having paid no rent—Bengal Act VIII of 1869, s. 19.

A raiyat who has held his land for a few months, and paid no rent at all, cannot sue for an abatement of rent on the ground that the land, on measurement, is less than the quantity mentioned in his pottah. **Brojonath Koondoo Chowdry v Unant Ram Dutt 17 W R 449.**

(E) MISREPRESENTATION & FRAUD.

20—Misrepresentation as to quantity of land—In a suit by a puruidar to recover rent in accordance with the terms of a dur putni lease, the defendant claimed an abatement of his putni

Abatement of Rent (Grounds of Abatement)—*Contd.*

rent on the ground that his pedecessor had obtained such abatement in a previous rent suit, in which it appeared that the lessor's share was slightly less than what was described in the lease. —*Held*, that unless the defendant could show that he had been damaged by the plaintiff's misrepresentation as to the extent of his share, he could not be relieved from his contract, in this form of suit at least. **Gour Mohun Roy v. Radha Romun Singh** 21 W R 372.

21——Misrepresentation as to quantity of land. Delay in suing——In 1859 G entered into negotiation with respect to the purchase of a certain talook at premium of Rs 42,411 and an annual rent of Rs. 48,070, and in January 1860 he signed a sale-bond which contained an enumeration of the mouzahs purchased, the actual sale being completed in the 2nd June following. Until his death in December 1861 he paid the stipulated rent according to the terms of the deed. Subsequently his widow brought a suit for abatement of the rent on the ground that her husband had been misled as to the amount of rent payable by the under-tenants,—Held, (affirming the decision of the High Court of Calcutta) that under the circumstances the suit could not be maintained **Darimbya Debbya v. Nilmoney Singh Deo** 5 C L R 465

22—Act X of 1859, ss 18 and 23, cl. 3—S. 18, Act X of 1859, is not applicable to a case in which a plaintiff patnidar sues for an abatement of rent on the ground of fraud caused by the concealment from him of the existence of an intermediate tenure created by the zemindar. Cl. 3. s. 23 of that Act, is wide enough to admit of such a suit being tried by the Revenue Courts. **Shokoor Ali v Umola Ahalya** 8 W R 504

23—Denial of right to assess lands in tenure A suit in which the plaintiff alleges that rent was wrongly assessed on him for lands not covered by his pottah, and contends that in assessing his rent these lands should be included, is not in the nature of a suit for abatement of rent. **Obhoy Gobind Chowdhry v Kenny** 8 W R 518

BREACH OF CONTRACT.

24—Breach of Contract —Jurisdiction of Civil Court—In a suit for damages by a lessee, where the plaint shows a distinct prayer for abatement of rent and also sets forth as the main ground of the suit in fraudulent breach of contract by misrepresentation and refusal of deduction and refund stipulated for, so much of the claim as refers to abatement is, by cl. 3, s. 23, Act X of 1859 beyond the jurisdiction of the Civil Court; but the rest of the suit is properly cognisable by such Court. **Nilmony Singh v. Issur Chunder Ghosal** 9 W R 92

Notes—Ref; 3 C L J 143

(G) REDUCTION OF RENT ALLOWED TO LANDLORD BY GOVERNMENT.

25.—Reduction of rent payable by landlord to Government—Act X of 1859, Ss. 17 and 18.

Sections 17 and 18 were passed for the benefit of the ryot, and not for the protection of the zemindar. Section 18 was intended to give the ryot a right to abatement in certain cases, but not to protect the zemindar from liability to make abatement in any other case. In a suit for abatement of rent on the ground that the jumma payable to Government had been reduced upon condition that the rents of the ryot should be reduced in a like proportion.—*Held*, that the right to abatement applies only to the case of rents of which the amount had been fixed before the jumma was reduced by Government, and not to rents fixed by pottahs or kabuliats entered into subsequently. **Sukhawatoollah v Puthoo Goldar.** 1 Ind Jur O S 7

(H) LOSS OF PORTION OF LAND.

26.—Loss of portion of land—Suit for declaration of liability to pay less rent—Equitable relief.—A suit by a tenant against his original lessors for a declaration that he is not liable to pay them the whole rent payable under his pottah in consequence of a third person having, subsequently to the grant of such pottah, by suit established a right to a share of the rent, is not a suit for abatement of rent. But where, under such circumstances, the tenant is holding more land than is covered by his pottah, it is not necessary that his landlords, if desirous of enhancing the rent, should be referred to a separate suit for that purpose. The suit of the tenant being for equitable relief, the claim of the

Abatement of Rent (Grounds of Abatement)-*Contd.*

landlords must be taken into consideration in determining what relief the plaintiff is entitled to obtain. **Chandmoni Dali v. Loke Nath Chatterjee.** 6 C L R., 494.

(I) LAND ACQUIRED BY GOVT. PUBLIC PURPOSES.

27—Land taken for public purposes.—Suit to recover share of money taken as compensation for land.—In a suit to recover the proportion of money paid into Court as compensation for land taken for a railway, to which the plaintiff, a dur-putnidar, may be entitled, and in which suit the zemindar and putnidar are defendants, the plaintiff cannot claim abatement of rent under Act X of 1859, section 18, since such a claim is cognizable only in a suit instituted under that Act. **Gordon Stuart & Co. v. Mohatab Chand** Marsh, 490

28—Claim to deduction from rent.—A claim for rent being a recurring cause of action, a tenant is entitled to set up against it for any particular year any right which he had to a deduction or abatement, notwithstanding that he has paid full rent for several previous years. When land is taken away for railway purposes, and compensation made, which is divided between the zemindar and those holding under him, any deduction of rent claimed, from the zeminder must be reckoned with reference, not to the gross amount of compensation, but to the portion which passed into his hands. **Mohatab Chand v. Chittro Coomaree Bibee** 16 W R 201

29—Abatement of rent, Suit for—Suit for refund of excess rents:—In a suit brought by a putnidar for a declaration that he was entitled to an annual abatement of the putni rent in consequence of some lands comprised in the putni having been required for the purposes of a railway, and also for the refund of the excess rents which he had been compelled to pay for some years. *Held:* per *Mookerjee*, J :—That this was a claim for abatement of rent and for recovery of damages for illegal exaction of rent within the meaning of clauses (2) and (3), S. 23 of Act X of 1859. The proper course for the plaintiff, therefore, was to sue in the first instance for abatement of rent in the Revenue Court which was the only court of competent jurisdiction for that purpose. Per *Harington, J., contra*, treating the case as though it were one of first impression :—Although

Abatement of Rent (Grounds of Abatement)-*Contd.*

under S. 23 of Act X of 1859 a civil court had no jurisidiction to entertain a suit for abatement of rent, still the suit in so far as it related to a claim for refund of the excess rents paid by the putnidar was properly cognizable by the civil court and should not be dismissed for want of jurisdiction because one of the steps which plaintiff should have to take in establishing his right to have the money repaid to him would if it had stood alone, have entitled him to a decree in the Revenue Court. Per *Mookerjee, J* :—The present suit is substantially one for abatement of rent and the prayer for refund is ancillary to the prayer for abatement, because as soon as the amount of abatement is determined, the amount of refund is deducible by simple arithmetical calculation. The civil court has no jurisdiction to allow a claim for abatement, and is not competent to embark upon precisely the same inquiry for the purpose of allowing a refund. Per *Mookerjee J* :—The following rules are deducible from a review of the authorities on the question :—(1) A suit for abatement of rent properly so called is maintainable only in the Revenue Court. I. W. R. 299 ref. to. (2) A suit for adjustment of the receipt on the ground that the rent payable under a lease is less than the sum nominally inserted in it, is not a suit for abatement of rent, properly so-called and is accordingly maintainable in the civil court B. L. R. F. B. 95 referred to. If the tenant is entitled to sue for abatement in the Revenue Court under Rule (1), the suit for refund lies in the same Court, but if the tenant is entitled to sue for adjustment in the Civil Court under Rule (2), the suit for refund lies in the same Court. The cases which support the view that a suit for refund lies in the Civil Court assume a prior determination of the amount of abatement by a Court of competent jurisdiction. W. R. Gap. No. (Act X) 46 ; 11 W. R. 412 relied upon; 17 W. R. 73 dissented from. **Ashutosh Roy v Harinarain Singh Deo.** 3 C L J 143

30—Construction of Kabuliat—Agreement between zemindar and putnidar to divide compensation in respect of land taken for public purposes.

A putni lease contained a clause by which it was stipulated that if any portion of the demised lands should be taken up by Government for public purposes, the zemindar and the putnidar should divide the compensation allowed equally.

Abatement of Rent
(Grounds of Abatement-*Contd.*

A portion of the land having been so taken and the compensation divided as agreed upon, it was held in a suit for arrears of rent that the putnidar was notwithstanding the fact of his having received his moiety of the compensation, equitably entitled to abatement on the ground that he had been deprived of a portion of the land covered by his putni.

Uma Sunker Sirkar v Tarini Churn Singh 11 C L R 366=9 Cal 571.

31—Ijara settlement—Deduction from rent—a kabuliat of an Ijardar who took on lease certain land, contained the following clause:—"In regard to the aforesaid rent we take upon ourselves the risk of flood and drought, of death and flight of alluvion and diluvion, of profit and loss. In no case shall we be able to claim a reduction in the rent, nor will it be open to you to demand more on account of alluvion etc.' During the lease part of these lands were taken up by Government for a railway, and the lessor was paid compensation therfore. The Ijardar claimed a deduction of rent for the lands taken away. Held, that such a claim did not come under the meaning of the word "abatement" as used in the the rent law, nor was it intended by the parties to be within the clause of the lease, but the land having been taken from the whole area demised, not by natural causes, but by vis major, the Ijardar was entitled to a deduction of rent, on his showing that there were tenants of his on the land who, before the land was taken by government, paid rent to him which they had not ceased to pay.

Watson & Co V Nistarini Gupta 10 Calc 544

32—In a suit for arrears of rent, a claim for abatement may be made by way of set-off in respect of land taken up by Government for the purposes of a road. **Deen Dyal Lall v Thukroo Koonwar 6 W R Act X 24.**

33—Proceedings under Land Acquisition Act, 1870—Purchase at sale for arrears of rent—Beng. Reg. VIII of 1819.—

Portion of certain land held under a patni having been taken up by the Government for public purposes under the Land Acquisition Act, the zemindar declared his intention of granting no abatement of rent, and acting upon this declaration the patnidar was allowed to appropriate the whole of the compensation. The patni was subsequently sold under Reg VIII of 1819, with notice of the amount of the original rent, and the purchaser now sued for abatement of that rent. He did not allege that he had no notice of the proceedings under the Land Acquisition Act. *Held*, that the plaintiff must be presumed to have had notice of these proceedings, and that it was therefore incumbent upon him to have made inquiry regarding the position of the patni, and that under the circumstances he was not entitled to the abatement sought for. **Peari Mohun Mukerjee v Audhiraj Aftab Chand. 10 C L R 526.**

Abatement of Rent
(Grounds of Abatement-*Concld.*)

(2) EFFECT OF FORMER SUIT FOR ABATEMENT.

34—Previous suit for abatement, effect of—Onus probandi.—

There is no provision in the Rent Law prescribing that suits for enhancement or abatement shall not be brought within a certain period after the determination of a similar suit on the same grounds. And there is no provision throwing upon a plaintiff in a suit for abatement of rent the burden of proof that there has been some change in circumstances since a decision in a previous similar suit was passed. **Cheda v Nunhoo Beg. 2 N W 348.**

(3) CLAIM TO ABATEMENT.

35—Claim to abatement—"Otherwise vary" the rent—

The words "otherwise vary" in s. 153, Act X of 1859, are meant to include abatement claimable by the ryot, and this reservation is made in respect of questions of right to vary the rent, whether raised by the landlord or by the tenant. **Anund Chunder Deghee v Nubocoomar Chatterjee. 8 W R 192.**

(4) WHO CAN SUE
(a) PATNIDAR.

36—Right to use—Patnidar—A patnidar can sue for abatement of rent under the Rent Act, 1859. **Prosunomoyee Dossee v Soondur Coomaree Debia 2 W R Act X 30.**

Man Gurobinee Dassea v Khettur Chunder Ghose. 2 W R Act X 47.

Notes—Ref; 3 C L J 143.

36 A—Patnidar—Act X of 1859, s. 23 A patnidar, or any other leaseholder, may bring a suit against the Zemindar for abatement of rent

Abatement of Rent (Who can sue)—*Concld.*

under this section. **Ramnarayan Banerjee v Jayakrishna Mookerjee. 1 W R F B 299: B L R Sup Vol F B 70.**

(b) HOWALDAR.

37—Howaldar—A howaldar has a right to sue for abatement of rent. **Komlakant Doss v Pogose 2 W R Act X 65.**

(c) TENANT NOT ENTITLED TO OCCUPANCY.

37 A—Tenant without right of occupancy—Act X of 1859, S 18—A tenant not having a right of occupancy is not entitled to an abatement of rent under Act X of 1859, s. 18.

Nobodeep Chunder Sircar v Lalla Seeb Lal Marsh 325.

(d) UNDER-TENANT.

38—Under-tenants—Act X of 1859, s. 23 cl 2—Illegal exaction of rent—

Cl 2 s 23 Act X of 1859 relating to the illegal exaction of rent, was not limited to suits at the instance of the raiyat, but applied to any under-tenant. **Gopal Paul Chowdry v Grish Chunder Pandey. 14 W R 269.**

(5) FORM OF SUIT.

39—Jurisdiction of Civil Court—Act X of 1859, s 23. A obtained from B a putni lease whereby it was agreed that A. should prepare a hastabud (rent roll); that, if it should appear that there was any deficiency in the jumma stated in the potta, the correct jumma should be ascertained as therein provided; and that the rent should be made up to A. by B; and B should return a proportionate amount of the consideration-money. A sued B for an abatement of rent, for a refund of rent paid in excess, and for a proportionate refund of the consideration money. *Held*, the suit was not a suit for abatement of rent within the meaning of this section, and the Civil Court has jurisdiction to try the different questions together in the same suit.

Raja Nilmani Singh v Annada Prasad Mookerjee 1 B L R F B 93=10 W R F B 41.

40—Rent, ennancement of-Transfer of Property Act. The right of enhancement is not an incident of every contract of tenancy In a proceeding for apportionment under the Land Acquisition Act, no abatement of rent can be made without the consent of the parties. The compensation is to be apportioned between the

Abatement of Rent (Form of suit)—*Contd.*

parties according to the value of interest which each of them parts with. The Zemindar has a right to the fixed rent and the loss he sustained is of so much of his rent. Any other possible injury such as the chance of the putnidar throwing up the land and its being diminished in value by what has been taken by Government, and still remaining as it did, liable to pay the same revenue is not appreciable and cannot be taken into account. If there is no abatement of the rent and the patnidar continues liable to pay to the zamindar the same rent as he had to pay before, there would be nothing for which the Zemindar is to receive compensation. The same rule applies to the case of lease in perpetuity with fixity of rent. The burden of proof is on the Zamindar to make out his claim and show as to the value of a particular contingency to him. **Satis Chunder Chattopadhya v Rai Johindra Nath Chowdhury 7 C L J 284.**

41—Apportionment of rent—Suit—Bengal act VIII of 1869, s 19—Certain batwara proceedings terminated, in 1877, and the portion of the estate, held by the plaintiff and allotted to the defendant was ascertained. The rent was Rs 4 per bigha. In 1881, a suit was brought by the defendants to recover rent of a larger amount than what the plaintiff admitted to be due and a decree obtained on the 31 st. May 1881. On the 20th September 1881, the plaintiff instituted a suit nominally under the provisions of s 19 of Bengal Act VIII of 1869, for abatement of rent, upon the ground that the defendants were seeking to charge him rent upon a larger amount of land than he actually held. The court found that the area of land held by the plaintiff was the same as stated by him in the plaint, and not that alleged by the defendants. *Held*, that the suit was rather one for the apportionment of rent after the Butwara proceedings, and not one for abatement of rent.

Durga Pershad v Ghosita Goria 11 cale 284.

Notes—Dist: 15 Mad 492.

(6) RATE OF REDUCTION.

42—Rate of reduction—Jurisdiction of Revenue Court—A granted a patni to B, to which a certain mehal appertained. The Government to which the mehal belonged, in reversion upon an ijara held by *A*, sold it to *C*. *Held* that *B*

Abatement of Rent (Rate of Reduction)–*Concld.*

was entitled to abatement of rent from A, and that a suit for abatement, under the circumstances, was cognizable by the Revenue Court. *Semble*,—Where there is no specification in the original contract of the amount of rent payable for the portion of land for which abatement is claimed, such a sum ought to be deducted from the whole rent as would bear to that whole rent the same proportion as the annual value of the portion of the land which has disappeared bears to the annual value of the land originally leased.

Brijanath Pal Chowdry v Hiralal Pal 1 B L R A C 87=10 W R 120.

43—Contract–Acceptance by landlord and his heirs of rent at a lower rate—effect of–Agreement to take lower rent not proved.

The mere acceptance of reduced rent, though it may amount to a full acquittance, cannot operate as a binding contract without proof of the agreement forming the basis of the reduction granted, and such an acceptance does not amount to such an agreement or release of a portion of the rent as to have a binding effect.

Radha Raman Chowdhury v Bhowani Prosad Bhowmik. 6 C W N 60

Notes—Dist 2 C L J 338 Ref, 10 C L J 570.

(7) PROCEDURE.

44–45–Procedure—Suit for arrears of rent.

A claim by defendant for abatement of rent under remission granted to plaintiff by Government may be tried in a suit for arrears.

Boikunto Paraki v Surendronath Roy 1 W R 84

46—Plea of Abatement in suit for arrears of rent.

In a suit to recover arrears of rent it is competent to a Court to adjudicate upon a plea of abatement.

Gour Kishore Chunder v Bonomalee Chowdhry. 22 W R 117=15 B L R 35

Notes–Fol· 4 Cal 411; 11 Cal 343; 15 Cal 750.

47.—Lease deed—Possession of lands leased—Proportionate reduction for lands not given possession of—Payment of whole rent—Voluntary payment—Damages. Plaintiff brought the suit for rent upon a registered muchilika executed by defendant for a term of 5 years. Defendants contended that they executed the suit muchilika in the full belief that the entire extent will be put

Abatement of Rent (Procedure) –*Concld.*

in their possession but that a certain tract containing 600 acres was trespassed upon by the neighbouring Talukdar who prevented defendant's occupation and that the defendant paid under protest at the end of fasli 1307 the full amount for Faslis 1305, 1306 and 1307.

Held, that the payments are not voluntary payments and the tenant is entitled to recover them. **Ghanta Ramanna v G Narayanasami Naidu 7 M L T 52=5 Ind Cas 712.**

(8) CIVIL COURT'S DECREE EFFECT OF, ON REVENUE COURT'S DECREE.

48.—Effect of decision of Civil Court on decree of Revenue Court—Suit for excess payments of rent after decree for abatement. A patnidar sued his zemindar and obtained a decree for abatment of the patni rent, on the ground that the assets of the patni fell short of the amount stated in the lease. While this suit was pending in the Civil Court, the zemindar brought a suit for the rent of the two years upon the full jumma; and though the patnidar objected that his suit for abatement was pending, the Collector decreed the rent suit in full. In execution the zemindar recovered the full rent, and the patnidar then sued for a refund of excess payments and of the interest realized by the zemindar thereon. *Held*, that the decree of the Revenue Court wes superseded and modified by the decree of the Civil Court. which was subsequently affirmed in appeal. *Held*, that the plaintiff's cause of action accrued on the date on which the zemindar recovered from him rent in excess of what he was justly liable for and also interest on such excess. *Held* (on reference to the decree) that the abatement was to take effect from the commencement of the patni lease.

Nilmoney Singh Deo v Sharoda Pershad Mookerjee 18 W R 434.

Notes:—Dist 20 W R 106.

49-Act No XII 1881(North-Western Provinces Rent Act), Chapter II Section 93 (a).—Landholder and tenant suit for rent-Plea of custom allowing deductions on account of land rendered unculturable by action of river.—Such deduction not an "abatement of Rent" within the meaning of the act.

An abatement of rent in the sense of chapter II of the North-Western Provinces Rent Act No. III of 1881, implies the reduction of the rent

Abatement of Rent (Civil Courts decree effect of)-*Concld.*

payable for the holding, if not permanently, at all events for an indeterminate period, the rent as abated being substituted for the original rent and continuing to be the rent of the holding until altered by agreement or by further order. A tenant cannot apply under Chapter II on any ground for a reduction or revision of rent for a particular year only and having no effect beyond that year on the rent payable for the holding.

In a suit for arrears of rent under section 93 (a) of the North-Western Provinces Rent Act 1881, the defendant proved a local custom, whereby a tenant was entitled to proportionate deduction from the rent for any year for such lands as were in that year, owing to fluvial action, unculturable by being submerged by water or covered by sand. No application for abatement for rent had been made under Chapter II of the act.

Held, that inasmuch as the defendant did not by his plea seek for an abatement of rent in the sense of Chapter VI namely a reduction permanently or for an indeterminate period of the rent payable for his holding, but only a remission or deduction from such rent for a particular year and in respect of such portions of the holding as were unculturable in that year, and inasmuch as remission could have been obtained in proceedings under Chapter II, the custom did not override any of the provisions of the Act, and must be given effect by the court trying the suit.

Bani Prasad Kuari v Dakkhi Rai
23 All 270=A W N 1901 69.

Abatement of execution-proceedings.

See Execution of decree.

Abatement of Nuisance.

See.

(1) Jurisdiction of Civil Court—Public ways-obstruction of.

(2) Nuisance

Abatement of part of claim.

See Relinquishment or omission to sue for portion Of claim

Abatement of Part of Rent.

See Abatement of Rent.

Abatement order of.

See appeal (Decrees).

Abatement

(1) ABATEMENT OF SUIT. (1-88)

(1) Lands washed away (1).
(2) Death of sole plaintiff (2-16).
(3) Insolvency of plaintiff (17-18).
(4) Survival of cause of action (19-88).

(2) ABATEMENT OF APPEAL (89-165)

(5) Death of appellant (89-96).
(6) Death of appellant—during pendency of appeal (97-112).
(7) Death of one of two joint decree-holders (113-114).
(8) Death of principal, pending appeal (115—116).
(9) Death of Respondent (117—165).

See cases under Right of.
Suit-Survival of Right

See also cases under:—

(1) Appeal—Orders
(2) Insolvency Act S 36.
(3) Right of suit—Survival of right.

Abatement of suits. Representatives of one of the respondents not brought on record—Abatement of appeal—See **5 Ind Cas 325.**

Abatement of suits. Pre-emption—Sale of a pre-emptional decree—No cause of action for a fresh suit—Parties—Vendor not a necessary party—Abatement of appeal—See **134 P L R 1902=94 P R 1902.**

Abatement of Suits. By husband for dissolution of marriage—Death of wife pending suit—Suit against correspondent, abatement of—See **60 P R 1906=69 P L R 1907.**

Abatement of suit. Partition decree—Execution—Death of plaintiff—Abatement of suit—Application to set aside—Limitation—See **13 Bom L R 517.**

(1) LANDS WASHED AWAY.

1.—Lands washed away—Suit for possession and mesne profits.

Abatement of suit (Lands washed away)-*Concld.*

A suit for possession with mesne prosfits does not abate by reason of the lands having since been washed away. **Unna Poorna Debia v Ram Lochan Ghose 5 W R 227.**

2. DEATH OF SOLE PLAINTIFF.

2.—Abatement of suit on death of sole plaintiff—Revivor Civil Procedure Code. Sections 363, 365,366,371-Limitation Act (XV of 1877) schedule II, Arts 171 and 178.

Upon the death of sole plaintiff, unless an application be made within 60 days from the plaintiff's death by the legal representative to have his name substituted upon the record.the suits abate under section 366 of the Code of Civil Procedure. But under section 371 of the Code, and Art 178 of Limitation Act (XV of 1877), the court may revive the suit on the application of the legal representative within three years from the time when the right to apply accrued, if can be proved that he was prevented by any sufficient cause from continuing the suit. **Bhoyrub Dass Johurry v Doman Thokoor I L R 5 Cal 139=4 C L R 374.**

Notes.—Ap: 9 Bom 275 Dist: 5 C L R 108

3.—Death of sole plaintiff after conclusion of cause, but before delivery of judgment—Decree drawn up in favour of deceased plaintiff-Material irregularity—Civil Procedure Code, 1882, sections 365. 366.

In a certain case after evidence had been taken and arguments heard on the 28th and 29th September 1897, the District Judge on the 2nd November 1897 gave the (sole) plaintiff a decree for the property claimed, and at the foot of his judgment recorded the following note:

"It having been brought to my knowledge "that plaintiff has died in the *interim*, I deliver "judgment notwithstanding, being guided by "I L R XXI Bom 314 and the authorities quo-"ted therein, defendant's counsel agreeing." Defendant applied to Chief Court on the Revision Side to set aside the said decree.

Held, that under the circumstances of the present case there had been a disregard of the provisions of the Civil Procedure which had materially prejudiced the defendant inasmuch as she could not appeal against a dead person and had no right of appeal against his heirs who were not

Abatement of suit (Death of sole plaintiff)-*Contd.*

on the record and was moreover, deprived of the possibility of the suit being allowed to abate in consequence of no application under Section 365 civil Procedure code being made within the time allowed by law.

Held, therefore, that the decree of the District Court must be set aside and the case remanded for dispossal in accordance with law with reference to Section 365 and 366 of the code.

Roe, C J.—A decree passed in favour of or against a dead person is not *ipso facto* a nullity. and all that can be said in such a case is that there has been a disregard of the provisions of the civil Procedure Code. Each case must be decided on its merits, and the decree should be set aside or maintained, as if the death occurred after decree, according as the disregard of procedure has or has not materially prejudiced the parties.

I L R XXI Bom 314, I L R VI Mad 180; I L R XV Mad 399; I L R XVII All 478 No; 31 P R 1886; No 7 P R 1889; and No 78 P R 1891 referred to. **Bates v Prestage 20 P R 1898.**

4.—C P C. O 22 r 3 (1) (1882 s. 365)-Appeal-Death of appellant—Representative not brought upon record—Decree. Where an appellant dies before the hearing of the appeal and his representative is not placed on the record, the decree passed by the appellate Court is a nullity: and if his legal representative applies within the prescribed period to have his name entered on the record the Court is bound, under S 365 of the Civil Procedure Code to enter his name **Janardhan v Ramchandra 4 Bom L R 23=26 Bom 317.**

5.—Power of Court.

If a sole appellant dies while his appeal is pending, the appellate Court cannot proceed to judgment in the appeal without the representatives of the deceased appellant being made a party to the record.

Lalji Sahai and another v Sukhi Lal and others 16 W N 91

6.—O. 22 r. 3 (1); O. 41 r. 25 (1882 Ss. 365, 566.)-Held, that a Court to which a case has been remanded under s. 566, Civil Procedure Code, has jurisdiction to act under s. 365 of the Code, and to do any act which may be necessary to carry out

Abatement of suit (Death of sole plaintiff)-*Contd.*

the order of remand. **Salabat Singh v Ram Kishan.** **7 O C 17.**

7—Civil Procedure Code (1859), s. 102 (1877) s, 371—Institution of fresh suit,—

Where a suit was declared abated in 1868 under s, 102 of Act VIII of 1859 for non-prosecution by the representative of deceased plaintiff,—*Held* that the Civil Procedure Code, s. 371, was no bar to a fresh suit instituted in 1880 on the same cause of action. **Pallikunath Ramen Menon v. Mullankaji Sri Kumaran Nambudri. 3 Mad 31.**

8-C P C. O 22, r. 9 (1), (2), (1882 S. 371)—Decree passed in a prior suit in favour of plaintiff after his death—Subsequent suit by plaintiff's legal representatives on the same cause of action—Whether maintainable. One R brought a suit against A and a decree was passed in plaintiff's favour, R's legal representatives brought the present suit on the same cause of action against A's representatives on the ground that R having died on the morning of the day on which judgment was pronounced the decree was a nullity.

Held, that the suit was not maintainable and that the decree passed in the former suit was only voidable at the plaintiff's instance and not void. (4 H and N 488; 19 Bom 807; 21 Bom 314 Ref to. 17 All 478: 26 Bom 317 Dist). **Gada Coopooramaier v M, Soondararmall 6 M L T 271= 33 Mad 167.**

9-C P C.O. 22 rr. 3 (1) 3 (2):9 (1) (2) (1882 Ss 365 366, 371)—Limitation Act (XV of 1877) Art 175—Applications for abatement and revival heard together—Form of order of revival. An application for abatement and an application for revival of a suit were set down for hearing together. The latter was made after six months of the Plaintiff's death.

Held-That on the court's being satisfied that the legal representative of the deceased plaintiff was prevented by sufficient cause from continuing the suit, the proper order to pass was to declare the suit to have abated and then at once pass an order under sec. 371 of the C P C setting aside the abatement and reviving the suit. **Ram Protab Chowdhry v. Lal Chand. 9 C W N 369.**

10—Civil Procedure Code (1882), ss. 365, 366, 371—Revival of suit.—The plaintiff died on the 28th August 1883 and in December 1884, letters of

Abatement of suit (Death of sole plaintiff)-*Contd.*

administration to his estate were granted to the Administrator General. The defendant died in June 1884, leaving a widow and one son him surviving. By his will he appointed two executors. On the 3rd February 1885, the Administrator General took out a summons to revive the suit. *Held*, that notwithstanding the provisions of s. 365 of the Civil Procedure Code (XIV of 1882) and of the Limitation Act (XV of 1877), it was competent for a Judge in chambers to revive the suit by making an order for abatement under s. 366 of the Code, coupled with an order under s. 371 setting aside the order for abatement. **Fulvahu v. Goculdas Vallabhdas. 9 Bom 275.**

11-C P C, O.22 rr 3 (1) 5 (1882 Ss.365 367)—Civil Procedure Code Act XIV of 1882 Ss. 365, 367, 371, 588 (18) 32-Plaintiff—Legal representative of deceased plaintiff—Objection to the legal representative—Nearest heir to the deceased—Appeal—Practice—Procedure. When a plaintiff dies the suit cannot proceed because there is none suing. The Legislature provides that his legal representative can come in his place; when he is allowed to come the defect is made up; there is a suit to proceed. The suit is then a suit on the merits. A Court has no jurisdiction after that stage has been reached to go back and enquire into the right of the legal representative to proceed with the suit side by side with an enquiry into the merits.

Where a person has once been admitted to the record as legal representative of a deceased plaintiff that person is a party and any dispute raised inter parties as to that substituted plaintiff's right of representation [not inheritance] so as to have such substituted plaintiff struck out comes properly under S. 32 and not under S. 367 of the Civ Pro Code

If S. 367 be read with S. 588 [18] of the Civ Pro Code, it becomes clear that the dispute contemplated in S. 367 is not an issue on the merits framed and recorded between a plaintiff and defendant. **Balaba v. Ganesh 4 Bom L R 980 =27 Bom 162.**

Notes.—Ref; 1 C W N 584.

12-C P C,O 22 r 3 (1) (1882 S.365)-Limitation-An application for the assessment of mesne profits is not a proceeding in execution of the decree, but merely a continuation of the original suit. **19 Cal 132 (F B) Fol. Debendra Nath v. Khirode Chandra 5 Ind Cas 279**

Abatement of suit (Death of sole plaintiff)—*Contd.*

13—C P C, O 22 r. 3 (1)-O. 33 r. 2 5. 8, 75 (1881 ss. 365 403, 407 410, 413) pauper, right to be declared whether personal—Death of the applicant —Substitution right of the heir—Civil Procedure Code [Act XIV of 1882] Secs, 365, 403, 407, 410 and413 The right to obtain permission to sue as a pauper is only a personal right. So on the death of an applicant praying for such permission his legal representative cannot come in as such and ask to be substituted in his place There is a marked distinction between a right to sue and a right to make an application for permission to sue as a pauper, and this distinction is clearly indicated in section 413. of the Code of Civil Procedure. The right to make such an application is Obviously a personal right and cannot survive in the legal representative who may or may not be a pauper himself.

Lalit Mohan Mandal v Satish Chandra Das 4 C L J 234=33 Cal 1163

14—C P C, O 22 r. 5 (1882 S.367)—Abatement of suit—Appeal—Revision. *Held*, that where after the death of a plaintiff the Court on the application of his widow to be brought on the record in place of her deceased husband held that the right to sue not having survived to the applicant, she could not be brought on the record as the legal representative of the deceased and ordered the suit to be dismissed as having abated. The proper remedy for the widow was to appeal against that order and not to apply for the revision of the same. 18 Mad 496; 27 Bom 162 and 10 Bom 220 referred to. **Mussammat Patraj Kuar v Bhaiya Janki Parshad. 9 O C 354**

15—C P C, O. 22 r. 5 (1882 S.367)—Dispute as to who is the legal representative of a deceased plaintiff—Order admitting a person to be legal representative for the purpose of prosecuting the suit—Effect of such order.

S. 367 empowers the Court in a case where a dispute arises as to who is the legal representative of a deceased plaintiff, to appoint a legal representative for the purpose of prosecuting the suit, but the appointment of such legal representative is not a determination of any issue which is properly raised in the suit, and particularly (as for example, in a suit for partition of family property) such a vital issue as whether the deceased plaintiff was joint with or separate from the rest of his family. **Parsotam Rao v Janki Bai A W N (1905) 206=28 All 109.**

C C 3

Abatement of suit (Death of sole plaintiff)—*Concld.*

16.—Execution of Decree—Death of decree-holder—Abatement of execution proceedings—Admission of application to set aside abatement after time—Sufficient cause—Civil Procedure Code, 1882, Sections 365, 371, 372 A—Limitation Act, 1877, Section 5.

In an execution proceeding the decree-holder having died in September 1898, the judgment-debtor, on the 18th October 1899, obtained an order from the executing Court for the removal of the attachment on the ground that no application in accordance with the provisions of Section 365, Civil Procedure Code, had been made by the representatives of the deceased decree-holder within the prescribed period of limitation. The circumstances were that the decree-holder who was a Sikh Jat had died and left a will probate of which having been keenly contested by his heirs was not granted to the executors until April 1900. In May 1900 two out of the three executors filed an application, but the judgment-debtor contended that by sec. 365 of the Civil Procedure Code the application was timebarred.

Held, that the word "suit" includes all proceedings in a suit including the proceedings in execution, and that the executors were bound to make and capable of making the application at the time of the death of the testator, but that, under the peculiar circumstances of the case, there was sufficient cause preventing them from continuing the execution proceedings originated by the testator within the meaning of s. 371, Civ. Pro. Code and that therefore under the provisions of s. 372A Civil Procedure Code, and of s. 5 of the Limitation Act they were entitled to an extension of the time for making the application to set aside the abatement order.

(7 Bom 341) (9 P R 1901) (6 All 269) (63 P R 1900) referred to. **Price v Golak Nath 39 P R 1903**

(3) INSOLVENCY OF PLAINTIFF

17—Insolvency of plaintiff—Civil Procedure Code (1859), s. 106 (1882) s. 370—Order for security for costs by Official Assignee when made a party. S. 106 of the Civil Procedure Code means that a suit abates by the insolvency of the plaintiff, but that the defendant shall not plead the abatement without giving Official

Abatement of suit (Insolvency of plaintiff)-*Concld.*

Assignee an opportunity of prosecuting the suit Where, therefore, the plaintiff after the institution of a suit, became insolvent and the defendant thereupon obtained an order that the Official Assignee should give security for the costs of the defendant within fourteen days, and should be made a party to the suit within one month, and that, in default of such security, the suit should be set down for dismissal within eight days after the expiration of the time so limited. *Held* that such order was irregular. *Held*, also, that the Official Assignee, having notice of the order was not entitled to the further notice of the setting down of the suit for dismissals he not having given the security required, and that the giving of such security was a condition precedent to his being made a party to the suit. **Ibrahim Bin Mahasin v Abdur Rahiman Bin Alli. Gamble v Abdur Rahim Bin Alli.** **12 B H C 257.**

18—If an assignee, who has been substituted for the plaintiff under s. 106, Act VIII of 1859, declines to furnish security for costs within such reasonable time as the Court may order, the defendant may, within eight days after such neglect and refusal, plead the bankruptcy or insolvency of the plaintiff as a reason for abating the suit. **Heera Lall Seal v Carapiet.** **13 W R 431.**

Notes:—Ref 9 B H C R 205.

(4) SURVIVAL OF CAUSE OF ACTION

19—Survival of cause of action During the pendency of a suit by a Hindu widow to recover possession of her husband's estate, the widow died.

Held, the cause of action was one which, from its very nature, survived on the death of the plaintiff, and therefore the suit did not abate.

Parbutty v Higgin. **17 W R 475**
Parbutty v Brikun. **8 B L R Ap 98.**

Notes—Ref 34 Cal 294; 11 C W N 501; 6 C L J 547; 12 C W N 590; Fol 35 Cal 756 F B =7 C L J 666=12 C W N 682.

20—C P C, S. 361—Suit for declaration of right as member of caste—Death of plaintiff.

Plaintiff who sued for a declaration of his right as a member of a caste to worship an idol, died and his son was entered by the Lower Court on the record as his heir.

Abatement of suit (Survival of cause of Action)-*Contd.*

Held, that as the claim was not based on any hereditary right, but on a right arising from membership in the caste, which by its nature vested in the son before the death of the father, no right survived to the son as he had enjoyed it independently of the father, and the suit abated. **Chimanaji v Parshotam.** **90 P J 219.**

21—C P C, O 22 rr 1, 5 (1882 Ss. 361 & 97) -Party to suit—Death—Right to sue—Abatement.

By the terms of a consent decree it was provided that any right, title and interest which the plaintiff's grandmother, father and uncle had in certain family properties should be released and conveyed to defendant 1, their mortgagee; and a conveyance accordingly was passed in terms of the decree. The plaintiff, who was a minor then, was not made a party to the consent decree or the conveyance. He subsequently brought a suit to have his rights declared against defendant 1. While this suit was pending the plaintiff died leaving a widow and daughter. Defendant 1 contented that the suit abated by reason of plaintiff's death as plaintiff's right had passed to him. Held that the right to sue survived as it was an interest in property, **Dharamsi v Narotam** **5 Bom L R 1041.**

22—C P C, O rr 3 (2), 5. s.104, O, 43, r. 1 (1882 Ss. 366, 367 588 cl. 18.)

The order of abatement of suit under the first paragraph of s. 366 might be treated as an order under s. 367, which is appelable under s. 588 cl. (18). Karta in a joint Hindu family must be with the consent of the adult members. If, other members of the family do not join with the descendants of a karta in carrying on the suit, the latter are entitled to carry on a suit brought by him for recovery of a property against the trespasser for the benefit of the whole family. 10 Bom 220; 27 Bom 152; 19 Mad 496; 2 N L R 7; 17 All 172; 17 Mad 209. 27 Mad 112. Ref 9 O C 354 followed. **Pandit Ikbal Narain v Pandit Ratan Lal.** **10 O C 121.**

23A—C P C. O XXII, r 3 (1)—Suit by Hindu widow—Death of plaintiff—Begal representative—Reversioner.

Where a Hindu widow died after the institution of a suit to recover property belonging to her deceased husband, the reversionary heirs of her husband, being her legal representatives, sho-

Abatement of suit (Survival of cause of Action)-*Contd.*

uld be brought upon the record. 9 M I A 543; 2 W R (P C) 31; 23 Cal 636; 20 All 341, Fol.

Rikhai Rai Sheopujan Singh. 7 Ind Cas 97=7 A L J 960.

24—C P C, O. 22 r 5; s 104; O 43 r 1 (1882 Ss.367, 588, (18) C P C order abating a suit s. 367, Cri. Pro. Code.)

Order deciding that the right to sue does not survive, is appealable. An order directing that a suit shall abate is not a decree nor appealable as such. Where a person applies to have his name entered on the record in place of the deceased plaintiff, and the Court decides that the right to sue does not survive the decision is to be regarded as come to under s. 367 C P C so that an appeal lies under s. 588 (18). 10 Bom 220, 17 All 172, 27 Mad 112; 18 Mad 496, 27 All 162; 11 Cal 6 ref. to. **Tejnath Dube v Loknath Dube 2 N L R 7.**

25-C P C, O 22 r 3 (1); The Second Schedule (1882 ss. 365, 523)—Arbitration, contract to refer to—Rule of Court—Death of one party, effect of—Revocation of contract only for just and sufficient cause—Leave of Court-Abatement of Arbitration.:—

Under the English common law the authority of an arbitrator may at any time before the award is made, be revoked at the pleasure of any party to the submission, whether such submission be by agreement in writing, bond deed or Judge's order at *nisiprius*. Such authority is, therefore, revoked in England by the death of any one of the parties to the submission 15 R R 580; 7 Taunt 57; referred to. This rule of English common law has not been followed in India so that contracts to submit to the decision of an arbitrator are not revocable at the mere will or pleasure of the parties. 8 M H C R 46 followed. A submission which has not been made a rule of court is not revocable without just and sufficient cause, and a submission which has been made a rule of court can be revoked only with the leave of court for good cause shown. 12 M I A 112, referred to. Where an uncle and his nephew who were members of a joint family entered into an agreement in writing to submit their disputes relating to the partition of their joint property to the decision of some arbitrators, and the uncle applied under s. 523 to have the agreement filed and the application was registered and numbered as a suit, but pending the

Abatement of suit (Survival of cause of Action)-*Contd.*

proceedings before the arbitrators the uncle died and his daughter's son, alleging to be the adopted son of the deceased, applied to continue the suit:—*Held* (1) that the suit did not abate; (2) that the contract of submission not being personal to the deceased, was not revoked by the death of one of the parties; and (3) that the procedure prescribed in s.367, C P C, was the one that should have been adopted. **Venkata Satyanarayana v Venkata Rangayya. 13 M L J 311= 27 Mad 112.**

Notes:—Ref. (1908) W N 228=30 All 505= 5 A L J 658.

26—Suit by son to set aside father's alienation of ancestral property—Death of son—Hindu mother.

Where a Hindu minor, governed by the law of the Mitakshara, on whose behalf a suit to set aside his father's alienation of ancestral property had been instituted, died,—*Held* that no right to sue survived in favour of his mother, but the suit abated. **Padarath Singh v Reja Ram 1882 W N 29=4 All 235**

Notes—Ref 19 Mad 345; 9 All 121 F B 26 Bom 597, 24 All 211, 217, 12 C W N 815.

27—C P C, O 22 r 1 (1882-S.361)-Abatement-Redemption suit by an unmarried daughter—Plaintiff suing as sole heir—Death of plaintiff—Right of married sister to continue the suit.

One Mussammat Prabhawati, sister of the respondent Mussammat Durga sued the appellant for redemption of a mortgage, executed by the Mussammat's father in favour of the appellant on the ground that she as an unmarried daughter, had obtained the sole right to the property of her father to the exclusion of her married sister to whom along with herself, when a minor, the mortgaged property had, in a previous litigation between the parties interested in the mortgage, been surrendered by the order of the court, which had held the mortgage debt to have been satisfied. In the present suit, Mussammat Durga was made a *Pro forma* defendant. Mussammat Prabhawati having died during the pendency of the suit, Mussammat Durga applied to have her name removed from the array of defendants and substituted as plaintiff.

Held, that the right claimed by Mussammat Prabhawati being a personal right and adverse to

Abatement of suit (Survival of cause of Action)-*Contd.*

that of her sister. Mussammat Durga, the suit abated after Mussammat Prabhawati's death and Mussammat Durga could not get her name substituted as plaintiff and continue the suit.

Balak Puri v **Mussammat Durga.** **4 A L J 783=30 All 49=1908 W N 6= 3 M L T 181.**

28—Mother, share of—Reversion—Right to sue, survival.

The right of the mother to a share of the father's properties, on a partition among the sons, is in lieu of maintenance, and such share on her death, reverts to the sons. Where the mother brought a suit against the sons for her share of certain Government Promissory Notes, which had been partitioned amongst themselves by them.

Held, on her death, the right to sue did not survive in her executor. 13 Cal 336, *Fol* 31 Cal 497 Ref. **Tripura Sundari Debi v Dakhina Mohan Roy.** **5 C L J 310= 11 C W N 698**

29—Suit by son contesting alienation by father of ancestral land—Death of son pending suit—Suit does not abate-Right of reversioner to continue suit—Civil Procedure Code ss. 351 and 367—Jats of Amritsar District—Migration from Rajputana-Customary Law of Punjab & not the Hindu Law governs the parties,

Held, also that the restraint on the alienation by a father of ancestral land applied equally to alienation by him to ancestral houses, gardens and shops. 27 Bom 162,(168-169) Fol 10; I A 150 97 P R 1893, 18 P R 1895; (F B), 55 P R 1903 (F B)=117 P L R 1903, 27 Mad 588: 15 I A 156 22 All 33 F B and 382 and 24 Mad 405 Refd. to. **Ram Rakha v Balwant Singh 59 P L R1905 =58 P R 1905.**

30—Personal cause of action,

Held, that under the circumstances the suit which had arisen on account of some illegal act of the widow, had abated on her death pending the suit and the question as to the plaintiff's reversionary right which was raised by an intervenor, must be decided in a separate suit. **Ramjun v Lachee.** **1 Agra 49.**

31-Abatement of declaratory suit brought by reversioner on his death—Reversioner, death of—Hindu Law—Declaratory suit.

A suit was brought by a reversioner for a declaration that certain alienation made by a Hindu widow had been made without necessity and were ineffectual beyond her life-time. The reversioner died during the pendency of the suit and the name of the son of the reversioner was entered on the record in place of his father. *Held*, that there being no privity of estate between one reversioner and another, each must claim in his own right from the last male-holder of the estate. *Held* also, that the right of a contingent reversioner to maintain a declaratory suit does not survive to the person who on the plaintiff's death becomes the next reversioner and that such a suit abates on the death of the original plaintiff. **Bhola v Mussammat Moona.** **8 O C 124.**

32.—*B*—Hindu Law—Reversioner's suit-suit for declaration of invalidity of alienation decree in favour of reversioner—Death of plaintiff Reversioner pending appeal—Abatement.—A reversioner brought a suit for possession of properties and in the alternative for a declaration that certain alienations by the widow will not bind the reversion. The lower courts declared the alienations invalid and gave a decree, for possession. The plaintiff reversioner died pending appeal by defendant. *Held*, that the suit for the declaration did not abate, the suit being on behalf of all the reversioners.

Muthuswami Mudli v Masilamani. **20 M L J 49.**

33—C P C O XXII. r. 1—'Right to sue'-Meaning of—Application for probate by executor—Death of executor—Right of leagal representative of executor to continue proceedings and obtain letters of administration—Abatement of suit. S, the sole executor as well as the residuary legatee under the will of A, deceased, applied for probate of the said will. On a *caveat* entered by N, the cause was set down as contentious and pending the hearing, S died, and P, his sole widow and heiress, applied that her name, as his sole widow and heiress, might be substituted for his name, and that the petition for probate might be amended by substituting a prayer for letters of administration with copy of the will annexed instead of a prayer for probate.

Held, that the right to sue did not survive to the widow of the executor and that the suit abated.

Abatement of suit (Survival of cause of Action)- *Contd.*

The right to sue, in O XXII, means the right to bring a suit, asserting a right to the same relief which the deceased plaintiff asserted at the time of his death, and that a right to obtain probate of a will is a right different in its nature from a right to be appointed by the Court to administer the deceased's estate.

Sarat Chandra Banerjee v Nani Mohan Banarjee. 36 Cal 799.

34.—C P C S. 367. K, a Mahant, brought a suit against his disciple N to have deed of gift executed by him in favour of N declared null and void. Before the defendant filed his reply, K died and B applied to be substituted for the deceased. The lower Court held that the cause of action had not survived and struck off the case. *Held*, that the cause of action did survive to B if he proved himself to be the legal representative of K and the Court must proceed under section 367 of the Code of Civil Procedure.

Ballabh Das v Narain Das 1885 A W N 7.

35.—Act VIII of 1859, section 100, (1882) Sec 362.—A and B, as joint owners of certain land, brought an action for damages on account of trespass. B died after action was brought. *Held*, that the cause of action survived to A. *Semble.*—The words " cause of action " in sec. 100 of Act VIII of 1859 mean right to bring an action **Chundermohun Dutt v Bishwambhur Laha: 1 B L R, O. C. 42.**

36.—Abatement of suit.—Joint vendees—Suit by both—Death of one of the vendees pending suit—Representative—C P C 363—Where certain property was purchased by two vendees, each taking a half share, and a suit was brought by them jointly for possession of the property, but during the pending of the suit one of the vendees died and his personal representatives were not made parties to the record. *Held* (per Banerji, J) that the surviving plaintiff was not entitled to obtain a decree for possession of the portion of the property to which he had no right. (Per Richards,) That he was entitled to carry on the litigation and to obtain a decree for the whole, the rights of the heirs of the deceased plaintiff being ascertained by an agreement or a suit between those heirs and the surviving plaintiff. **Kanjumal v Gauri Shanker. 3 A L J 30.**

Abatement of suit (Survival of cause of Action)—*Contd.*

37-C P C, O 22, rr.3 (1), 3 (2), 5 (1882 Secs. 365 366, 367)—An objection that a person is not the legal representative must be taken at the earliest opportunity and before he is entered on the record as the legal person's name representative. When once the name of a person is entered on the record under S. 365, C. P. C. in the place of the deceased plaintiff as the latter's representative, the court is bound to proceed with the suit. No order for abatement can be passed after the legal representative's name is entered on the record. **Meenatchi Achi v Ananthanarayana. Aiyar. 12 M L J 380= 26 Mad 224.**

38—C P C, O. 22, r. 1 (1882 Sec.361) -Abatement of suit—Principal and Agent—Suit by Agent on behalf of undisclosed principal—Death of Agent —Agent's representatives not brought on record —No right to Principal to continue the suit :— Where an agent, suing on behalf of an undisclosed principal, dies pending the suit, the suit should, after the death of the agent, be continued, if it can be continued at all, by the agent's representatives and not by the principal. Cause title does not suffice to make the suit one on behalf of the principal (22 Bom 672 Dist.).

Periannan Chettiar v Rangachi Reddy. 17 M L J 116.

39.—Advances by partners—Rights regarding the advances made by him to the partnership—Account—Plaintiff's death—Defendant becoming plaintiff—Practice and Procedure.—A firm, owned by a joint Hindu family consisting of father and son, plaintiff and defendant 2, made advances to a partnership of which defendant 2 was one of the partners. Plaintiff brought a suit to recover the advances made from all the partners and the surety including defendant 2 The lower Court passed a decree against the defendants. One of the partners and the surety preferred an appeal to the High Court : and while the appeal was pending plaintiff died. At this, defendant 2, who thereby became the sole owner of the firm, was substituted in plaintiff's place :

Held, (1) that the fact that defendant 2 was partly interested both as creditor and debtor rendered the suit unmaintainable so far as his share was concerned, but it could not stand in the way of the Court's adjusting the rights of the parties in accordance with the rule of justice, equity and good conscience.

Abatement of suit (Survival of cause of Action)-*Contd.*

(2) that as defendant 2 became the sole creditor and plaintiff owing to plaintiffs death pending the appeal, he was entitled only to such relief as would have been possible and he occupied that position at the institution of the suit; that therefore, defendant 2 was only entitled to credit in the partnership account his share as well as the share which descended to him at plaintiff's death but not entitled to any decree in the present suit either against the partners or the surety. **Rustomjee v Purshotamdas. (3 Bom L R 227.)**

40.—C P C. O XXII, r. 6—Death of plaintiff—Case adjourned for arguments—Arguments heard without plaintiff's heirs as parties—Decree passed therein is a nullity. After evidence on both sides in a case was adduced. the case was adjourned for hearing arguments. Between those two dates, the plaintiff died. The arguments in the case, however, were heard without making the heirs of the plaintiff parties to the suit, and the suit proceeded to judgment and decree. The defendant appealed against the decree but the appeal was subsequently withdrawn. When the decree was sought to be executed against him the defendant contended that the decree was a nullity and therefore incapable of execution. *Held*, (1) that the decree was passed without jurisdiction, and therefore, a nullity; (2) that the withdrawal of appeal by defendant did not in any way validate the decree. **Vishvanath Dnyanoba v Lallu Kabla. 11 Bom L R 1070**

41.—In a suit to recover possession of timber, the first defendant had ceased to have any interest, and after the settlement of the issues he died. *Held*, that the cause of action against the other defendants survived, and that the first defendant having no interest in the subject of suit, it was not necessary that the suit should be revived against his representatives.

Moung Khine v Burn. 6 W R, Civ Ref. 2

42.—Lunatic Defendant—Abatement of suit until appointment of Manager—Act XXXV of 1858. The defendant was sane when he contracted the debt sued upon, but became insane before the suit was instituted. *Held*, that his wife could not be summoned as his legal representative to appear and defend until she had been appointed manager of her husband's estate under Section 9 of Act XXXV of 1858, and that

Abatement of suit (Survival of cause of Action)-*Contd.*

until the appointment of a manager, the suit must abate. **Ghassee Khan v Eldred. P R 89 of 1869.**

43.—C. P. C. O. 22 rr. 3 (1) 10, (1)—Ss. 365, 372) —Legal representatives—"Pending suit" —Consent decree for sale:—In a suit a consent decree was made which provided that a certain sum of money should be paid by a defendant to the plaintiff within a specified time, that the same should form a charge on certain property mentioned, and that in case of default, the property should be sold for the realization of the money. The defendant, the promisor, having died the plaintiff applied to have the names of his representative substituted in the place of the deceased defendants. *Held*: (1) that the decree was similar to a mortgage decree, viz, directing property to be sold on non-payment of the amount due within a specified time. (2) that such a decree was not a final one, (3) that plaintiff had to apply in the same suit for a sale order, (4) that therefore, the suit was pending one, and (5) the application for substitution can be made and sucessfully entertained in the same suit. Where an order is not final, liberty to apply to the Court is implied without its being expressly reserved in the order. **Kissory Lal Chowdhury v Raja Sewbux Bogla. 13 C W N 787.**

44.—C P C, O. 22, r. 4; O 1 rr. 8 (2), 10, (2) (3) (5), 11 (1882 Ss. 368, 32)—Application for substitution to deceased defendant—Substitution of heirs under S. 368—Subsequent knowledge of probate of will—Substitution of executors in place of heirs—Bona-fides—Limitation. Where an applicant obtained substitute of names of the heirs of a deceased defendant under Sec 368 C P C, through want of sufficient information that probate of the will of the deceased had been granted, and subsequently applied, more than 6 months after death, to have the names of the said heirs struck out and that of executors substituted:—*Held*, that the application was one under S. 32, C. P. C. and that even under S. 368, C. P. C., it was not barred as the applicant has throughout had a *bona-fide* desire to effect substitution of the proper legal representatives and had shown sufficient cause for delay.

Syed Hossein Ali v Abdur Rahim 7 C W N 529

Abatement of suit (Survival of cause of Action)-*Contd.*

45—Act X of 1859, s. 20 (Beng Act VIII of 1869, s. 21).—

A cause of action accruing against an agent for money received and accounts kept, falling within the class mentioned in s. 20, Act X of 1859, survives the death of the agent. **Hills v Shokhee Monee Dossee, 10 W R 59.**

46—C P C, O. 21 r. 16; O. 22 r. 4 (1882 Ss. 232 and 368)—Application by transferee of decree to bring in defendant's representative on record—Limitation Act, Art. 179, cl. 4—Step-in—aid of execution.

There is nothing in S. 232 of the Code to prohibit the transferee of a decree, from applying for and obtaining an order, under s. 368 of the Code, to bring in the representatives of defendant on record. Such an application is a step-in-aid of execution. **Mahalinga Moopanar v. Kuppanchariar, 17 M L J 485=3 M L T 21.**

47—Suit by original mortgagor against mortgagee and sub-mortgagee—Death of mortgagee pending suit — Civil Procedure Code (1882), S. 368.—

Plaintiff sued to redeem a mortgage passed by his deceased father to defendant No. 1, and joined defendant No. 2 as being the sub-mortgagee of defendant No. 1 and in possession of the property. After suit, defendant No. 1 died, and no steps were taken by the plaintiff within time to make his legal representatives parties. The suit was, however, allowed to be continued against defendant No. 2, and a redemption decree was passed in plaintiff's favour:—*Held*, on second appeal, that defendant No. 2 being the sub-mortgagee, and not the assignee of defendant No. 1, on the death of the latter, no cause of action survived to the plaintiff against defendant No. 2, and the suit abated under s. 368 of the Civil Procedure Code.

Padgaya v. Baji Babaji Moholkar. 20 Bom 549.

Notes:—Con: 20 Mad 35. Ref: 10 C L J 470.

48—C. P. C. O. 22 rr. 3, 5—Representation of deceased defendant—Executor not substituted—Decree passed against heirs if binding on the estate:—

B, one of the defendants in a money suit brought by P, died during pendency of the suit leaving a will in favour of the plaintiff in the present suit. On P's application the heirs of B were substituted as defendants in her place and the plaintiff's application for substitution of his own name was rejected as he had not obtained probate of B's will. A decree was passed *ex parte* and the property sold in execution thereof:—*Held*, that the estate of B was not properly represented in the suit and so far as the estate covered by the will was concerned it was not affected by the decree or the sale. (9 Bom 86; 9 C W N 201 S C. 32 Cal 296; 32 I A 23; 22 Cal 903 Fol: 4 Cal 342; 30 Cal 1044 Dist) **Harish Chandra Biswas v. Praidas Das, 14 C W N 1041.**

Abatement of suit (Survival of cause of Action)-*Contd.*

49—C P C O. 22 r. 4 (1882 S. 368)—Legal Representative—Person brought on record—Wrong person—Effect of:—

Under S. 368 of the Civil Procedure Code, a person whom the plaintiff alleges to be the legal representative of the deceased defendant and whose name the court enters upon the record in the place of such defendant sufficiently represents the estate of the deceased for the purposes of the suit and a decree passed in such suit will in the absence of fraud or collusion bind the estate though the person entered on the record is not the true representative or is only one of several representatives. A person prosecuting or defending a suit of a deceased party will be accountable to others who like himself are also the legal representatives or to the true legal representative.

Kadir Mohideen Marakkayur v. Muthukrishna Aiyar. 12 M L J 368=26 Mad 230.

Notes:—Fol: 28 Mad 420. Ref: 19 M L J 671.

50—C P C, O. 22 r. 4; S. 104; O. 43 r. 1 (1882 Ss. 368, 588 cl. 18.)—Penultimate clause—Order of abatement—Appeal—Death of one of several defendants—Election to proceed against survivors.

Though the penultimate clause in S. 368 does not in words require an order of abatement by Court, an order is necessary declaring that the suit has abated: and an appeal lies from such order under cl. 18 of S. 588. A mortgagee is entitled to waive his right to proceed against a surety and restrict himself to his right against the mortgagor and consequently when the surety dies after being impleaded in the suit along with the mortgagor, the mortgagee need not bring in the legal representatives of the deceased surety on record, but may proceed against the rest.

Mehdi Hussain v. Sughra Begam, 1903 A W N 15=25 All 206.

Abatement of suit (Survival of cause of Action)-*Contd.*

Notes:—The new code does not allow an appeal against an order of abatement.

51—C P C. O. 22 r. 4 (1882 S. 368)—Death of defendant—Time for joining his representatives—Dismissal of suit—Whether appeal lies.

Where in the course of an action the defendant died and the Munsiff dismissed the suit without giving sufficient time to join as defendants the representatives of the deceased defendant.

Held, that the course taken by the Munsiff was not an order under sec. 368 or any other section of the Civil Procedure Code, and that the proceedings of the Munsiff amounted to a decree and an appeal lay to the District Judge. 18 Mad 496 Fol: **Muthu Alagappa Chetti v. Selia Pillai, 3 M L T 327.**

52-C P C Ss.362, 368—Redemption suit-Parties.

In a redemption suit, defendant No. 1 the mortgagee, assigned all his rights under the mortgage to defendant No. 2, and died. *Held*, that his representatives were not necessary parties to the suit, and s 362 and not s 368 applied.

Nagesh v. Waman....., 88 P J 191.

53—C P C O 22 r. 4 (1882 Sec. 368)—Dispute as to who is legal representative—Procedure in execution applicating—Validity of sale.

Where there are two or more claimants to the estate of a deceased judgment-debtor, held that the decree-holder may apply for execution against any one of them whom he honestly and reasonably believes to be the same legal representative and if his interests in respect of the proceedings are identical with that of his rivals and if he acts without fraud or collusion he represents the estate even though it is decided subsequently that he has not the proper representative. (14 Mad 454; 20 Mad 230; 30 Cal 1044 Ref. to; 32 Cal 296 Expl 17 Mad 186 Dist 15 Mad 399 at 400, Not Appl)

Ramaswami Chetiar v. Oppilamani Chetti. 6 M L T 269=33 Mad 6=19 M L J 671= 4 Ind Cas 1059.

54—C P C. O 22 r.4; S 50 (1882 Ss 368, 108, 234)—*Ex parte* decree against a defendant—Application by representatives of the defendant to be brought on record, maintainability of. An *exparte* decree was passed against a defendant in a suit. An application was made, after the death of such defendant, by his representatives, praying to set aside the decree under S. 108 of the Code and to add them (the representatives) as the legal representatives of the original defendant. *Held*, where a defendant dies before a decree, S. 368 of the Code provides for an application by the representatives of the deceased defendant to be brought on record. In this case, the defendant died after decree. The section applicable after decree is 234 of the Code, which does not authorise any application to be made by the representatives of the deceased judgment-debtor to bring them on the record but only authorises the plaintiffs to make such an application. S. 108 of the Code only authorises applications by the defendant against whom an *ex—parte* decree has been made. Therefore, the application could not be entertained. **Sambasiva Chetti v. Veera Perumal Mudali, 28 Mad 361.**

Abatement of suit (Survival of cause of Action)-*Contd.*

55—Mother's interest on—Partition — Civil Procedure Code (Act XIV of 1882) S. 361 ill (c).—D, a Hindu Mother was allotted a one-third share of certain properties on partition. A suit was brought by her for a relief, restraining the defendant from encroachments on her share. The defendant compromised by an agreement to purchase her share of the property. The question of the value of her share was to be decided by the arbitrators. After the award of the arbitrators was filed but before a decree could be drawn thereon, D died leaving two sons. The sons obtained an *ex parte* order to revive the suit in their own names. On the defendants application to set aside the *ex parte* order as the suit abated on the death of D it was, *held*, that on account of the death of D the suit did not abate, and the right of action on the award survived to the sons. 4 C W N 280 Affirmed in appeal in.

Chooney Money Dassee v. Ram Kinkur Dutt, 28 Cal 155=5 C W N 242.

55A—C P C. O. 1, r. 10-Partition-decree-Execution—Death of plaintiff — Abatement of suit—Application to set aside abatement — Limitation Act (IX of 1908). Art. 171 — Court — Inherent Powers—All parties to be before Court in partition-suit—Addition of parties.

In a partition-suit, a decree was passed on the 5th April 1892 on a compromise One Revchand who was a defendant in the suit died on 18th October, 1893, leaving him surviving a minor

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4 SURVIVAL OF CAUSE OF ACTION-*Contd.*

son named Lukhmichand who attained majority on the 7th February 1907. He made an application on the 16th April 1910 for bringing him on the record and for issuing a commission to effect a partition according to the rights declared in the partition-decree

Held, (1) that the suit abated, as soon as the C P. C. of 1908 came into force, so far as regarded the applicant's father who was a party, and the application to set aside the abatement by adding the applicant as the legal representative, not having been made within sixty days, was barred by article 171 of the Limitation Act of 1908.

(2) that, in a partition suit, all the parties should be before the Court, and there was nothing in the C. P. C. (Act V of 1908) limiting or affecting the inherent power of the Court to make such orders as might be necessary for the ends of justice, and under O. 1, r. 10, the Court might, at any stage of the proceedings, order that the name of any person, whose presence might be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

Lakhmichand Rewachand v. Kachubhai Gulabchand, 13 Bom L R 517.

56—Plaintiff sued R for damages for wrongful arrest and prosecution. R died pending the suit. *Held*, that the suit was not one to which Act XII of 1855 could be applied, the alleged wrong having been committed more than a year before R's death, and that as the wrong did not benefit the estate of R, the remedy could not be pursued against his representative, but the suit must abate. **Haridas Ramdas Lakhasa v. Ramdas Mathuradas, P J (1889), 53= I L R 13 Bom 677.**

Notes:—Dist: 26 Bom 597. Ref: 8 M L J 180. 31 Cal 406. Fol: 28 Mad 487.

57—C. P C. O. 22. r 10 (1882 S. 372)—Civil Procedure Code (Act XIV of 1882) Sec. 372—Parties, Substitution of-Assignment of the rights of a plaintiff—Substitution of assignee—Limitation Act (XV of 1877). S. 22.

When the name of the plaintiff is removed from the record and that of his assignee substituted in its place, the provisions of section 22 of the Limitation Act are applicable and the suit must be dismissed if it is barred at the date when such substitution takes place. (25 Cal 409 Appr: 5 Cal 720 Disapproved and Distd.

Abdul Rahaman v. Amir Ali, 5 C L J 486= 11 C W N 521 (F B)=34 Cal 612= 2 M L T 312.

58—C. P. C. O. 22 r. 10 (S. 50) (Ss. 372, 234) —"Assignment, creation or devolution of any interest"—Transferree of interest—Pending suit—Execution against assignee of personal decree against assignor:—

A & Co were sued by B and pending the suit the business of A & Co were sold to C, but A & Co continued to manage the business of C as C's agent. A personal decree was obtained against A & Co. and execution was sought to be had against C as A & Co's representative. *Held*, that neither S. 234 nor S. 372 applied, there having been no assignment, creation or devolution of any interest, within the meaning of the section, the liability not being a proper subject of an assignment. (30 Cal 261 Fol).

Arbuthnot Industrials Ltd. v. Muthu Chettiar, 31 Mad 464.

59—C.P.C. S. 368—Suit for damages for malicious prosecution-Cause of action accruing in Foreign State, but suit instituted in British India—Discharge of plaintiff in former proceedings-Death of defendant pending appeal — Abatement of appeal — Civil Procedure Code, 1882, Sections 368, 582, and Act XII of 1855, Section 1—"Reasonable and probable cause".—

Upon a charge of theft, brought by defendant in the Courts of the Kalsia State, plaintiff was arrested and kept in custody for about six weeks, but was subsequently discharged after full enquiry had been made into the truth of defendant's allegations. Thereafter plaintiff instituted a suit in the District Court, Umballa, within the jurisdiction of which defendant was resident, for Rs. 3400 as damage for malicious prosecution. Defendant traversed the allegations in the plaint, and further pleaded that plaintiff could not sue in a British Court on a cause of action which had arisen in Kalsia State. The Court overruled this objection and awarded plaintiff Rs. 610 as damages, whereupon both parties appealed to the Chief Court. Pending the appeal, defendant died, and his son was brought on the record as his representative, and at the hearing it was contend-

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4 SURVIVAL OF CAUSE OF ACTION-*Contd.*

ed on his behalf, (*i*) that plaintiff's appeal had abated on defendant's death; (*ii*) that plaintiff had not proved that the alleged malicious prosecution amounted to a tortious act *lege loci delicti commissi* (*i. e.*, of the Kalsia State) as well as *lege fori* (*i. e.*, of British India); (*iii*) that the former proceedings had not resulted in the *acquittal*, but merely in the *discharge*, of the plaintiff; and (*iv*) that, in any event, defendant had not acted without "reasonable and probable cause" in charging plaintiff with theft.

Held, as to (*i*), that plaintiff's appeal did not abate on the death of defendant as aforesaid, as to (*ii*), that the plea not having been raised in the Lower Court in this form, could not be raised in the Chief Court on appeal; and as to (*iii*), that a discharge after full inquiry is better proof of the innocence of an accused person than an acquittal.

But *held*, upon the facts of the case, that plaintiff's suit for damages must be dismissed, inasmuch as defendant had not acted without reasonable and probable cause in charging plaintiff with theft.— **Bhagwan Singh v. Pandit Joti, 4 P R 1897**

60—C.P.C.O. 22 r. 10. 3 (1) (1882 Ss.372 and 365)—Meaning of 'other cases' in S.372-Mortgage decree—Order absolute for sale—Death of decree-holder pending suit—Application for substitution by legal representatives of a decree-holder if under S. 372, C. P. C. The words 'other cases' in S. 372, C. P. C., mean cases other than those specifically mentioned in the previous sections in Chapter XXI. If, therefore, the preceding sections, though they may have dealt with the event of death, have dealt so with particular cases only, other cases will fall under S. 372. S. 395, C. P. C., refers to death only as occurring before decree. A mortgage suit, even after a decree has been made and an order absoltute for sale has been passed, is a pending suit until the sale actually takes place, and an application made before sale by the legal representatives of the deceased decree-holder for substitution would fall within S. 372, C. P. C. 23 All 331, 334 ref. to.

Bhugwan Das Khettry v. Nilkanta Ganguli, 9 C W N 171

Notes:—Fol. 2 C L J 288; 13 C W N 787.

61—Where the Court appoints a receiver of the property of an insolvent judgment-debtor, it cannot discharge the insolvent until the receiver has made his report.

Chanmalapa v. Hari, 1887 P J 79.

62—C.P.C. O. 22 r. 10 (1882 S. 372) — Decree in mortgage suit assigned before passing order absolute for sale—Assignee of mortgage decree.

An assignee of a mortgage decree order absolute can be made a party under S. 372, C. P. C., to an appeal against his assignor; but he cannot raise any defence of the plea of limitation to the appeal which could not be raised by the assignors.

Chunni Lal v. Abdul Ali Khan, 23 All 331.

63—C. P. C. O. 22 r. 10 (1882 S 372) — C. P. C. —Pendency of mortgage suit—Objections under S. 372 not appealable.

No appeal lies against an order allowing objections under Section 372 C. P. C. A mortgage suit is to be considered pending within the meaning of S. 372, C. P. C, until the conditional decree is made absolute. 9 C W N 171 and 23 All 331 Ref. to. **Fana v. Tetka, 2 N L R 178.**

64.-C.P.C.O 22 r 10 (1882 S.372)-"Assignment creation &c., of interest"— "Interest".The assignment by a judgment-debtor company of its liabilities to another company, the transaction is no assignment, creation or devolution of interest within the meaning of S 372. The interest referred to in the section is interest in the property which is the subject matter of the suit.

Harsih Chandra Tewary v Chandpore Company Limited 30 Cal 961.

NOtes:—Fol: 31 Mad 464=4 M L T 190.

65.—Reversioners—Contingent reversionary heir. Where a cause of action accrues to a contingent reversionary heir and is barred as against him, it is barred as against all the successive reversionary heirs. **Jamnabai v Dharsey 4 Bom L R 893.**

Notes:—Dist: 13 M L J 360.

66—*Res judicata*.—The abatement of suit under S 371 of the Civil Procedure Code has no other effect than that of preventing the plaintiff or those claiming under him from suing again on the same cause of action. The section does not say that the title of the plaintiff or those claiming under him is extinguished by such abatement and that in any suit, brought not by but against

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4 SURVIVAL OF CAUSE OF ACTION *Contd.*

him, the plaintiff cannot defend his possession or rights by relying upon his true title. The abatement of a suit under S 371 has not the same effect as *res judicata* under S 13 of the Civil Procedure Code. **Jayasing v Gopal 6 Bom L R 638**

67.—C P C O 22—Substitution application for —Privy Council Appeal—Death of parties after final admission and before transmission of record After the final order for admission of an appeal to His Majesty in Council has been made by the High Court, and before the transcript of the record has been transmitted to England, the High Court has power to entertain an application for substitution of the legal representatives of parties who have died meanwhile. Order 22 of the Civil Procedure Code, 1908, has no application to this matter. No question of limitation can consequently arise. Any order for substitution made by the High Court, however is subject to the rules of the Judicial Committee and such directions as may be given by their Lordships at the hearing of the appeal.

The history of the practice in this matter reviewed. **Jadunandan Koer v Ramjiban Lal 10 C L J 331**

68.—C P C O 22 r 10 (S 372)—S 372 not applicable to execution proceedings. **Mumotha Nath Mitter v Rakhal Chandra Tewari 11 C W N 752.**

69.—C P C O 22 r 10 (1882 S. 372)—'Devolution of interest'—Interpretation. The phrase "devolution of interest" in S 372 of the Civil Procedure Code is not confined in its meaning to devolution by death. The legislature intended by this section to provide for all cases not falling within the foregoing sections as to devolution by assignment marriage or death. **Macleod v Kisson 6 Bom L R 995.**

70.—(Act XIV of 1882),—S. 366—Legal representatives—Wrong representative brought on record—Civil Procedure Code (Act V of 1908). Order 22, rule 3, cl. [1]—Abatement. A *bona fide* application to bring the legal representatives (though the wrong persons) of a deceased defendant on record is an application made to the Court within the meaning of section 366 of the old Code, Order 22 rule 3, sub-rule [1] of the new Code, as not to cause the suit to abate. 22

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Mad 125 Appl. 26 Mad 230; 27 Bom 162 Ref. **Mallaprajadu v Veeraragava Row 7 M L T 43=5 Ind Cas 514.**

71.—C P C O 22, r 4 (1882 S 368) Ejectment suit against several trespassers—Death of one of the defendants-Abatement of suit-Withdrawal of suit with consent of surviving defendants. In a suit for ejectment against several trespassers, the death of one of the defendants, does not cause the suit to abate against the surviving defendants. The right to sue survives against them so far as their interests are concerned.

Where, after the death of one of the defendants, the suit was withdrawn with the consent of the remaining defendants and the Court granted leave to plaintiff to bring a fresh suit: *Held*, that the leave was not *non est* by reason of the second defendant's representatives not having consented to the withdrawal, but was operative till set aside on review or revision. 33 Cal 580; 34 Cal 1020, 11 C W N 1100, 6 C L J 715; Fol. 31 Cal 487; 8 C W N 442; 31 I A 71 Dist. **Perumal v Pichan 8 Ind Cas 268.**

72.—Abatement of suit— C P C O 22 r. 10 (S 372) Insolvency pending suit on mortgage—Official Assignee not made a party not bound—Devolution of interest of judgment-debtor or Official Assignee.

Sec 372, Civil Procedure, applies to the devolution of interest by operation of law or in *invitum* and an Official Assignee in whom the rights of the insolvent are vested during the pendency of a suit can be properly made a party under Ss 32 and 372, Civil Procedure Code (18 Cal 43 Dist).

Where a person is adjudicated an insolvent pending a suit brought against him, which is a purely an action *in personam* the Official Assignee is not a proper party. S. 372, Civil Procedure Code, has no relation to such a case as the section only relates to the case of an assignment pending suit of an interest in the subject matter of the suit. (18 Cal 43; 22 Cal 259) Appr. **Punithavela Mudaliar v Bhashyam Aiyangar 12 M L J 282=25 Mad 46.**

Notes—Dist; 26 Mad 230; Ref 9 C W N 14; Dist: 12 M L J 368.

73. C P C O 22 r 4 (1882-S 368)-Death of defendant—Power to adjourn. A Court has no power

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4 SURVIVAL OF CAUSE OF ACTION-*Contd.*

to adjourn a suit for trial when it is shown that one of the defendants died leaving legal representatives and cause of action did not survive solely to the surviving defendants. The Court cannot proceed further with the suit until the course prescribed in S 368, C P C, which is applicable to such a case, is taken (or until the time fixed by law for taking such a course has elapsed).

Purushottama Patnaik v Chaitana Naiko 12 M L J 188.

74.-C P C O 22, r 4 (1882 S 368)—Decree passed by mistake against a deceased defendant-Decree declared incapable of execution-Remedy open to plaintiff. When a decree is allowed by a plaintiff to be passed *exparte* against a sole defendant who is not alive at the time of the passing of such decree, but of whose death the plaintiff had at the time no knowledge, it is competent to the plaintiff, on the decree so obtained being declared incapable of execution to apply under S 368 C P C., to have the case reopened after bringing upon the record the legal representatives of the deceased defendant. **Qutub Ali v Dwarka Das 1904 A W N 44**

75.—C.P.C. O 22 r 10 (1882 S 372)-Devolution meaning of. 'Devolution of interest' referred to by C P C, S 372 is not confined to devolution by death, but to all cases of transfer from one to another. **Rajah Sowundra Mohan v Rani Shiromoni 5 C W N 307=28 Cal 171**

Notes;—Ref; 30 Bom 250; 6 Bom L R 995 Dist: 7 O C 78.

76-Abatement of suit against joint tort-feasors-Compromise between plaintiff and one defendant —Such compromise no bar to a decree against the other defendants.

The plaintiff sued several defendants jointly to recover damages in respect of an alleged assault committed on him by the defendants, but entered into a compromise with one of the defendants. *Held*, that this compromise did not preclude the plaintiff from recovering damages against the other defendants. (7 S and L. 547, Dist.)

Ram Kunwar v. Sheikh Ali Husain,(1908) A W N 190.

77.—Leave of Court. The original plaintiffs in this case were H L, J A and M A, the two latter claiming as the assignees of a moiety of H L's share. Subsequently L A and U A were subsituted for J A and M A on the ground that the latter had transferred their interest in the peoperty sued for the former. *Held*, that in order to maintain the suit J A and M A should have proved

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4 SURVIVAL OF CAUSE OF ACTION-*Contd.*

the purchase and the payment of the consideration. That no proceedings having been taken under s 372 of the Code of Civil Procedure, in respect of the substitution of L A and M A, there was no assignment within the meaning of the statute which could enable them to go on with the action. **Ramji Mal v Hazari Lal. 5 W N 242.**

78—C. P. C. O. 22 R 1 (S. 361)—Act XII of 1855 (The Legal Representatives suits) S. 1 cl 2-Suit for damages for malicious prosecution against prosecutor himself—Death of prosecutor pending suit—Right of plaintiff to bring in his legal representatives.

This Suit for damages for malicious prosecution was instituted against the prosecutor, when he was alive, and, on his death, before the final hearing, plaintiff sought to bring his legal representative on the record. Held, that the suit abated on the death of the defendant and that plaintiff was not entitled to proceed against the legal representatives of the deceased defendant under cl 2 of S. 1 of Act XII of 1855 since that clause had no application to an action commenced against the wrong-doer in his life-time. but could govern only actions, commenced against the executors, administrators or other representatives of a deceased wrong-doer. 13 Bom 677 Fol . 31 Cal 405 Appro. **Ramchode Doss v Rukmany Bai. 28 Mad 487 also 8 C W N 329 also 26 Mad 499.**

79.—C.P.C.O. 22 r 10 (1882 S 372)-Appeal. An appeal lies against an order directing substitution of parties under section 372 C. P. C; such an order amounts to an order disallowing objections to substitution. **Sourindra Mohan Tagore v Rani Shiromoni. 5 C W N 307= 28 Cal 171.**

Notes.—Ref. 30 Bom 250=6 Bom L R 995. Dist: 7 O C 78.

80—C P C O 22 rr 10, 4 (1882 Ss. 372, 368)-Limitation Act, S. 178-Decree directing accounts pending suit—Limitation;

Where a decree was made declaring that a party was entitled to a share in a certain property and directed the taking of accounts of that property, and the said party applied to have the death of certain defendant who had died after the decree to be recorded and the name of his heirs substituted before the final decree:—*Held*.—That S. 372 C P C applied and that the right of the petitioner to apply for such substitution accrued from day to day and was not barred under Sec. 178 of the Limitation Act. The *ratio* in such cases is not

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4 SURVIVAL OF CAUSE OF ACTION-*Contd*

whether the decree directs a partition or a taking of accounts, but whether there is a pending suit. 5 Cal 731:8 Cal 420; 3 C W N 757 followed.

Surendro Keshub Roy v Khetter Kristo Mitter. 7 C W N 517=30 Cal 609.

81A-C P C O 22 r 4 (1882 S. 368)-Suit, institution of, in a Civil ourt-Death of defendant before presentation of plaint-Court's power to substitute his representatives—Jurisdiction.

Held, that when a plaint is presented by plaintiff for the purpose of instituting a suit against a defendant in accordance with the provision of the Civil Procedure Code, 1882, and it afterwards turns out that the defendant had died before the presentation of the plaint, the Court has no jurisdiction to substitute the representatives of the deceased as defendants and allow the suit to proceed as against them. (16 Mad 319, Ref: and 12 W R 45 approved & followed.)

Not only is there nothing in the Civil Procedure Code to authorize the institution of a suit against a dead man as distinct from a suit against his legal representative but the death of the defendant puts an end to the suit within a preseribed period unless steps are taken within that period for bringing in the legal representatives.

Veerappan Chetty v Tindal Ponnan. 3 M L T 12=17 M L J 551=31 Mad 86.

82-C P C O 22 r 4 (1882 S 368).—Application.

Held, that the provisions of sec. 368 can only be applied, where the applicant is the legal represenative, and not when he is merely a person alleging himself to be such representative. (8 Mad 306, Cons). **Vemulapati Polamrazu v Uggumadi Subbarama Reddy. 4 M L T 227=19 M L J 33=2 Ind Cas 479.**

83—C P C 0 22 r 10 (S 372)—Receiver—Suit in ejectment by receiver—Discharge of receiver pending suit—Devolution of interest—See:— **30 Bom 250.**

84—Code of Civil Procedure (Act XIV of 1882) Secs 13 and 43—First suit for revocation of agency-Second suit for dismissal for mis-conduct -no bar-Meaning of 'Irrevocable Agency'-Abatement.

The plaintiff brought a suit to revoke the authority given to the first defendant as agent for a time of 18 years under a power of Attorney, which was dismissed on the ground that the agency was irrevocable. The present suit was instituted by the plaintiff for the dismissal of the first defendant on the ground of mis-conduct. The defendant pleaded that the suit was barred by *res judicata*.

Held, that it was not barred. In every contract of service there is an implied condition that if the service be not faithfully rendered the employer is entitled to put an end to the contract. **Mayil Kolta v Kumdur Kultala. 7 M L J 87=33 Mad 162=5 Ind Cas 758.**

85—C P C Act XIV of 1882, S 503—Receiver—Appointment of new Receiver in place of Receiver

Civil proceedings instituted by original receiver and pending at date of appointment of new Receiver. Necessity for making new Receiver party.

Where a Receiver appointed under section 503 of the Code of Civil Procedure, institutes Civil proceedings and is then replaced by another Receiver it is necessary that the new Receiver should be made a party to those proceedings. Observations on the mode and circumstances in which a new Receiver will be made a party. S. 372 of C P C is only and enabling section.

Akula Paradesi v Dhelli Jugannadha Row. 28 Mad 157.

86—C P C, 1882, ss. 366, 367—Application by alleged adopted sons of deceased plaintiff to be brought on record—Appeal from order rejecting application and order declaring suit abated.

On the death of the plaintiff in a partition suit, an application was made on behalf of a boy alleged to be the adopted son of the deceased to be brought on the record in his place. The Court of first instance dismissed the application and declared the suit abated. Appeals were preferred against both the orders. *Held*, that the adopted son was the legal representative of the person to whom he was adopted and under s. 366 it was not competent to the Court to order that the suit should abate. Appeals lay against both the orders.

Subbayya v Saminadayyar. 18 Mad 496=5 M L J 63

Notes.—[F., 10 O C 121; 3 M L T 327, 30 All 348=5 A L J 363=A W N 1908, 139; R., 27 Bom 162, 5 Bom L R 1041, 2 N L R. 7, 9 O C 351, 12I P R 1907, 587=51 P W R 1907; D., 26 Mad 224=22 M L J 380].

87—Suit for dissolution—Necessary parties - Party, death of—Substitution of heirs, not made in time—Abatement of suit:

A suit for dissolution and winding up of a partnership involves the determination of the plain-

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4 SURVIVAL OF CAUSE OF ACTION-*Contd*

tiff's share and the taking of accounts, and the plaintiff's share could not be determined definitely without making all the parties interested in the partnership parties to the suit, and the accounts could not be properly taken in the absence of any of them If on the death of one of the defendants his heirs are not made parties to the suit by substitution in time, the whole suit is to be dismissed even where no relief against the deceased defendant or his heirs was asked for specifically. 14 Cal 791 ref to and foll. **Srinath Pal v Hari Charun 7 C L J 266.**

88—Death of defendant pending suit—Cause of action, when survives against his legal representative—No assets

Where the manager of a temple sued the pedda jiyyangar of the temple to recover compensation for loss of income and for expenses caused to the temple by his alleged refusal to give up the keys of the temple and have worship duly performed therein and, on the defendant dying pending the suit, his successor in office was brought in as his legal representative, *held* that, whether the misconduct on the part of the deceased defendant was regarded as a tort or as a breach of contract of personal service, in neither case the cause of action survived against his legal representative, for the reason that the misconduct was one purely personal to the deceased and did not in any way benefit his estate. **Satagopa Ramanuja v Mahabir Dossji 8 M L J 180.**

Notes:-13 Bom 677 Ref

88 1—Abatement—Suit to declare invalidity of relinquishment deed as against one's reversionary rights—Death of plaintiff—Cause of action—Whether survives in favour of legal representatives.

A suit to declare a deed of relinquishment invalid as against one's reversionary rights abates on the death of the plaintiff, and the cause of action does not survive to his legal representatives. 27 Mad 588, Fol.; 33 Mad 342, expl.: 29 Mad 390; 11 M L J 70 & 33 I A 156, Ref.

Kommeneni Chinna Veerayya v. Kommeneni Lakshminarasamma, 11 M L T 184.

88*B*—Pre-emption—Wajib-ul-arz—Interpretation of document—Custom or contract—Abatement of suit—Share of each vendee specified in sale-deed—Death of one such vendee.

In a suit for a pre-emption based upon the *wajib-ul-arz*, the plaintiff relied upon an entry in the *wajib-ul-arz* of 1870, which gave a right of pre-emption to (1) a real brother, (2) a near brother and (3) other co-sharers in the village. The defendants, on the other hand, produced the *wajib-ul-arz* of 1860, in which the right was given in these terms. "If any co-sharer wishes to transfer his proprietary rights by sale or mortgage, first let him transfer it to a real brother or a near brother or to other co-sharers, and in case these refuse or decline to pay the proper price, the owner may transfer to whomsoever he pleases". *Held*, that this being the whole of the evidence in the case, the existence of the custom was not disproved and that the later *wajib-ul-arz* explained the ambiguity in the earlier one.

Held, also that, where the sale was made to three sets of vendees, the share of each of whom was specified, and one of them died and his heirs were not brought on the record till after six months, the suit did not abate in respect of the shares of the other two sets. **Hukam Singh v. Thakur Das. 8 A L J 1135.**

2 ABATEMENT OF APPEAL.

(5) Death of Appellant.

89—(5) Death of appellant.—Death of appellant.—The death of an appellant was held to be no reason for the abatement or postponement of a case which was being conducted by an agent of the deceased defendant, and was not in any way prejudiced. **Jugomohun Singh v Dabee Pershad. W R 1864 Act X 47.**

89A—S. 99 O XXII, rr 3, 4—Sole appellant dying pending appeal—No application made to bring representatives on record-Vakalatnama filed on behalf of the representatives-Abatement-Irregularity not affecting merits.

An appellant died after filing his appeal and no application was made to bring his representatives on the record, but a *Vakalatnama* was filed by a Pleader on behalf of the representatives and the appeal was heard and the suit decreed in the name of deceased appellant:

Held, that this was not a mere irregularity which could be cured by S. 99 of Code of 1908 and that the appeal had abated. **Badal Khan v Murtaza 9 Ind Cas 977.**

90—Death of *pro forma* defendant.

The death of a *pro forma* defendant, who had appealed along with the other defendants who could have maintained their appeal independently of the said *pro forma* defendant, does not serve to abate the appeal of other defendants.

Ashiq Husain v Asghari Begam. 4 A L J 809 =30 All 90=1908 W N 21.

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5 DEATH OF APPELLANT-*Contd.*

91—Code of Civil Procedure (Act XIV of 1882), Section 588 cl. 18—Order rejecting an application for substitution—Appeal.

Held, that an order rejecting an application made by persons claiming to be the legal representatives of a deceased appellant is an order within the meaning of section 588, clause 18 of the Code of Civil Procedure, and it is not necessary that the dispute referred to in section 367 of the Civil Procedure Code, must be one between rival claimants as legal representatives.

Hanwant Singh v Ramgopal Singh.
5 A L J 363=30 All 348=1908 A W N 139

92—Suit for malicious prosecution—Second appeal by defendant in a suit for malicious prosecution—Death of defendant-appellant—No abatement—

Where pending an appeal against a decree passed against a defendant in a suit for damages for malicious prosecution, the appellant dies, the appeal does not abate and can be prosecuted by his legal representative—26 Bom 597, opinion of the majority followed.— **Paramen Chetty v Sundararaja Naick. 26 Mad 499.**

93—C P C O 22 r 1 (1882 S 361)—Abatement of appeal—Right of next reversioner to prosecute appeal:—An appeal by a plaintiff reversioner against a decree passed against him dismissing his suit abates on that reversioner-appellant's death, and his son, though the next reversioner, cannot prosecute the appeal. **Sakhyahari Ingle Rao Sahib v Bhavani Boyi Sahib 27 Mad 588.**

Notes—Disap. 29 Mad 390 F B=16 M L J 307=1 M L T 183.

94—An appellant having died and no application having been made before the lapse of two months to enter appearance on behalf of the representatives, the appeal was held to have abated **Khettronath Dey v Gossain Dass Dev. 11 W R 543.**
Bhagian v Palmer 20 W R 267.

95—On the 15th April, 1886, at the adjourned hearing of this appeal, the counsel for the appellant stated that he had been informed that his client was dead, and had been dead since the beginning of 1885. *Held*, that under these circumstances the first paragraph of s 366 Code, of Civil Procedure applies, and as no application has been made by any one claiming to be the appellant's legal representative, to be brought upon the record under s 365, the appeal abates. **Gregor Grant v The Oudh and Rohilkhand Railway Company. 6 W N 90.**

96—Civil Procedure Code ss. 102 (1882, ss 365 366) and 348 (1882, s 561) and Act XXIII of 1861, s 37 (Act X of 1872, s 582)—Issue based on objections by respondent—Where the special appellant died after the High Court had referred for trial to the Court below an issue based upon objections taken by the respondent under s 348 of Act VIII of 1859—*Held* that the appeal must abate in accordance with s 102 of Act VIII of 1859 and s 37 of Act XXIII of 1861: and that the respondent does not require that it should proceed, in order that he might have an opportunity of taking objection to the decree of the Court below. If the respondent desires to secure the right of asking for decision on his objection, he must file a separate appeal. **Jaita Bin Kalu v Balu Bin Raghu 3 B H C 81.**

Notes—Ref: 10 B H C R 397; 23 Bom 692.

(6) DEATH OF APPELLANT DURING PENDENCY OF APPEAL.

97—S.366 C P C—Application for substitution—By one only of several representatives.

When a sole appellant died during the pendency of his appeal leaving three legal representatives, and only one of such legal representatives was brought upon the record in the place of the deceased appellant within the prescribed period of limitation. *Held* that the appeal must abate. Either all the legal representatives of the deceased appellant should have been brought upon the record as appellants, or, if any had refused to be joined as appellants, they should have been brought on as respondents. **Ghamandi Lal v Amir Begam. 16 All 211, 14 W N 92.**

Notes:—Con: 23 Mad 125, 25 All 27. Ref: 22 All 222; 26 Mad 230; 235. Dist: 12 M L J 368; 25 All 27. Fol. 30 All 117=(1908) W N 41=5 A L J 62.

98—Sections 365—556 558—Legal representative of a deceased appellant—

When the legal representative of a deceased Plaintiff or Appellant applies under section 365 Civil Procedure Code within the period allowed by Law, the Court shall place him in exactly the same position (supposing of course that the right to sue or appeal survives) as the Plaintiff or Appellant held at the time of his death, in respect of the suit under litigation.

Bhopat Singh v Gayaram. 4 C P L R 183.

99—Death of sole appellant-Nullity of decree—Remedy—

F., the sole appellant before the Divisional Court, died while the appeal was still pending, but after the death of F, the sons of F applied to have their names placed on the record in the

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room of their deceased father This application was rejected by the Divisional Court for default When the appeal was heard on the merits no objection was raised by either party and the appeal was decreed in the deceased appellant's favour

Held on the revision side, no appeal being competent that the proper order to pass was one setting aside the decree of the Divisional Judge as a nullity leaving either party to make any application which he might be advised to make to that Court with a view to re opening the case

Chaunni Lal v Farida 78 P R 1891

100—C P C O 22 r 2 (1882 Sec 362)—Parties —Death of sole appellant-All representatives not brought upon the record—Abatement of appeal —The sole appellant a Muhammadan, died pending the appeal leaving him surviving a widow two sons and two daughters The two sons applied to have themselves brought on the record as appellants but did not ask that their mother and sisters should be made parties to the appeal An application to that effect made by the respondents was not acted upon by Lower Appellate Court. *Held* that it was the duty of the sons to have brought upon the record, either as appellants or respondents the other representatives of their father and, as they had not done so the appeal abated

Haidar Husain v Abdul Ahad 3 M L T 207=5 A L J 62=30 All 117 =1908 W N 41

101—Civil Procedure Code (Act XIV of 1882) Sections 366, 372—Death of appellant during pendency of appeal—Suit against sovereign as Ruler of State—Public Functionary-Evidence Act (I of 1872) Section 57 (8)—During the pendency in the Chief Court of an appeal from a decree given against the Maharaja of Kashmir during the lifetime of the late Maharaja the Maharaja died and as no application was made within 60 days to put a representative of the deceased appellant upon the record it was contended for the respondent that the appeal abated under Section 366 Civil Procedure Code It appeared that the suit was not to enforce any liability contracted by the defendant personally but that the decree must be taken to have been passed against the Maharaja as Ruler of Kashmir, and that he must be regarded as having appealed against it in that capacity

Held, that as the Court was bound, under Section 57 clause 8 of the Evidence Act, to take judicial notice of the facts that the State of Kashmir existed, and that the Maharaja was its Sovereign recognized as such by the British Crown, and as the decree was against the Maharaja in his capacity as Ruler of the State, and was appealed from by him in that capacity the appellant must be regarded as a public functionary who was sued under, and appealed by his official designation and the appeal did not therefore abate under Section 366 of the Code as the true appellant was not dead the decree not being against the Maharaja in his private capacity, and the State which he represented for the purposes of the suit still existing

Maharaja of Kashmir v Mohanlal (51 P R of 1886 Civil)

102—One of the appellants dying pending the appeal—Representative of the deceased not brought on record—All persons interested not before Court—Abatement of appeal

One of the appellants against a joint decree died during the pendency of the appeal in the High Court His representatives were not brought on the record *Held* that the appeal must abate as the Court had not before it all those persons whose interest might be affected by the decree (22 All 233 Pol) **Ram Lal v Debi Singh 4 Ind Cas 385**

See also cases under C P C (1908) O 22

103—Appeal—Civil Procedure Code 1882 366—Application by legal representative to carry on appeal—The appellants father having died during the pendency of an appeal lodged by him a notice was served upon the appellants two adult brothers but they having failed to apply within sixty days the appellant who was a minor applied several months afterwards to be put on the record in his deceased father's place as his legal representative which was done The assistant Judge who heard the appeal was of opinion that in consequence of the omission on the part of the brothers of the appellant to apply the appeal abated and he passed an order accordingly *Held* that the application having been made by the minor son within the time limited by law the order of abatement made by the Judge was wrong Although the complete legal representation vested in the minor son and his two brothers, s 366 of the Civil Procedure Code only required an application to be made by a person claiming to be the legal representative, in order to prevent an order of abatement being made If neither of the brothers was willing to have

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his name placed on the record, the respondent was entitled to have them made defendants, so that they might be bound by the decree. The minor son could then proceed alone with the appeal. **Bhikaji Ramchandra v. Purshotam 10 Bom., 220.**

Notes:—Diss: 17 All 172. Con: 23 Mad 125; 12 M L J 368. Ref 18 Mad 496; 16 Bom 23; 27 Bom 164.

104-C. P. C. O. 22 r.1 (1882 S 361)-Right to sue-Appeal—Death of appellant—Auction for libel—Legal representative. The words 'right to sue' in S. 361 of the Civil Procedure Code must be interpreted in their ordinary meaning, namely, the right to obtain relief by means of legal procedure. It does not follow that the right to appeal against a decree partakes of the nature of the original decree. Plaintiff sued to recover damages on account of a libel, and obtained a decree for damages against defendant. Defendant paid the amount of the decree and filed an appeal in the High Court after which he died; his son was then brought on the record as his heir and legal representative. To this it was objected that at defendant's death the appeal abated and his son had no right to continue the same:-*Held*, by Fulton and Crowe. J. J., (Candy, J., dissentient) that the appeal did not abate. Where the claim has been perfected by judgment, the nature of the relief claimed on appeal stands on a different footing and there can be no abatement. **Gopal v Ramchandra 4 Bom L R 325=26 Bom 597.**

105—Abatement of suit—Sections 365, 366—Death of sole appellant—Abatement of appeal—Legal representative--Right to sue.

Held, that the words "legal representative" in Section 365 of the Civil Procedure Code must be read in connection with the "right to sue" which is involved in the case before the Court and that unless the person applying to be considered the "legal representative" can show that he is the person to whom the "right to sue" involved in the case descends or survives by law, he is not *qua* that right the "legal representative' within the meaning of Section 365, Civil Procedure Code. **Harnam Singh v Bachatar Singh 23 P R 1889.**

106—Abatement of suit—S. 365-Civil Procedure Code, Sections 365, 366, 367 and 382—Suit by widow with life-interest to recover from

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6 DEATH OF APPELLANT-DURING PENDENCY OF APPEAL—*Contd.*

collaterals property of her deceased husband—Legal representative of such widow for the purpose of continuing the suit or appeal on widow's behalf—Dat Brahmins of Kanjrur, tahsil Shakargarh, Gurdaspur District.

The plaintiff, who was the widow of one H. R., sued to recover from the defendants, collaterals, of H. R., a portion of her husband's estate, of which it was alleged they had taken wrongful possession. During the pendency of her appeal in the Chief Court, the plaintiff died, and applications by the widows of other collaterals of H. R. who claimed to be brought upon the record and to continue the appeal as representatives of the deceased appellant, were resisted by the defendants on the ground that, as the deceased had only a life interest in the property and practically left no heir—the succession going to the heirs of her deceased husband—the right to appeal did not survive, and that the appeal ought therefore to abate.

The deceased H. R. was a Dat Brahmin of Kanjrur, tahsil Shakargarh, Gurdaspur District.

Held, that the right to appeal survived to the heirs, whoever they might be of the late H. R.

Held, also, that as all the parties interested in the result of the present application were parties to a new suit brought in order to determine the question of the right to succeed to the property of L. R the proper order to pass at the present stage was to direct under Section 367, Civil procedure Code that the appeal should be stayed until the fact as to who was the legal representative of Mussammat L had been tried and determined in such suit. **Mussammat Lachmi v Amin Chand 97 P R 1898.**

107-C. P. C. Ss. 365 and 366:-Death of appellant—Two out of four representatives substituted for appellant—The other two made respondents after time—Abatement—Limitation Act, Art, 175-A

All the legal representatives of a deceased appellant should, if possible, join in the application to the court to be made parties in place of the deceased. But if, by reason of the ignorance of the existence of other representatives or of the unwillingness of some of them to join in the application or of the *bona fide* belief on the part of some, of exclusive title, or for any other like cause they are not able to join, those

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6 DEATH OF APPELLANT-DURING PENDENCY OE APPEAL—*Contd.*

who agree may apply. within the period limited by Art 175 A of the Limitation Act, to be made parties so as to save the proceedings from abatement under S. 366 C P C 10 B 220 and 16 All 211 considered. **Musa'areddi v Ramayya 23 Mad 125=9 M L J 313**

Notes—Ref 26 Mad 235; 8 C W N 843. Dist 26 Mad 230; 12 M L J 368.

108—C. P, C. s. 368—Cross appeals—Substitution of names.] Where in a suit decreed in part in the first Court and pending cross appeals, the plaintiff died, and a party was substituted as his legal representative in the plaintiff's appeal, but no application was made by the defendants for substitution in their appeal, and both appeals were subsequently decided in the plaintiff's favor, *Held* that the title of the person added as legal representative in the plaintiff's appeal to execute both decrees as such legal representative was *res judicata* and was not affected by the defendant's omission to bring such person on the record in their appeal under s 368 of the Code of Civil procedure. **Saonli Bibi v. Kapur Chand. 8 W N 83.**

109—C.P C. O 22 rr 1,2,3 O 41 r 4 S 107 *(2)*,O 22 r 11 1882 Ss 361 362, 363, 544, 582—Appeal -Parties-Death of one of several appellants—Survival of right of appeal—Abatement of appeal.

Where several plaintiffs or defendants jointly appeal against a decree to which s 544 of the Code of Civil Procedure applies, the death of one of such appellants, if no legal representative of the deceased appellant is brought upon the record within limitation, can only have the effect of causing the appeal to abate so far as the deceased appellant was concerned: it cannot have the effect of causing the appeal as a whole to abate 22 Bom 718 ref. to: 16 All 211 dist: 22 All 222 overruled. **Ram Sewak v Lambar Pande 1902 A W N 171=25 All 27.**

Notes—Ref 5 C L J 393.

110—Guardian and Wards Act VIII of 1820 ss 7 (3). 8 (a) 13—Mother and grand-mother contesting guardianship of a minor, grand-mother leaving her claim on a will—Death of grand-mother pending the proceedings—Brother of grand-mother applying to continue the proceedings—Proceedings abated on her death.

The guardianship of a minor was contested by the mother and by the grandmother of the minor basing her claim upon a will. The Court of first instance decided in favour of the mother. The, grandmother preferred an appeal, and while this appeal was pending she died. Her brother applied to have his name entered on the record as her representative and to be allowed to continue this appeal.

Held, that the brother had no right to continue the appeal, as the objection raised by the grandmother to the appointment of the mother to the guardianship was purely a personal one it was based upon her own appointment by the will of the minor's father and it ceased on her death. **Gangabai v Kashibai 1 Bom L R 363 =23 Bom 719**

111—Gift of land—Suit for cancellation—Death of one of the appellants—Effect—Want of landlord's consent to gift—S. 34 Punjab Tenancy Act.

After the filing of an appeal against the decree of the Lower Court setting aside the gift by one defendant in favour of another, one of the appellants, the donor—defendant died. Held, that the appeal did not abate even though no legal representatives of the deceased were brought on record as the donee could alone have instituted the appeal independently of the donor. *Held* also, that where the landlord is no party to the suit and does not choose to contest the tenant's action s. 34, Punjab Tenancy Act will not empower strangers to question the tenant's alienation on the ground of want of landlord's consent. **Karim Din v Ismail 109 P R 1881**

112—C P C O. XXI, rr.10, 21, s.48 (=s.230,Civ. Pro. Code, 1882)—Abatement of appeal—Calculation of time.

An appellant died while his appeal was pending in the High Court. The High Court made an order to the effect that the appeal had abated and that the respondent was entitled to his costs. *Held*, that the order was in effect an order confirming the decree of the lower Court, and the decree-holder was entitled to the benefit of twelve years, limitation calculated from the decree of the appellate Court. **Muhammad Razi v. Karba-Lai Bibi, 7 A L J 58=32 All 136=5 Ind. Cas 473.**

Notes—23 All 124 Dist; 34 Cal 874 Fol.

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(7) DEATH OF ONE OF TWO JOINT DECREE-HOLDERS.—*Concld.*

113—If one of the appellants dies and his representatives are not brought on the record within the prescribed period, the appeal abates. 14 W.N.23 referred to.

Kamalpat v. Baldeo **22 All. 222= 20 W N 24.**

Notes—Dist: 23 All 22. Over. 25 All 27. Ref: 5 C L J 393.

113A-C P C S. 544—Joint decree—Joint appeal-One of the appellants dying during pendency of appeal—Representative of deceased not brought on record—Abatement.

Where several defendants jointly appeal against a joint decree, to which S. 544 of the Code of Civil Procedure, 1882, applies, the death of one of such appellants, if no legal representative of the deceased appellant is brought on the record within limitation, can only have the effect of causing the appeal to abate so far as the deceased appellant is concerned. It cannot have the effect of causing the appeal as a whole to abate 25 All. 27, F. 22 All. 222 overruled. **Ram Lal v. Debi Singh 10 Ind Cas 27**

114-C P C O.22 r.4 S.107 (2); O. 22 r. 11 (1882Ss 368, 582)-Out of six decree-holders, four filed a suit under s. 283 Code of Civil procedure, and, having lost in the first two courts, appealed to the High Court. Pending this appeal the other two decree-holders, who were made defendants in the suit, died, but their representatives were not brought on the record. *Held*, the appeal did not abate. *Chander Singh v. Khimadhat* 22 Bom 718 ref. to. *Kamlapat v. Baldeo*, 20 W. N 24 distinguished. **Alla Baksh v. Madho Ram 23 All 22= 20 W N 163.**

Notes.—Ref: 28 Bom 153.

(8) DEATH OF PRINCIPAL PENDING APPEAL.

115—Death of principal pending appeal—Principal and agent.—The plea of abatement on account of the death of the principal, pending the suit in appeal before the Lower Appellate Court, was disallowed, it being shown from the circumstances of the case that appellant, though an agent, intended himself to be the plaintiff. Had he acted as an agent, the whole authority was determined on the death of the principal, and the appeal must have abated until resumed by substituting the heir of the deceased principal as a party to the suit. **Thornhill v. Taylor I Agra, 215.**

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8 DEATH OF PRINCIPAL PENDING APPEAL—*Concld.*

116—Abatement of appeal.—Where one of the defendants in a mortgage suit died pending appeal and no application was made to bring on record his legal representative as a party to the appeal, the appeal did not necessarily abate. It abates only in cases in which the litigation can not proceed without the representative of the deceased party to a final and complete adjudication. **Renga Srinivasa Chari v. Gnanaprakasa Mudaliar. 2 M L T 36=30 Mad 67.**

(9) DEATH OF RESPONDENT.

117—Appeals.] One of 4 respondents died, but no application was made within 6 months to bring his representatives on the record. In their application that was eventually made the name of a wrong person was inserted. *Held*, that the right of appeal did not survive against the surviving respondents alone but against them and other representatives of the respondent who had died. Therefore the proper order was to have directed this suit to abate. *Held* further, that when the order as to abatement was embodied in the judgment and decree, objection was properly taken thereto by way of second appeal against the decree. 18 All 19. 20 W N 109, 19 W N 136; 14 All 221, 22 Bom 718. referred to. **Hem Kunwar v. Amba Prasada. 22 All. 430. 20 W N 136.**

Notes.—Dist: 33 Cal 580. Ref: 5 C L J 393.

118—C P C. O. 22 r. 4 S. 107 (2); O. 22, r. 11 (1882 Ss 368, 582)-Revenue Sale Law (Act XI of 1859).—Sale of joint residuary estate, suit to set aside—Plaintiffs, respondents, death of one of several — Substitution not made within time—Abatement of appeal. Where a decree which had been obtained by several plaintiffs, proprietors of a joint residuary estate, set aside the sale of the said estate held under Act XI of 1859, and two of the plaintiffs, respondents died during the pendency of the appeal by the defendants against that decree to the High Court, and their representatives were not brought on the record within the time allowed by law.

Held, that the decree could not be reversed in appeal without the representatives of the deceased proprietors being placed on the record, and that as the decree set aside the sale of the entire joint estate, under no circumstances should that decree be affirmed as to the unascertained shares of some joint share-holders and reversed as to the unascertained shares of other joint share-holders.

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9 DEATH OF RESPONDENT—*Contd.*

Held further, that as sufficient cause was not shown by the appellant as to why application was not made within the time allowed by law to bring in the heirs of the deceased respondents and as the right of the appeal did not survive against the surviving respondents alone, the appeal had abated under the provision of section 368 read with section 582 of the Code of Civil Procedure. **Chandreswar Persad Narain Singh v. Dharamjit Narain, 5 C L J 393= 11 C W N 504.**

119-C. P. C.—S. 368—Death of respondent during pendency of appeal—Legal representative—

During the pendency of an appeal in the Chief Court in a pre emption suit brought by the pre-emptor as appellant against the vendor and the vendee as respondents, the vendor-respondent (who was a childless widow) died; whereupon an application was duly made by the appellant under Section 368, Civil Procedure Code, to substitute as the legal representatives of the deceased respondent, certain persons who were the reversionary heirs of the husband of the said deceased. It was objected at the hearing on their behalf that they were not the legal representatives of the deceased respondent, as there was a sister and a sister's son of the deceased in existence.

Held, that the term "legal representative", as used in Section 368 of the Code, clearly does not necessarily mean "legal heirs"; that it is not the intention of the section that an elaborate inquiry and decision should be given, in case of nice questions arising as to exactly who, under particular rules of law, is the legal representative, and that looking in the present case to the obvious practical interest which the reversioners had in the property, and the great probability (to say the least) that they were as much the next heirs and representatives as a sister or a sister's son, the objection taken by the respondents must be disallowed.— **Charanjit Mal v. Mussammat Mitho, 29 P R 1888.**

120-C. P. C. O. 22, r. 4 (1882 S. 368)—Deceased defendant's representatives not brought on record—Decree against defendant who was dead and others—Decree indivisible—Abatement of entire suit.

During the pendency in the High Court of an appeal in a pre emption suit, one of the respondents died, and his representatives were not brought on the record within limitation. Judgment was passed against the respondents in ignorance of his death. Execution was applied for by the successful appellant and was allowed as against the surviving respondents.

Held, that the decree being one for pre-emption, in which possession of the entire property might have been taken in execution, and the representatives of one respondent not having been brought on the record, the cause of action did not survive as against the remaining respondents. 3 Cal 487 (P C) relied upon; 17 All 478 dist. **Imam Uddin v. Sadarat Rai, 7 A L J 228= 5 Ind Cas 797.**

Notes:—See also 31 Cal 487=1 A L J 145 =8 C W N 442. But see the new section

121-C. P. C. O. 22 r. 4 (1882 S. 368)—Appeal. Joint and several liability of the respondents—Non-substitution of the representatives of a deceased respondent, effect of.

On the preliminary objection, taken on behalf of the respondents in this appeal, that it should abate on account of appellant's failure to get the legal representatives of a deceased respondent substituted on the record under S. 368 of the Code, it was *held*, that since the liability of the respondents in the present case was joint and several, the death of one of them without his legal representatives being substituted in his place could not exonerate the others from liability and the appeal would abate only so far as the deceased respondent was concerned. (32 All 130. Distd.)

Joy Gobind Laha v. Monmatha Nath Banerjee. 33 Cal 580.

Notes:—Dist: 5 C L J 393. Ref: 11 C W N 504.

122—C. P. C. O. 22 rr. 2, 3, 4; S. 107 (2); O. 22, r. 11 (1882 Ss. 362, 363, 368 and 582)—Suit, right of— Substitution, application for.

A, B and C, members of a joint Hindu Mitakshar family, applied for registration of their names under the Land Registration Act. The application was opposed and refused in 1883. In 1894, they sued for declaration of title and obtained a decree. During the pendency of the appeal against such decree, A died, and more than six months after the appellant applied to have B and C noted as legal representatives, who had taken the estate by survivorship.

Held, that the application for substitution was governed by S. 362, C. P. C., and not S. 368, S. 362 is not limited in its application to cases in which the right of suit survives against the

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9 DEATH OF RESPONDENT—*Contd.*

surviving defendants, by reason of some circumstance antecedent to the suit. **Shyamanand Das v. Raj Narain Das,** **4 C L J 568 = 11 C W N 186.**

123-Civil Procedure Code (Act XIV of 1882), Ss. 368, 371—Abatement of appeal owing to death of respondent—Application to set aside order of abatement.—

Section 371 of the Code of Civil Procedure, 1882, does not allow an application by an appellant to set aside an order of abatement, where the appeal has abated by reason of the death of the respondent in the case; nor is there any provision in the law for setting aside such an order, though, under the last clause of Section 368 of the Code of 1882, explanation of delay in applying to substitute on the record the representative of a deceased respondent may be offered at the hearing of the appeal. **Sham Singh v Sant Singh.** **22 P R 1885.**

Ghasita Mal v. Mul Singh, **22 P R 1885.**

124—Defendant— A respondent is not included in the word "defendant" used in art 171 of the Limitation Act, 1877. **Udit Narain Singh v. Hargouri Prosad,** **12 Calc 590.**

Notes:—Fol: 10 Bom 663. Dist: 10 All 223 F B. Ref: 29 Mad 529 F B = 16 M L J 475 = 1 M L T 348.

125—C.P.C.O. 22, r. 4; S. 107 (2): O 22. r. 11 (1883 S. 368)—Suit for possession—Death of two of the respondents—Interest of one vesting in the surviving respondents—Another respondent not a necessary party—Survival of cause of action.

One B died bequeathing by his will certain portions of his property to plaintiff, and defendants 4, 5, 6, respectively. Plaintiff sued on the will for the recovery of the possession of her share from defendants 1, 2 and 3, who were alleged to be in possession of the property in suit improperly. Defendants 4, 5, 6, refused to join plaintiff, so they were made defendants, but they did not appear either at the hearing in the Court of first instance or an appeal.

Defendants 1, 2, 3, joint brothers, and related to B as cousins, opposed.

The suit was dismissed An appeal against it was admitted and adjourned *sine die*; at the hearing after nearly two years, it was found that defendants-respondents Nos. 2 and 5, had died in the interval, and no steps had been taken to bring their legal representatives on the record. It was alleged that defendants-respondents Nos. 1, 2, 3 were joint and the interest of respondent No. 2, merged into those of 1 and 3, and that respondent No. 5 was not a necessary party. The appeal was still ordered to abate.

Held, that it could abate only as regards defendants-respondents Nos. 2 and 5, and should proceed against the rest, on the merits.

Bai Full v. Adesang, **3 Bom L R 736 = 26 Bom 203.**

Notes:—Ref: 5 C L J 393; 6 C L J 715.

Abatement of suit—This is also the view taken by the Allahabad High Court. See **23 All 22.**

126—On the 12th December 1881 the Court passed an order declaring the appeal had abated as no application had been made within sixty days from the death of the deceased to bring his representative. On the 30th January 1882, the application was presented under S. 371 Civil Pro. *Held*, that the application must be disposed of under the law as it stood when the application was presented and so it was not competent to the petitioner to prefer it; and that S. 371 does not apply to a case in which a defendant or respondent died but to the case only in which the plaintiff or defendant dies. **Suri Bhatta v. Sittarama Bhatta,** **7 Mad 195.**

127—Sufficient cause-*Sine die* postponement. An appeal was filed in April 1891. In June 1891 it was adjourned *sine die* pending the decision of a certain case by the High Court. The case being decided, the appeal was set down for hearing in 1896 when the appellant informed the Court that the respondent had died three years ago and asked the Court to substitute his heir in his place. *Held* that the Court was wrong in ordering the appeal to abate, that the appeal being adjourned *sine die* there was nothing to draw the appellant's attention to it, and his ignorance of the death of the respondent in the interval was sufficient cause within the meaning of section 368 of the Civil Procedure Code. **The Collector of Broach v. Balvantrai,** **96 P J 674.**

128— C P C—O. 22, r. 4: S. 107 (2); O. 22 r. 11 (1882—Ss. 368,582,)—Limitation Act. Art 175 C.—Death of respondent—Legal representative necessary for prosecution of appeal—Application

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9 DEATH OF RESPONDENT—*Contd.*

for substitution of legal representative made within six months of obtaining probate of deceased respondent's will, but more than six months after his death—Abatement of appeal—Sufficient cause. In a suit which was in substance one for taking the accounts and winding up the affairs of a partnership which had subsisted between the plaintiff and several defendants to that suit, a final decree was made binding the plaintiff and some of the defendants to contribute in certain proportion a sum of money of which a portion was directed to be paid to another defendant A. Pending an appeal before the High Court preferred by some of the former, A (respondent) died leaving a will. About four months after A's death, A's son obtained probate of the will. The appellants applied for substituting the name of A's son for A within six months of his obtaining the probate, but more than six months after A's death. *Held*, that the appeal could not have proceeded in the absence of a representative of A, and no sufficient cause having been shown for not applying for substitution within six months of A's death the appeal had abated under Ss. 368 and 582 C P C and Art 175 C of Sch II of the Limitation Act. 14 M L J 147.

Raj Chunder Sen v. Gangadar Seal 1 A L J 145=31 Cal 487=8 C W N 442=31 I A 71 P C.

Notes —Ref: 11 C W N 698; 5 C L J 310.

129—Civil Procedure Code, ss. 365, 582—Substitution of second applicant as respondent—A respondent having died, a conditional order was, on the application of the appellant, made substituting the name of his alleged representative on the record. That order was cancelled upon the application of another person who satisfied the Court that he and not the person whose name had been conditionally substituted was the real representative and who asked to have his name put on the record—*Held*, that the Court had no power to substitute the name of the second applicant upon the record and no further application having been made by the appellant to complete the record the appeal was ordered to abate. **Sadhu Sarun Singh v. Dwarka Singh 12 C L R 45**

130—Practice — Procedure Parties-Death of respondent pending appeal—Application by appellant to have certain person brought on record as deceased's legal representative—similar application by third party who alleges himself to be deceased's legal representative—Duty of Court—

Abatement (Appeal)

9 DEATH OF RESPONDENT—*Contd.*

Civil Procedure Code 1882, Sections 367, 368—One of two respondents having died pending an appeal, the appellant applied to have one Mussammat T.D brought on the record as the deceased's legal representative. Thereupon one H N applied under Section 368 of the Civil Procedure Code 1882, to be accepted as the legal representative of the deceased instead of Mussammat T, D. The Divisional Judge, without inquiring into the truth of the allegations held that he was bound to accept as the deceased's legal representative, the person indicated in the application of the appellant H N having appealed to the Chief Court.

Held, that although Section 368 of the Code does not make any express provision for the case of a dispute in such matters, it follows *ex necessitate rei*, that when a dispute does arise, the court should have the power of deciding it by an interlocutary order for the purposes of proceeding with the case or appeal. I L R IX Bom., 151, and I L R X All., 223, cited; 5 P R 1890, distinguished —

Har Narain v. Tulsi Ram 66 P R 1894.

131—C P C 582—No application for substitution of deceased's representative—Act XV of 1877 (Limitation Act), sch II, art 171 B—

Held by the Full Bench (Mahmood, J. dissenting) that s 582 of the Civil Procedure Code does not make the provisions of chapter XXI, relating to the death of a defendant in a suit, applicable to the death of a plaintiff-respondent in an appeal so as to render it obligatory on the defendant-appellant to make an application to the Court praying that the legal representatives of the deceased be made parties to the appeal; and that, where there has been no such application, the appeal does not abate. *Per* Petheram, C J —The words "so far as may be," in the second clause of the first paragraph of s 582, must be construed as meaning "so far as may be necessray to carry into effect the remedies contemplated by chapter XXI." *Per* Mahmood, J., *contra*, that the object of s. 582 of the Civil Procedure Code is to obviate the necessity of repeating the provisions of chapter XXI, so as to make them applicable to appeals, and the words "appellant' and " repondent" as used in the section include both plaintiffs and defendants in an appeal; that the whole Code maintains the analogy between the position of a respondent and that of a defendant for the purposes of being impleaded and brought before the Court; that chapter XXI applies to cases where a plaintiff-respondent has died; and

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that, in such a case, and where no application has been made, within the period prescribed therefor, praying that the legal representatives of the deceased be made parties in his place, the appeal abates. Also *per* Mahmood, *J*—The word "defendant," as used in art. 171 B of the Limitation (XV of 1877), must be taken to include a respondent, whether plaintiff or defendant in the suit *I L R., 4 Bom 654 I L R 8 Calc 440* and *I L R 9 Bom 56*. referred to. **Naraindas v Lajja Ram. I L R 7 All 693=5 W N 169**

Notes—Fol 10 All 264 F B 12 Cal 590 F B: 10 All 260 F B Dist: 7 All 734; 10 All 223 F B.

131A—Art 175 C – For substitution of names – Death of plaintiff-respondent. *Held* that art 171 B of Act XV of 1177 does not apply to an application by a defendant appellant to have the representative of a deceased plantiff-respondent made a respondent (*I L R 4 Bom 654*) (*I L R 8 Cal 440*) (*I L R 9 Bom 56*) referred to. **Narain Das and others v Lajja Ram. 7 All 693=5 W N 169.**

132.-C.P.C.**S.368**-Abatement of application under s 368 as one under s 372.

Held, that an application made under s 368 of the Code of Civil Procedure to bring upon the record the legal representatives of a deceased defendant, which was made after the expiration of the sixty days allowed by art. 171 B of the Limitation Act (prior to its amendment by Act VII of 1888) could not be treated as an application under s 372. (*I L R 8 Calc. 837*) dissented from on this point. Nor could it be regarded as an application under s32 Athiappa v Ayanna, (I L R 8 Mad 300) dissented from.

Ojagar Mal and Another v Niamat Bibi. 10 C W N 21.

133.—Civil Procedure Code (Act XIV of 1882) S 368—Death of respondent--Ommission to apply within 60 days to place representative of deceased on record—"Sufficient cause" for not applying within such period.

Where, pending an appeal, one of the respondents died and it appeared that the right to sue did not survive against the other respondents alone and no application was presented within the period allowed by law to substitute the legal representative of the deceased on record in his stead, *held*, that the excuse that the heir was not put on the record because the plaintiff-appeallants did not know the requirements of the Code and the Limitation Law, could not be accepted as "sufficient cause" in the terms of Section 368 of the Civil Procedure Code for the appellant's omission. **Allanditta v Ziadat 39 P R of 1885**

Compare Mussammat Bhain v Uttam Chand P R 39 of 1885

134.—Appplication to implead the legal representative of a deceased respondent—"Sufficient cause" for not applying within the prescribed period—Ignorance of law.

In a suit in which there were numerous defendants, it appeared that after the plaintiff had filed his appeal in the Court of the Divisional Judge, one of the respondents died leaving minor sons, and (it was allegeed) a widow, and also a brother who was also a respondent. At the hearing of the appeal it was objected that plaintiff had not applied within 60 days of the death of the deceased respondent to have his sons made legal representatives, whereupon the plaintiff explained that he considered it unnecessary, as the deceased's brother was alive and a party to the suit. The Divisional Judge held that this was merely pleading ignornance of law and the excuse was not sufficient.

Held, that the explanation was sufficient, the plaintiff being an uneducated zamindar, who, it might easily be believed, would consider the adult surviving brother to be the proper representative of the deceased in preference either to his widow or his minor sons in a suit regarding immoveable property.

It is not necessarily a ground for rejecting cause shown for omitting to apply for legal representatives to be brought on the record in place of a deceased party, that the cause shown involves a mistake of law (See No 81 P R 1886 F B,

Amir Bakhsh v Dula 43 P R 1889.

Ghulam Shah v Malak Muzaffar Khan 43 P R 1889.

135 —Civil Procedure Code (Act XIV of 1882, Section 362, 368—Death of respondent during pendency of appeal—Omission to apply within time to substitute legal representatives of deceased—Right to sue surviving against surviving respondents alone—Suit for partition of undivided estate of joint family--Necessity for placing divided brothr or widow of deceased co-parcener on the record.

During the pendency of an appeal by plaintiff

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9 DEATH OF RESPONDENT—*Contd.*

in Chief Court, arising out of a suit for partition of what he (plaintiff) alleged to be the undivided estate of a Hindu joint family, one of the defendant-respondents died, and no application having been made within the 60 days prescribed by Article 171 B, Schedule II, Act XV or 1877, to put his heirs on the record, it was contended on behalf of the remaining respondents that the appeal abated. It appeared that after the period of limitation for such an application had expired the appellant did put in on application, praying that, in addition to one B D., brother of the deceased already on the record, one R C. another brother, and also the widow of the deceased should be placed on the record as respondents, but in a subsequent application it was pointed out that neither R C who had separated from the family, nor the widow were entitled to be regarded as the lengal representatives of the deceased and the appellant therefore prayed that the suit be proceeded with, under Section 362, Civil Procedure Code without adding any parties to those already on the record.

As regards R C., *held*, that the suit having hitherto proceeded on the footing that he would have no claim to a share in the property on division, the Court would not be justified in assuming in a case where no custom modifying the Hindu law had been pleaded or proved, that a custom allowing separated brothers to share with associated brothers in the property of a deceased brother was applicable to the parties, and that R C was not therefore a necessary party to the appeal. (No 44 of 1884. Civil) referred to.

As regards the widow *held*, that in a suit for partition brought by one member of an undivided family against another, the widows of deceased brothers and cousins are not necessary parties though in many cases it might be convenient that they should be made parties, in order to ascertain what provision should be made for their claims against the estate.

The right to sue was therefere *held* to survive against the surviving respondents, against whom the appeal was directed to proceed under Section 362, Civil Procedure Code. **Budha Mal v Bhagwan Das P R 86 of 1886 Civil.**

136.—O 22 r 2 (1882 S 362)—Limitation—Application to bring the surviving respondents entered as legal representatives of the deceased respondent—Limitation Act Art 178;—S 362, C P C is not limited in its application to cases where the right to sue (or appeal) survives against the surviving defendants (or respondents) not as the legal representatives of the deceased, but by reason of a right vested in them antecedent to the suit. **Chowdhury Shamanund Das v Rajnarain Das 11 C W N 186.**

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137.—Civil Procedure Code (Act XIV of 1882 Section 368—Application to make the representative of a deceased respondent a respondent—"Sufficient cause" for not applying within the prescribed period—Ignorance of law.

The question referred for the decision of the Full Bench was whether, for the purpose of ascertaining what is "sufficient cause" within the meaning of Section 368, Civil Procedure Code and other similar provisions of the Code it is necessary to exclude altogether from consideration mistakes arising from ignorance of law

Held, by Burney Tremlett and Smyth, JJ that it cannot be laid down as a general proposition that ignorance of law can never be considered : but that the principle laid down in (No 39 of 1885, Civil), (viz that the excuse that the heir of a deceased respondent was not put on the record within the prescribed period, because the appellant did not know the requirements of the Code and the Limitation Law, could not be accepted as "sufficient cause" in the terms of Section 368 of the Code for the appellant's omission) should only be departed from under special circumstances.

Held, per Barkely, J., (while otherwise concurring in the reply to the reference made) that it is inexpendient to lay down any general rule to control the discretion of the Court in dealing with each case with reference to its particular facts. **Ghulam Shah v Mallik Muzaffar Khan 81 P R of 1886 Civ.**

See also **Lakmi Dass v. Mahant Gobind Bakhsh P R 81 of 1886 Civil.**

138.—Civil Procedure Code (Act X of 1877), SS 368 372 Death during pendency of appeal of defendant-respondent—Appellant omitting to apply within the 60 days to place deceased's legal representative upon the record—Suit for immoveable property—Abatement of appeal—Limitation Act (XV of 1877), Schedule II Arts 171 B,, 178.

During the pendency of an appeal by the plaintiffs in a suit for cancellation of a mortgage

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of immoveable property, one of the defendant-respondents died and no application was made till after the lapse of 60 days from the date of the respondent's death by the appellants to place the names of the legal representatives of the deceased on the record in his stead, nor was the case one in which the cause of action could be held to have survived against the surviving respondent alone.

Held, by the Full Bench that S 368 of the Civil Procedure Code of 1877 and not S 372 was applicable to the above case, as the expression "cause of action" in Chapter XXI of the Code means any cause of action whether the suit be for damages, or for personal property or for immoveable property, or for some peculiar relief, and the expression "a cause of action which survives" means a cause of action which is not extinguished by the death of the plaintiff or of the defendant as the case may be. (10 Calc L R 449) not followed.

Held therefore, by the Division Bench (Plowden and Smyth JJ) that Art 171 B and not Art. 178 of the 2nd Schedule of the Limitation Act applied to the above case, and accordingly under S 368 of the Code the appeal abated.

Jafar v Jawaya **P R 76 of 1884.**

139—C. P. C. Section 582—Appeal—Local representative of respondent.

In the case of the death of a respondent, the Court has no authority to inquire as to who is the legal representative of the deceased or to refuse to accept the person designated as such by the appellant. Section 368 leaves it to the appellant to apply that a certain person whom he alleges to be the legal representative be brought on the record. If he wilfully omits to bring the right person on the record he will bear the consequence, as the proceedings will not bind the true heir. **Kutba v Mussammat Umri.**

5 P R 1890.

140—Civil Procedure Code, 1882, Sections 361, 368—Death of one of several defendants pending appeal—No application by plaintiff within prescribed period to put legal representative of deceased on the record—Abatement of appeal—Amendment of appeal—Cross-objections, abatement of—Contract—Act, 1872, Sections 42, 43.

Plaintiff sued for recovery of Rs. 48, 400, principal and interest due on a mortgage-bond

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9 DEATH OF RESPONDENT—*Contd.*

executed by a Muhamadan lady, widow of one R A., on the 2nd June 1881. The said lady having died in 1883, the persons sued were the brother and nephews of R A., they having succeeded to R. A's property on the death of the widow and the claim was based on the grounds that the defendants were the heirs and representatives of the widow, and that in any event, as the debt was incurred for necessary purposes, it was recoverable from the estate of her husband in their hands. Defendants pleaded that the deed was fictitious and without consideration, and that it was not executed for necessary purposes, and did not therefore bind the estate of R A.

The District Judge found necessity proved to the extent of Rs. 3,000 only, and, gave plaintiff a decree for that amount with interest at one per cent. up to date of suit or Rs 7,260 in all, with proportionate costs, against the property sought to be charged, and dismissed the rest of the suit with costs.

Plaintiff thereupon appealed to the Chief Court for the portion of his claim disallowed by the Lower Court and defendants filed cross-objections under Section 561, Civil Procedure Code, in regard to the amount decreed against them.

When the appeal came on for hearing, respondents' counsel pointed out that one of the respondents had died more than six months previously, and that no application had been made to put his representatives on the record, and contended that the appeal had therefore abated under Sections 368 and 582, Civil Procedure Code. On behalf of appellant, it was admitted that the facts were as stated, but it was urged that appellant had nevertheless a right to proceed against the remaining respondents.

Held, that the appeal abated as against the remaining respondents, inasmuch as under Section 42 of the Contract Act, the obligation to perform the promise of the widow devolved on her death, on all her representatives jointly, and as on the death of one of her said representatives, the heirs of the latter were not discharged, but took their place with reference to the liability, Section 368 was applicable to the suit though founded on contract, and no act on the part of plaintiff could take the case out of the operation of the said section.

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S. 43 of the Contract Act which gives a creditor a right to proceed against any one of his joint debtors, deals with substantive law, and the right so given must be exercised before the creditor institutes his suit. After the suit is filed the creditor is in the hands of the Court, and his option under s. 43 of the Contract Act is subject to the provisions of the Code of, Civil Procedure. He cannot therefore, defeat the provisions of s. 368 of the Code by resorting to his right under s. 43 of the Contract Act after the Limitation prescribed for putting the representative of his deceased debtor on the record has expired, and he has no explanation to offer for the delay.

Held, also, that even if appellant's prayer to proceed against the remaining respondents could be regarded as tantamount to one to amend his appeal, the appeal having at the time abated, it was too late to ask for such amendment in the form proposed, whatever might have been the decision on such application, if it had been made within six months of the death of the deceased respondent

Held, further, that as there can be no hearing on the merits after abatement, the cross objections had also abated. **Rao Ghulam Muhammad Khan v Nahar Ali. 53 P R 1896.**

141—Insolvency proceedings.

The decree holder respondent, in an appeal from an order refusing an application by the judgment debtor for declaration of insolvency under S. 344 Code of Civil Procedure, died. No step was taken to implead his representative. Held that the appeal abated.

Rameshur Singh v 'Bisheshar Singh 7 All 734, 5 W N 217,

Notes—Over 10 All 264 F B

142—Judgment before death.

A suit was brought for recovery of a share of ancestral family property, which had been sold in execution of a money-decree for a debt contracted by the plaintiff's grandfather. The plaintiff obtained a decree in the lower appellate Court, from which the defendant appealed to the High Court. During the pendency of the appeal, the plaintiff died, and on her own application, his widow was brought on the record. At the hearing it was contended that upon the plaintiff's death, the right to sue did not survive, and that the suit should be dismissed. Held by the Full Bench that, judgment having been obtained before the plaintiff's death, the benefit of the judgment or the right to sue, would survive to his legal representative. **Muhammad Husain v Khushalo. 9 All 131.**

Notes—Ref 19 Mad 345. Fol 26 Bom 597.

143—C. P. C. O 22 r 4 (1882 S. 368).

Held, that in case of the death of one of the defendant-respondents an appeal abates altogether, if the plaintiff (appellant) fails to substitute legal representatives within time in case of joint possession. 22 All 430 Ref. **Shive Bin v Ma Thein. 3 L B R 168.**

144—C.P.C. O 22 r 4 (1882-s. 368)-Death of one of two respondents alleged by appellants to be members of a joint Hindu family—Application by widow of deceased respondent to declare the appeal to have abated, and by appellants to bring the widow on to the record—Widow added by the Court.

The plaintiffs sued two defendants alleging them to be members of a joint Hindu family. Their suit having been unsuccessful, the plaintiffs appealed and during the pendency of the appeal one of the respondents died. After the lapse of more than six months the widow of the deceased respondent applied to the Court to have it declared that the appeal had abated. The appellants contested this application, but at the same time themselves asked that the widow might be brought on to the record if the Court thought it necessary that she should be a party. The Court accordingly ordered that the widow should be made a respondent. *Held*, that, under the peculiar circumstances of the case, the plaintiff's appellants having pleaded that the respondents were joint, whilst the Court of first instance had held that they were separate, the plaintiffs were excusable in not having applied to have the widow made a party to the appeal and the appellare Court had used a proper discretion in joining her **Sher Singh v Hari Singh 1902 A W N 152.**

145—The plaintiff-responent in an appeal, pending before the High Court, died on the 17th of September, 1885, subsequently D applied to the High Court, to be brought on the the record as legal representative

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of the deceased. On the 15th of April. 1886, he was referred to a regular suit to establish his title as such representative, and on the 25th of February 1887 such suit was dismissed. On the 8th of February. 1886, the defendant-appellants applied to the High Court for judgment, but the application was dismissed under the decision of a full Bench in 10 All 260.On 24th July,1888,they applied to bring certain persons on the record as the legal representative of the deceased plaintiff-respondent. *Held* that the appeal abated.

Chajjmal Das v Jagdamba Prasad, 11 All 408=8 W N 111

146- C. P. C. O 41 r 4 (1332) S 544)—Death of defendant—Right to appeal—Appeal—Practice.

Where a decree is passed against defendants. and one of them dies, it is open to the rest of the defendants to appeal against the whole decree, if the ground of appeal is common to all the defendants, **Chintaman v Gangabai. 5 Bom L R 90=27 Bom 284.**

147—S. 371 C. P. C.—Sufficient cause.

An order having been made under s. 366 of the Code of Civil Procedure for the abatement of a suit an application was made to set aside the abatement and to substitute, the applicant in the place of the deceased plaintiff. The application was made several months after the period of sixty days allowed by art 171 of sch (ii) of the Limitation Act ; and the only cause alleged by the applicant for not continuing the suit related to a period of thirteen days only. The Court set aside the abatement, brought the applicant on the record and decreed the claim. The defendants appealed and in their memorandum of appeal objected to the order setting aside the abatement as illegal. *Held*, that the Court of first instance had committed an error in law in making the order setting aside the abatement, inasmuch as that order was time-barred and without sufficient cause being shown within the meaning of s *371* of the Code : that the error was one which affected the decision of the case within the meaning of s 591 ; and the defendants were therefore entitled to set it forth in their memorandum of appeal in the lower appellate Court. **Dudhraj v Parbati, 9 W N 70, Chajjandas v. Jagdamba Prasad. 11 All 408=8 W N 111.**

148—C.P.C. O,22,r 9 (1)(2);S.107 (2);O,22 r.11 (1882 Ss 371 and 582)—Death of one defendant

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9 DEATH OF RESPONDENT—*Contd.*

—Withdrawl of suit against surviving defendant, pending appeal by him—Restoration of appeal upon application by heirs of deceased defendant. Where two defendants, who were jointly interested in a suit, preferred an appeal to the district Judge and the appeal being dismissed, one preferred a second appeal. the other having died, and on remand by the High Court, the plaintiff withdrew the suit as against the surviving appellant by arrangement with him and the appeal was dismissed.

Held. that an application by the heirs of the deceased defendant for restoration of the appeal ought to be allowed, inasmuch as it was not necessary for them to prosecute the appeal so long as the other defendant was prosecuting it. **Chandra Kumar Majhi v. Sandhyamoni, 13 C W N 338=36 Cal 418= 2 Ind Cas 412.**

149—Abatement of suits—Suit for redemption—Decree for—Appeal—By first mortgagee—Death of mortgagor-Legal representatives—Not brought on the record-Abatement.

In a suit for redemption by the mortgagor and second mortgagee a decree was passed. The first mortgagee appealed and claimed a larger sum than was allowed. The mortgagor died pending the appeal and his legal representatives were not brought on the record. *Held*, the appeal has abated. **Seshu Patter's son v yakanath Easwaran Unni Valia Kaimal 9 M L T 356**

150—Art. 175C—Death of a respondent, a co-sharer landlord. on appeal by tenant in rent—Suit—Abatement of suit. When a respondent in a second appeal dies during the pendency of the appeal, and application by the appellants to substitute his heirs on the record is governed by Art. 175, cl. (c) of Sch II of the Limitation Act Sec. 587 of the Code of Civil Procedure must be read in conjunction with Sec. 582 of the Code and Art. 175, cl (c) of Sch II of the Limitation Act. I.L R 29 Mad 529 Mad (1906).dissented from. **Upendra Kumar Chakravartti v. Sham Lal Mondol 11 C W N 1100=6 C LJ 715.**

See also:—

Limitation Act

Art 175 C.

151—C.P.C. S. 3 8 (6)-Application to place legal representative of deceased defendant respondent

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on the record-Sufficient cause for not applying within prescribed period-Civil Procedure Code (Act XIV of 1882) Section 368.

Held, that the period for applying in the case of a deceased defendant-respondent to place his legal representative upon the record is 60 days under Art. *171* B. of the Second Schedule of the Limitation Act. (No. *133* P. R. (No. 1884) *133* P. R. *1886*) followed.

Held, further, that ignorance by an appellant of the fact of a respondent's death may be a sufficient excuse for not applying within 60 days, within the meaning of the last clause of Section *368* of the Civil Procedure Code. **Gaman v. Baksha 42 P R 1887.**

152—S. 363 C. P. C.——*Onus.—H and G* plaintiffs in the suit, preferred this second appeal. After the appeal had been filed, H died, and an application was made no behalf of his sons to have their names substituted for their ewased father, in which ita,edei stated that he pp'son or about the 15th June last." Held, that it was for the petitioners to prove that the application was made within the period of limitation provided in art. *171*; that they having failed to do so the application must be refused and the appeal as regards H must abate. **Harnandan v. Durga. 7 W N 60.**

153—C.P.C O. *22* r. 4 S. *107* (2) r. *11* (*1882* Ss. *368* and *582*)-Decision before expiry of six months. The sole respondent died leaving a son and two grandsons. On the application of the son his name was brought on the record without any objection. The appellant did not apply to have any one's name substituted in the place of the deceased father. The court decreed the appeal. The respondent appealed on the ground that the appeal in the Court below ought to have been held to have abated. *Held*, that inasmuch as the appeal in the Court below was decided before the expiry of six months from the death of the sole respondent's death, it could not be held to have abated and the appeal was remanded to the lower appellate Court. **Inayat Ullah v. Gopal Narain Lal 1901 W N 187.**

154—C.P.C O. *22* r. 1 S *107* (*2*); O. *22*, r. *11* (*1882* Ss *361*, *582*)—Act XIV of *1882*) ss *361* and *582*-Suit for injunction-Dismissal—Appeal—Death of defendant, pending appeal-Abatement A.

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personal action would not survive. The parties sued or suing and a party mulcted in costs in such an action dismissed and incompetent to prosecute his appeal for the damages is not entitled to maintain an appeal for the setting aside of a decree for costs, which was consequent on the dismissal of the action. If an action fails what is incidental to it must fail also. *26* Bom. 597; 24 ch. D. *439*; 9 All. *131*: 9 Q B D 170; 31 Cal 409 Ref **Josiam Thiruvengada Charlar v. Sami Iyengar 7 M L T 195= 5 Ind Cas 937=20 M L J 760**

155—C P C O 22 rr. *3*, 4 (Ss *365*,*368*)—"The legal representative may apply"—*Court's duty:*—The provisions in Ss *365* and *368*, C P C (Act XIV of *1882*) that "the legal representative may apply" do not mean that the Court is to accept as legal representative of the deceased party any person who choses to apply, The provisions of S *368* can be applied only when the application is made by the real legal representative **Mamraza v. Subbarama Reddi 19 M L J 33**

156—C.P.C. S. 372-Transfer of interest pending suit or appeal-Registration-Notice-Verbal mortgage for over Rs. *100*—Plaintiff sued for possession under a registered sale-deed, Defendant pleaded a verbal mortgage for over Rs. *100* with possession and of which plaintiff had notice. The first Court decided in favour of the defendant's mortgage, but the Devisional Judge passed an unconditional decree in favour of plaintiff. Defendant appealed to the Chief Court. While the appeal was pending, the defendant sued the plaintiff, for pre-emption of the same land and got a decree At the hearing of the appeal the plaintiff objected *in limine* to the appeal being heard, on the ground, that he had no longer any interest in it; that all his rights had passed to the defendant under the pre-emption decree, and that consequently nothing was left to decide. Held, that this contention was not correct. It was material to the defendant to get a decision on the question whether or not he held a lien on the land as mortgagee, as this would effect the amount of money he may have to pay as pre-emptor.

A registered purchaser with notice of an oral mortgage takes subject to the latter. **Najmuddin v Akbar Din 143 P R 1889.**

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9 DEATH OF RESPONDENT—*Contd.*

157—C P C S. 368 & 582—Section 168—Death of a respondent—Limitation for application under section 168 Civil Procedure Code.—

When an appellant predeceases a respondent the period of limitation prescribed for making an application under sections 168 and 582 Civil Procedure Code is computed from the time when the names of the legal representatives of the deceased appellant are entered on the record.

Nil Kanth Talatuley v Govind Rao Desh-Mukh. 16 C P L R 78.

158-159-C.P.C. O 22,r 4 (1882-S.368)-Penultimate clause-Abatement-Absolute—Limitation-Act S. 7—Per Daries J:

The abatement provided for in the penultimate clause of S. 368 is absolute and cannot subsequently be set aside. A minor cannot seek to set aside the order of abatement after the appeal has been ordered once to abate through the negligence of the former guardian, to apply to bring the legal representative of the deceased respondent on record. S. 7 Limitation Act, will not help him, there being no appeal pending at the time.

Paru v Variangatil Raman Menon. 28 Mad 359.

160—Abatement—Appeal, incompetency of-Privy Council appeal—After final admission and before transmission of record—High Court duty of.

After an appeal to His Majesty in Council had been admitted but before the transmission of the transcript record to England, it was objected by the respondent that he had attained the status of a Sovereign Prince, so that the suit could not be continued against him in any Municipal Court, and he prayed that the appeal may be declared to have abated.

Held, that although the High Court retained jurisdiction over the appeal for interlocutory matters; it would not make the order for abatement, but would transmit the petition with a report upon the truth or otherwise of the allegations made therein, to be dealt with by the Judicial Committee upon the hearing of the appeal.

Samarendra Chandra Deo v Birendra Kishore. 10 C L J 330.

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9 DEATH OF RESPONDENT—*Contd.*

161—C. P. C. O 22 r 1 (1882 S.361)—Appeal-Defect of.

When during the pendency of an appeal against a decree for rent one of the plaintiffs, respondents, died and his heirs were not brought on the record. *Held*.—That the appeal ought to be dismissed. 6 C W N 196 foll. **Tarip Dafadar v Khotejannessa Bibi. 10 C W N 981.**

162—C. P. C.O 22, r 9 Sub-r. (2)—Abatement-Sufficient cause-Negligence or forgetfulness:—

Negligence or forgetfulness on the part of the agent specially appointed by the appellant to look after the appeal and to receive notices and information from his vakil, is not a sufficient cause within the meaning of O 21, r 9, sub-rule 2. When the time for reviving proceedings in a court is once passed, a very valuable right is secured to the successful litigant and the court must therefore be fully satisfied of the justice of the grounds on which it is sought to obtain an extension of the time for attacking the decree. 30 Bom 329; 31 Bom 333 Ref. **Tarini Kumar Datta v Gopeswar Pal Chowdhury. 12 C L J 615=7 Ind Cas 391.**

163—C.P.C. O 22. r 4 (1882 s.368.) Abatement of appeal as against one of the respondents.

Appeal continuing as against the remaining respondents. Where there are more respondents than one, and one of them died pending the hearing of the appeal, and an application to substitute the name of his heir was rejected.

Held, that the appeal has abated so far as the deceased respondent was concerned, but the appellate Court will proceed against the remaining respondent. **Upendra Kumar v Sham Lal. 6 C L J 715=11 C W N 1100.**

164—Defendant.—

The word "defendant" in art. 171 3 of the Limitation Act, 1877, does not include a respondent.

Udit Narain Singh v Harogouri Prasad. 12 Calc 590.

165—Suit for redemption—Appeal—Mortgagor's death pending suit—His legal representatives not brought on record—Abatement.

Abatement (Appeal)

9 DEATH OF RESPONDENT—*Contd.*

Where, in a suit for redemption, a decree was passed, and pending an appeal preferred by the first mortgagee and others, the mortgagor (Jenmi) died and the legal representatives of the mortgagor were not brought on record, held that the appeal abated. **Seshu Pattar v Unni Yalia Kaimal. 9 M L T 356.**

166—C P.C. O. 22. r. 1 (1882 S. 361)-Partition suit——Death of co-partner pending appeal—Abatement—Widow's right to represent:—

Where a co-partner dies after decree for partition in first court, but pending appeal, his widow was allowed to be brought on record as his representative for purposes of appeal —*Quære.*— Whether she can claim her husband's share. **Narayan v. Durgaji, 28 Bom 201.**

Notes·—Ref: 19 M L J 70, 9 C L J 133= 13 C W N 309, 32 Mad 271.

167—C. P. C. O. XLIII r. 1 (k)—Order of abatement-No application made to set aside—No appeal—No revision—Punjab Courts Act, XVIII of 1884, S. 70 (1) (a).

Where no application to set aside an abatement was made, *held* that no appeal would lie under O. XLIII, r. 1 (k), Civ. Pro. Code.

Where an applicant fails to avail himself of the remedy by way of application to set aside the abatement, the Court will refuse to interfere under S. 70 (1) (a), Punjab Courts Act, 1884. **Thakur Das v. Perma Nand, 95 P R 1911.**

168—(21) O. XXII r. 4 (3)-Death of respondent--No application to bring in legal representatives on record made within 6 months—Abatement—Ignorance of death till after expiry of 6 months.

Where one of the respondents appointed under O. I, r. 8, Civ. Pro. Code, to represent a body of numerous respondents, died, and where no application to bring on record his legal representatives was made within 6 months from the date of his death.

Held, that the appeal abated.

Ignorance of death until after the expiry of the period of limitation is not such a ground that would justify a departure from the rule laid down in O. XXII, r. 4 (3), which is imperative in its terms. **Sayad Mir Nawab v. Hardeo. 60 P R 1911.**

Abatement (Appeal)

9 DEATH OF RESPONDENT—*Concld.*

Abatement of suit—General cases.

See (1) Parties—Adding parties to suits.

See also cases under C P C O XXII.

Abatement of wrong.

See Damages—Suit for damages—torts.

Abbreviation of time.

See (1) Mortgage—Redemption.

,, (2) Possession—Adverse possession.

Abdication.

See Hindu Law—Interitance—Impartible estate.

Abduction.

Abduction.—See Contract Act 1872 s.3. **82 P R 1904.**

Abduction & Seduction of daughter

See Damages—Suit for damages-Torts.

Abkari Act.

See Bombay Acts.

Abkari Laws.

1—Abkari license—Licensee taking a partner in violation of Abkari Rules-Fort St, George Gazette Notification No. 58, dated 4th February 1890 and 29th September 1896.

The taking of a partner by an Abkari licensee is not illegal, though it is in violation of rule 27 of the license forbidding a sale or transfer of the privilege, as the rule is ultra vires of the notification No. 58 Fort Saint George Gazette and the subsequent notification of the 29th September 1896 did not have a retrospective effect. **Jayanti Bhimappa v Seshanna, 6 M L T 345.**

Abkari Renter.

See Stamp Act XXXVI of 1860.

Abkari sale.

1—Madras Act (Abkari) S. 28,—Sale for arrears under—Prior encumbrance by defaulter, effect of such sale on.

Abkari Sale-(*Concld.*)

Certain lands were sold under S. 28 for arrears of Abkari revenue due by its owner. They were purchased by the seventh defendant in this suit and the question for decision was whether he took it free of incumbrances or subject to the mortgage which, prior to the sale, the defaulter had created it in favour of the plaintiff in this suit. *Held*, that the seventh defendant took the land subject to the plaintiff's mortgage, that, in cases under the old Abkari Act it has been decided that the purchaser at such a sale did not take the land free of all incumbrances, that between the words "in like manner as for the recovery of arrears of land revenue" in S, 10 of the old Act and the corresponding words "as if they were arrears of land revenue" of the present S. 28, there is no real difference in the meaning and, that to hold otherwise, would open a wide door to fraud on *bona fide* mortgages (7 Mad 434; 25 Mad 57; 26 Mad 230 Fol.) **Ibrahim Khan v Rangasami 28 Mad 420.**

Absconding debtor.

See Attachment—Attachment of person.

Absconding offender.

1—Power to try claims of third parties—Criminal Procedure Code,1882' ss. 88 89-Proceedings of magistrate—"Judicial proceedings."

There is no provision of law requiring a Magistrate, who has attached property under s. 88 of the Criminal Procedure Code, to investigate the claims of third persons to the ownership of such property. 7 W. R, Cr, 35, followed. The proceedings of a Magistrate under s. 88 of the Criminal Procedure Code are therefore not "Judicial proceedings" in the sense of s. 4 (d) of that Code. **Sheo Lihal Rai 6 All. 487**

2-C.P.C. S.88-Attachment of property as of an absconding person—Claim a property attached —Procedure. When a claim is made to property attached under section 88 of the Code of Criminal Procedure, the Magistrate should stay the sale to give the claimant time to establish his right. If the Magistrate errs, the remedy of the aggrieved party is by civil suit and not by criminal revision petition. **Kandappa Goundan, 20 Mad. 88.**

3—Attachment by magistrate—Priority of attachment—Criminal Procedure Code Act X of 1872 Secs, 171 173, 173—Disposal of Government

Absconding offender-(*Concld.*)

The proprietor having absconded certain immoveable property belonging to him was attached on the Seventh August 1878 by the Magistrate under s. 172 of the Criminal Procedure Code Act X of 1872. While this attachment was still subsisting the plaintiff attached the same property in execution of a decree and at the sale in execution became herself the purchaser on the 15th January 1879. The original proprietor not having appeared within the time specified in the proclamation issued under s. 171 of the Code, the Magistrate in April 1880 at a public sale sold the rights of the Government to the defendant.

Held, that so long as the attachment by the Magistrate subsisted no title could be conferred by any subsequent attachment, and that the plaintiff's title could not prevail against that of the defendant. Golrm **Abed v Toolseeram Bera 9 Cal 861=12 C L R 411**

4—Criminal Porcedure Code, ss. 88 and 89—Property of alleged absconding offender attached and sold under an illegal warrant—Suit for recovery of such property.

Held that where the property of an alleged absconding offender is attached and sold by a Court purporting to act under s. 88 of the Code of the Criminal Procedure, and it turns out that the proclamation of sale is irregular and illegal there is nothing to bar a suit by the owner of the property so sold to recover such property in the hands of a purchaser. **Abdul v Kazim Begam A W N 1904, 159**

5—Criminal Procedure Code, 1882 ss. 87 88, 89—Proclamation and attachment-Sale of attached property-Title of purchaser. Where property was attached and sold as property of a proclaimed offender under ss. 87 and 88 of the Code of Criminal Procedure, it was held that, although the proclamation was irregular. yet the property having vested in third parties, strangers to the proceedings in which the proclamation was made the sale could not be set aside. **Abdullah v Jitu 22 All 216=(1900) A W N 28**

Notes—Ref 9 P R 1908, 29 P W R 1908= 8 Cr L J 260.

Absence

See Resjudicata-judgments on technical points.

C. P C. O. 9 r. 9 and O 17 r. 3

Absence from British India.

See Cases under

(1) Limitation Act (IX of 1908) s 13

(2) Dismissal of Suit

1—Absence by reason of transportation

During the plaintiff's absence by reason of transportation, the defendant took possession of land which previously belonged to him as a tenant, and the landlord allowed the defendant to hold as his tenant He held possession for more than twelve years In a suit by the plaintiff on his return to turn the defendant out of possession, in which the landlord was made a defendant, —*Held* that the suit was barred there being no exception in the Limitation Act with regard to plaintiffs who are beyond the sea in consequence of transportation. **Domun v Sudunkoolah.**
1 B L R S N 25=10 W R 253

Absence of defendant at an adjourned hearing.

See C. P C. O. 9 r 13 and O 17 r. 3

Absence of defendant from British India.

See Limitation Act 1877 Ss 13, 9

Absence of entry of acceptance in drawer's books.

See Bill of exchange.

Absence of foreclosure clause in a mortgage deed.

See Mortgage Foreclosure.

Absence of intention to grant Zamindari partible.

See Grant-Construction of grants

Absence of natural father at Datt-Homom.

See Hindu Law Adoption

Absence of reasonable & probable cause.

See Malicious Prosecution.

Absence or want of notice no ground for review by another Judge.

See-Review Grounds for review Review Review by Judge other than judge in original case.

Absent Co-owner claiming property after seven years absence.

See (1) Evidence Act Ss 107 and 108.

(2) Hindu Law Presumption of death.

(3) Mahomedan Law presumption of death

Absentee Co-sharers.

See Co sharers

Absentees.

See (1) Limitation Act art 144 (Adverse Possession)

(2) Landlord and Tenant (Abandonment or Relinquishment of Tenure)

(3) Right of Occupancy

(4) Adverse Possession

Absentees

Long absence—Presumption of relinquishment—Presumption not affected by the conduct of the persons holding adversely

Long absence by an absentee, who though residing near the land takes no steps to assert his claim, raises a strong presumption that the absentee has relinquished all claim to the land recorded in his name and this presumption is not affected by the conduct of those who permit the absentee's name to be borne in the settlement papers (78 P R 1875 Fol)

Shera v Qutba **38 P R 1878.**

Notes—Cited 38 P R 1887 Fol 141 P R 1887 Ref 120 P R 1905.

Absolute estate.

1—Will—Construction of—Absolute estate—Restriction upon alienation—Validity of—A Hindu testator directed by his will "The house I give after my decease to my son Ramabhau and to the sons and grandsons that may hereafter be

Absolute estate-(*Concld.*)

born to him. As to the property mentioned above which I have given as recited above to my said son Ramabhau, his wives Manjulabai and Taibai and their lineal sons and grandsons alone shall be entitled to the said property after the death of the said Ramabhau. No one else besides these shall be entitled. *Held*, (1) that Ramabhau acquired, under the will, an absolute estate in the property bequeathed to him; (2) that the restriction put upon the estate by the latter provision was void. **Chimanrao v Bamabhau. 4 Bom L R.509.**

See also cases under—

(1) Will.
(2) Hindu Law (Will)
(3) Hindu Law (Stridhan)
(4) Hindu Law (Widow)

Absolute grant.

See (1) Will—Construction Grant-Construction of grants.
(2) Mahomedan Law—Endowment.

Absolute occupancy holding.

See Landlord and tenant—Nature of Tenancy.

Absolute occupancy Tenant.

1—Mortgage—Pre-emption.

A mortgaged his absolute occupancy holding to B without the consent of the malguzar. The holding was put up to sale in execution of a money decree subject to whatever encumbrances existed upon it and it was purchased by C. Before sale the Collector gave C an opportunity of pre-emption; but the Commissioner set aside the transaction on the ground that the right of pre-emption had not been exercised within a month. B now sued to enforce his lien against the holding. *Held*, that the proceedings taken by the Collector and by the Commissioner under section 38 Tenancy Act must be left out of consideration altogether as in no way affecting the rights of the defendant. The mortgage was void as against him, II C P L R 16 referred to. **Ramlal v. Hasan Bibi, 7 C P L R 89.**

See also Cases under:—

(1) C. P. Tenancy Act, S. 38
(2) Limitation Act Art. 10

C. C. 7

Absolute occupancy Tenant-(*Concld.*)

(3) Mortgage (usufructuary and mortgage by Conditional Sale)

2—Absolute Occupancy Tenant—Malguzar—C. P. Tenancy Act. 1883 Sec. 38 —Mortgagee—Possession—Sale Deed— Specific Relief Act. An absolute occupancy tenant mortgaged his holding by a registered deed which was void as against the malguzar under Section 38 of the C. P. Tenancy Act 1883. The mortgagee sued the tenant on the deed, obtained a decree and got possession in March 1896. In June 1896 the malguzar with the knowledge of the above facts got a sale deed executed by the tenant and forcibly ejected the mortgagee who again got possession by a suit under the Specific Relief Act.

The malguzar then sued the mortgagee on his sale deed. *Held* that at the date of his purchase the malguzar had a right to take over the holding at a price to be fixed by the Deputy Commissioner but that as he chose to purchase for a price arranged between himself and the tenant and to pay the whole of that price to the tenant his suit could not succeed. 5. C. P. L. R. 125. 6 C. P. L. *R.* 131, referred to. 7 C P L R 89; 18 All 354.

Seth Laxmichand &c. v. Thakur Raghuraj Singh. 12 C. P. L. R. 127.

Absolute privilege

See (1)—Evidence Act 1872 S. 126.
(2)—Privileged communication
(3)—Privilege

1.—C. P C. O 11 rr. 12, 13 (1882—S. 130).

Indian Evidence Act (1 of 1872, S 126—Document, production of—Privilege attaching to documents—Legal adviser—Court—Discretion.

Under the Evidence Act. in regard to certain documents—when they are absolutely privileged the court has no power whatever to order production. But under S. 130 of the C. P C. 1882. the court does possess the discretion, and the discretion is to be exercised according to the practice of the Court. And although a document may not be such as passed directly between the legal adviser and the client yet if it is of such a nature as to make it quite clear that was obtained confidentially for the purpose of being used in litigation and with a view to being submitted to legal advisers then the Court will not compel the production of such a document 7 Q B D 769 Ref to. **Vishnu v. New York Life Insurance Co. 7 Bom L R 709**

Absolute Privilege-(*Concld.*)

2-State proceedings-Communications between Ministers of State—Production in a Court of law.

All communications between Ministers of State with regard to public matters or public functions all expressions of opinion in the conduct of public duties by the officers of State, and all records and documents in which the opinions, or order of public officers are contained, are absolutely privileged, and cannot be compelled to be produced in a Court of law

If *prima facie* a document purports to be an official communication which would be privileged, no allegation of malice would be allowed and no proof of malice would take away the privilege.

Jehangir v. Secretary of Stste 5 Bom L R 30.

Abstract of Title

See Vendor and Purchaser (Warranty of title)

Abuse

See—(1) Slander.
(2) Damages-suit for damages-tort.
Jurisdiction of Civil Court—Abuse defamation and slander.

Abuse, defamation and slander.

See—Jurisdiction of Civil Court

Abuse of process of Court.

1—T. P, Act S 90—Abuse of process of court—Fraud—Purchase benami for decree-holder—Estoppel Where upon an application for sale the decree-holder obtains leave to purchase in the property upon the undertaking to pay the full decretal amount for it and the property is purchased benami for him, at a less sum, and the judgement-debtor does not object at the time *Held*, upon the decree-holder applying for a personal decree for the balance, that the judgement debtor having the remedy to get the sale set aside in due course of law cannot object to the decree-holder executing his decree for the balance, although the purchase by the decree-holder was an abuse of the process of the court. **Durga v Bhagwan Das, 1 A L J 486**

2—C P C O. 16 r. 1, (1882 S.159)—Summons to witnesses—Jurisdiction inherent in Court to prevent abuse of process.

Although on application of a party to a legal proceeding summons to a witness will ordinarily issue and a court is bound to issue a summons under S. 159, except in cases governed by s. 386, C. P. C., a Court has an inherent right to prevent an abuse of its own process,and where it is shown that the process is applied for not *bona fide* for the purpose of obtaining any material evidence, the Court will be justified in declining to issue process. **Veerabadran Chetty v. Nataraja Dasikar. 14 M L J 329=28 Mad 28=9 C W N 421=32 Cal 582 also 15 M L J 569=28 Mad 560.**

Abuse of process of Court-(*Concld.*)

Abuse, suit for Damages—

See—(1) Jurisdiction of Civil Court—Abuse, Defamation and Slander, Suits For.
(2) Slander.
(3) Defamation.

Abusive language

See—Cases under defamation-Jurisdiction of Civil Court-Abuse defamation and Slander.

Abutting or adjoining a public Road.

See—Jurisdiction of Cvil Court-Public ways, obstruction of.

Abwab.

See also Cases under.—
(1) Cess.
(2) Batta,
(3) Bengal Tenacy Act (VIII of 1885) S. 74.

1-Beng. Tenancy Act S. 74—"Abwab"—Stipulation made before Act.

"All impositions upon tenants under the denomination of abwab," etc., and "all stipulations and reservations for the payment of such," referred to in sec. 74 of the Bengal Tenancy Act, relate to both past and future stipulations ; such stipulations made before the passing of the Bengal Tenancy Act are therefore void.

Jotindra Mohan Tagore v Chandra Nath Safui, 6 C W N 860.

Abwab-(*Contd.*)

2—Abwab—Puja expenses.

Puja kharach or expenses for a puja agreed to be paid in excess of the rent is an abwab and cannot be enforced. Road cess is not abwab within the meaning of S. 74 of the Bengal Tenancy Act (4 Cal 576; 3 C L J 337 Ref. 22 Cal 214 Expl).

Narandra Kumar Ghose v Gora Chand Joddar. 3 C L J 391=33 Cal 683.

Notes.—Ref: 12 C W N 154, 8 C L J 525.

3—Abwab—Promise to supply wood-Not forming part of rent—Bengal Tenancy Act (VIII of 1885), S. 179-Reg. (VIII of 1819), S. 5.

A *patni* lease, executed before the Bengal Tenancy Act came into operation, provided that the *patnidar* should supply wood for the cooking of the *bhog* of certain idol. On his default, the *Zamindar* sued him for the price of the article.

Held, that, as the value of the wood was not incorporated with and did not form an integral component of the rent of the *patni*, it should be considered as an abwab and not recoverable.

The original patnidar having died, his representatives the present defendants, were called upon in 1903 by the Zamindar to execute a security bond, and they complied with the requisition agreeing to remain bound by the terms of the original patni lease.

Held, that the execution of the security bond did not amount to a new lease, and that, therefore, s.179, of the Bengal Tenancy Act was of no assistance to the plaintiff. 3 C L J 301: 33 Cal 683; 4 C C L J 527, 10 C W N 527, 12 C W N 175. Rel on 3 C W N 608; 26 Cal 611, Dist. **Ranjit Singh v Bahadur Singh. 9 Ind Cas 47**

4—Abwad——Mokurari lease——Zemindari selami.

In a mokurari lease, executed before the Bengal Tenancy Act came into force, there was an agreement to pay a certain sum as rent and a certain additional sum as Zamindari selami, holi &c, expenses, which latter were found to be arbitrary and extra charges imposed on the tenants on account of work done in the Zemindari sherista and for other purposes.

Held, that the additional sum was an illegal cess or *abwab* and could not be recovered from the lessee by the zamindar. 17 Cal 726. **Bepin Behary Mitter v Prokash Chandra Sarkar. 13 C L J 148.**

Abwab-(*Concld.*)

5—Abwab—Delivery of 10 seers of chilli part of consideration for which tenant was allowed to take lease—Kabulyat—Construction.

If a particular sum is specified in a lease or is agreed to be paid and is the lawful consideration for the use and occupation of the land, that is to say, if it is really part of the rent, although not described as such, the landlord is entitled to recover the same.

Where in a *patni kabulyat* executed before the Bengal Tenancy Act, it was stipulated that, besides the money rent agreed upon, the tenant would deliver 10 seers of chilli 5 days before the *Puja* to the landlord

Held, on a construction of the *kabulyat*, that the delivery of the chilli was a part of the consideration for which the tenant was allowed to take the lease, and that it was a part of the rent and not an *abwab*. 4 C L J 529, 10 C W N 529 rel. upon. **Sarada Kripa Lala v. Mostafizar Rahman, 12 Ind Cas 37.**

Acceleration of Estate

See also cases under —

(1) Hindu Law (Widow)
(2) Hindu Law Reversioners

Acceptance

See (1) Contract-Construction of contracts.
(2) Hundi
(3) Debtor and creditor
(4) Bill of exchange

Acceptance of an instalment overdue.

See Limitation Act Arts 74, 75
„ Limitation Act Art 179 Order for Payment at specified date.

See also Bond—Bond payable by instalment.

Acceptance of executorship

See (1) Probate
(2) Executor

Acceptance of gift

See Hindu Law.—Gift

Acceptance of goods by buyers

See (1) Contract Act s 108

Acceptance of goods by buyers-*Concld.*

(2) Vendor and purchaser-Completion of transfer

Acceptance of Patta not in accordance with Law

See Landlord and tenant

Acceptance of Vakalat

See pleader

Acceptance or renunciation of executionership

See (1) Probate
(2) Executor

Acceptance what amounts to

See (1) Contract—Construction of contracts
(2) Contract Act s 4
(3) Negotiable Instrument Act

Accepting lower rent than that entitled to for long time.

See.—acquiescence

Acceptor.

See (1) Hundi
(2) Bill of exchange

Accession.

See (1) Lease
(2) Landlord & tenant
(3) Accretion

Accession to Land.

1—Accession —Transfer of Property Act s 63 The meaning of the term accession in section 63.

By virtue of his mortgage the mortgagee steps into the shoes of the landlord and in such capacity acquires rights which as a stranger he cannot acquire. The holding acquired by him therefore is an accession and the mortgagor is entitled to such accession on payment to the mortgagee of the cost of acquiring it X C P L R 103. Distinguished. 10 B H C 369, 5 Cal 198, referred to

Mohan Lall v Chaodhri Jalandar Singh 14 C P L R 169

2—Accession—Building on mortgaged land

When a mortgagor builds on mortgaged land after mortgage, the mortgagee is entitled to treat the building as an accession to the mortgaged

Accession to Land *(Concld.)*

property and it is part of his security as if the building had been on the land at the date of his mortgage. **Krishna Gopal Sadhani v A B Miller 29 Cal 803**

See also cases under
(1) Building on another's Land.
(2) Landlord and Tenant
(3) Equitable relief
(4) Accretion

Accident, loss by.

See Cases under (1) Carriers
(2) Railway Company
(3) Shipping law
(4) Damages suit for

Accidents.

See
(1) Carriers
(2) Shipping Law
(3) Gas plant

Accommodation acceptor.

See
(1) Bill of Exchange
(2) Negotiable Instruments
(3) Principal & Surety
(4) Hundi

Accommodation drawer.

See Principal and Surety—Discharge of Surety.

Accord & satisfaction.

See
(1) Waiver
(2) Debtor discharge of

Account.

(a) Power of court to order account instead of referring party to separate suit (1)
(b) Suit on accounts not signed (2)
(c) Accounts taken in one suit adopted in another (3)
(d) Mode of taking account (4).
(e) Current mutual account (5-5a).
(f) Suit for balance on running account (5b)
(g) Court s order to furnish (6).
(h) Decree for contribution (7)
(i) Caste inspection of books right of (8).

Account-(*Contd.*)

(j) Form of an executor (9)

(k) Judgment-debtors paying off decree against estates account (10)

(l) Account kept in course of business (11-12)

(m) Common Law right of the member to inspect books of the corporation (13).

(n) Inventory and account (14-15).

(2) Miscellaneous Cases

(a) Payments made by agent (16)

(b) Partnership account (17-18)

(c) Custom of trade (19)

(d) Dishonest conversion by partner (20).

(e) Hard and unconscienable bargain (21)

(f) Executor's right to call for inventory and account (22).

(g) Guardian s liability to render accounts (23).

(h) Entry in Government Gazettee Account Book (24)

(i) Leave to bring suit for accounts (25)

(j) Receiver s Accounts (26).

(k) Commissioner to examine (27).

(a) During inquiry suit

(b) Acknowledgment of debt

Account—See Copyright

Account—See Cases under Decree — Construction of Decree—Account.

Account—See Decree — Form of Decree—Account.

Account—See Cases under Mortgage — Interest-Accounts.

Account—See Onus of Proof—Account

Account—See Pledgor and Pledgee

Account—See Principal and Agent — Duty of Agents to Account

Account—See Variance between Pleading and Proof—Special Cases—Account

Account—See Special and second appeal.

Account—Right to an — See Cases under

Account-(*Contd.*)

Hindu Law—Partition — Right to Account on Partition

(a) POWER OF COURT TO ORDER ACCOUNT INSTEAD OF PREFERRING PARTY TO SEPARATE

1—Power of Court to order Account instead of referring party to separate suit —

In a suit by the heirs of a deceased Mahomedan to recover from his widow landed property of which she claims to be in possession as absolute owner under a mokurari deed alleged to have been executed in lieu of her dower where she wholly fails to prove execution of the deed, it is competent to the Court, instead of referring the plaintiffs to a separate suit, to direct an account to be taken of the mesne profits received by the widow and of the amount due to her on account of dower with a view to the settlement of the claims of both parties

Asloo v Umdutoonissa, Umdutoonissa v. Asloo, 20 W R 297

Notes —Fol 21 Mad 27. Ref 15 All 29

(b) SUIT ON ACCOUNTS NOT SIGNED.

2—Suit on accounts—Account not signed—Limitation.—

An account settled must be signed by the debtor and the creditor has three years from its date for the institution of the suit

Chinnasawmi Naidu v Venkatasami Naidu 7 M L T 372=6 Ind Cas 719.

(c) ACCOUNTS TAKEN IN ONE SUIT ADOPTED IN ANOTHER

3—Accounts taken in one suit adopted in another, Practice as to —

Where the accounts actually taken and completed in one suit are adopted in another, the ordinary practice is to allow the result of those accounts and enquiries to be questioned in the suit wherein they are adopted **Advocate General of Bombay v Kuramally, 4 Bom L R 857**

(d) MODE OF TAKING ACCOUNT

4—Mode of taking Account.

In orders relating to the taking of accounts it is irregular to direct the amounts to be taken irrespective of the plea limitation **Asghar Ali v. Kurshed Ali, 3 Bom L R 576=24 All 27**

Account-(*Contd.*)

(e) CURRENT MUTUAL ACCOUNT

5—Current mutual account—Limitation.

Where the dealings between the parties are such as to create independent obligations in favour of one party against the other, the account between them is a mutual account. Article 85, Limitation Act of 1877, applies to a case of this nature giving rise to reciprocal demands, and limitation begins to run from the close of the year, in which the last item was entered in the account. 22 Bom 606 Fol. A W N (1895) 186 relied on. **Chittiar Mal v. Behari Lal, 6 A L J 921=32 All 11=4 Ind Cas 261**

See also Limitation Act, Arts. 85, 89 and 57.

5*A*—Account, mutual, open and current—Reciprocity of dealing—Settled account—Signature.

The reciprocity of dealing and the right to mutual demand form the essential ingredients of a mutual, open and current account.

Haji Abdul v. Haji Bibee. 7 Bom L R 151.

(f) SUIT FOR BALANCE ON RUNNING ACCOUNT.

5*B*—Suit for balance on running account.

When an account between a principal and his agent shows what balance is due from either party at different times, but is never finally settled, it is a running account, and the limitation begins to run from the date of its being closed under Art. 85, Limitation Act. **Prem Kaur v. Mohan Lal, 128 P L R 1909= 115 P W R 1909=4 Ind Cas 960.**

(g) COURT'S ORDER TO FURNISH.

6—Accounts, Court's order to furnish—Company transferring its business to a limited Company—New Company not bound by the order.

Where a decree directs a company to furnish accounts, and the company in the meanwhile transfers its business to a limited company, the latter company is not bound by the decree as it is a distinct legal person; and the decree does not operate beyond the date of such transfer.

Fraser & Co. v. Bombay Ice Manufacturing Co. 7 Bom L R 107=29 Bom 107.

(h) DECREE FOR CONTRIBUTION.

7—Decree for—Satisfaction—Apportionment —Contribution.—

Account-(*Contd.*)

When a decree for mesne profits was satisfied by some out of the entire body of persons liable thereunder by payments made from time to time and a question arose as to the principle which would regulate contribution amongst the parties themselves:

Held, that the correct principle was to allow interest on the sums paid from the date of payment, and then to apportion rateably the whole sum crediting interest on each amount paid in favour of the party on whose behalf it was paid, from the date of payment until the final satisfaction of the decree for mesne profits. Judgment of the Judicial Committee in 31 Cal 597 explained. **Guru Prasanna Lahiri v. Jotindra Mohun Lahiri, 7 C L J 454=35 Cal 303=35 I A 32.**

(i) CASTE INSPECTION OF BOOKS RIGHT OF.

8—Caste, not a corporation — Inspection of books—Right of members to.—

The right to inspect account books kept in connection with caste funds and properties is not in any sense a caste privilege. It is a legal right. It is preliminary to a right to assert a claim to property and is incidental to the right to recover property which may be lost to the caste by misuse or misappropriation. A suit brought by plaintiffs on behalf of themselves and others as members of Cutchi Memon Jamat to have full and free inspection of the books of account kept by the defendants in their capacity as trustees of caste funds and properties is maintainable in Civil Courts. It is the assertion of a pure legal right and it in no way affects the internal autonomy of the caste "or" its social relations. There is no analogy whatever between a corporation as known to English Law and an Indian caste. The principles governing the rights of members of caste to inspection of accounts of caste properties must be governed by considerations very different from those governing the rights of members of corporation seeking inspection of documents of such corporation.—**Haroon Haji Vahedina v. Haji Adam Haji Oosman Nurani, 11 Bom L R 1267=4 Ind Cas 569.**

(j) FORM OF AN EXECUTOR.

9—From an executor—Filing of accounts.

It is the duty of an executor to file his accounts without compelling the parties interested in the estate to take out an order to compel him

Account-(*Contd.*)

to do so. If an executor improperly and without sufficient reason fails to file the accounts, he will have to bear the costs of the order for compelling him to do so.

An executor is not justified in declining to file his accounts simply because there may be a dispute as to the period from which the accounts should begin. But a party interested in the estate will be ordered to bear his own costs of the order if his application is frivolous or vexatious or if he has been guilty of long delay or laches or if he has acquiesced in the executor not filing the accounts.

Jetha Padamsi, 7 Bom L R 451.

(K) JUDGMENT—DEBTORS PAYING OFF DECREE AGAINST ESTATES ACCOUNT

10.—Judgment-debtors paying off decree against estate—Accounts. R, the 12 annas share holder of an estate, and after his death his successor-in-interest remained in wrongful possession of the remaining 4 annas share from 1826 to 1854 when the true owners recovered possession. In 1862, they instituted a suit for mesne profits from 1826 to 1854 against "the co-sharers, zemindars of 12 annas share" and got a decree in the first Court in 1875 against persons who were co-partners in the estate at the date of the decree. On appeal, the High Court merely reduced the amount decreed (in 1882). Between 1854 and 1882 several changes had taken place in the distribution of interest amongst the different branches of R's family. On a question subsequently arising as to what amount each co-partner was liable to contribute in paying off the decretal amount, the High Court held that this was to be determined according to the share which each of them had in possession from 1826 to 1864: *Held (reversing the judgment of the Court)*—That the cause of action in the suit was the wrongful enjoyment of the 4 annas share by the 12 annas shareholder collectively as part of their family estate and the decree which followed being in effect one against the estate, was against those who were co-parteners when it was passed and they were bound to contribute according to shares they then held in the estate. The decree was satisfied by payments made from time to time on behalf of the several co-partners from 1883 to 1889 and during this period interest ran on so much only of the amount of the decree as for the time being remained unsatisfied. In a suit for contribution instituted by one of the co-partners against the others in respect of the amounts so paid: *Held*—That inasmuch as each payment, so far as it went, stopped the running of the interest of the decretal amount, the benefit, of that cessation of interest ought to go in relief only of those who made the payment and not of those who continued in default. Accordingly accounts were directed to be taken on the following principle, viz., interest was to be computed on the total principal of the judgment-debt to the date of the final extinguishment without regard to the sums from time to time paid on account, and interest at the same rate on each amount so paid from the date of payment until the final satisfaction of the decree was to be credited in favour of the party on whose behalf it was paid, decree depending on the result. One of the items paid on account consisted of a sum of money held by the Government Treasury to the credit of the co-partners in separate accounts and derived from a portion of the estate which lay in the Garo Hill District. This amount was drawn in 1883 but one of the co-partners, H, proved that before that he had by suit established his right to a larger share in the estate than was represented by the amount held by the Treasury to his credit. The High Court in passing accounts held that H was entitled to a credit out of the sum drawn from the Treasury proportionate to his share in the estate: *Held (reversing the judgment of the High Court)*—That the money not having been held on joint account, H was not entitled for the purpose of the present suit to credit for a larger sum than that which stood to his account.

Jotindra Mohun Lahiri v Guru Prosunno Laniri 8 C W N 625=31 Cal 597=31 I A 94.

(L) ACCOUNT KEPT IN COURSE OF BUSINESS.

11-12.—Account kept in course of business.

A person used to enter all his receipts and all the advances he made to his *amlahs* first in a *khata* book. The *amlahs* used to submit *furds* embodying the expenses incurred by them and these used to be regularly checked by him. He used to prepare his monthly and other accounts from the *khata* book and the *furds*. *Held*—That these accounts having been kept regularly in the course of business, were admissible under sec. 34 of the Evidence Act even though the *khata* book itself was not produced. 4 C W N

Account-(*Contd.*)

147, s. c. I L R 27 Cal 118 (1899), referred to.

Raja Peary Mohon Mookerjea v. Narendra Nath Mookerjea. 9 C W N 421.

See also.

(1) Evidence Civil cases.

(2) Accounts & account books

(m) COMMON LAW RIGHT OF THE MEMBERS TO INSPECT BOOKS OF THE CORPORATION.

13.—Register of shareholders—Member of the Corporation—Common-Law right of the member to inspect books of the Corporation—Presidency Banks Act (XI of 1876)——Bank of Bombay—Shareholder—Suit by shareholder against the Bank to enforce inspection of the register of shareholders.

On the application of a member the King's Bench Division will in general grant a rule for a *limited inspection* of the documents of the corporation, if it be shown that such inspection is requisite with reference either to an action then instituted or at least to some specific dispute or question depending in which the applicant is interested; but, even in this case, the inspection will be granted to such an extent only as may be necessary for the particular occasion. The rule was formerly sometimes laid down broadly, and the language ascribed to the Court in one or two cases might almost lead to the inference that members of a corporation have an absolute right, whenever they think fit, to inspect all papers belonging to the aggregate body. But any such doctrine is now exploded; and the privilege of inspection is now confined to cases where the member of the corporation has in view some definite right or object of his own, and to these documents which would tend to illustrate such right or object.

These principles were extended to the case where a shareholder applied to inspect list of shareholders, and registers of their addresses, of a bank incorporated under the Presidency Banks Act, 1876. **The Bank of Bombay v. Sulleman Somji. 10 Bom L R 636= 12 C W N 825=32 Bom 466. Reversing 9 Bom L R 165. Restored 9 Bom L R 169.**

Account-(*Contd.*)

(n) INVENTORY AND ACCOUNT.

14-15.—Inventory and Account.

District Judge, power of, to call for inventory or account—High Court, decision of, if binding on lower court—Construction of Act—Reference to proceedings of Legislative Council:—Under S. 98 of the Probate and Administration Act, the District Judge has no power to institute a judicial enquiry by an audit of the inventory and account at the expense of the executor or administrator, nor can such an authority be implied from the provisions of the Code of Civil Procedure as to the appointment of a commission to examine the accounts. All that the District Judge has to do under S. 98 of the Probate and Administration Act is to see that the inventory and account *prima facie* satisfy the requirements of the section, that is, that the inventory appears on inspection to be a full and true estimate of all the property, credits and debts, and that the account on inspection appears really to be a true one shewing the assets and their disposal. To ascertain this the inventory and account should be passed under some examination by the judge's staff so as to detect manifest mistakes or errors: if such were detected the papers could not satisfy the section, and for this purpose the section empowers the judge to extend the time to the executor or administrator to amend the account. Where the testator enjoined on his executor to prepare accounts annually; *held*, that that did not enlarge the Judge's power and empower him to exact an account annually although it would authorise a person interested to take action against the executor. S 98 of the Probate and Administration Act does not give a Judge power to call for a revised account, if an account has already been exhibited as required by the section and has been accepted as *prima facie* true, but if it appears that the account is materially untrue the Judge may take action under its fourth subsection. Where once an account had been filed and accepted shortly after the expiry of a year from the grant of probate —*Held*, that the judge had no power to call for further accounts of subsequent years. **Maharani Sarat Sundari Barmani v. Uma Prosad Roy Chowdry. 8 C W N 578= 31 Cal 628.**

(2) MISCELLANEOUS CASES.

(a) PAYMENT MADE BY AGENT.

16.—Payments made by agent.—

How proved—Moneys taken to pay illegal

Account-(*Contd.*)

gratification must be accounted for. When an agent's account is being taken, items of payment alleged to have been made by him cannot be passed without a voucher or a clear account of the facts. An agent is bound to prove that moneys drawn by him for payment as illegal gratifications reached their destination.

G R Fox v Beni Pershad Koer. 13 C W N 212

(b) PARTNERSHIP ACCOUNT.

17.—Art 106—Suit for partnership account and share of partnership assets.

A suit by the heir of a deceased partner against surviving partner for an account and share of the deceased in the partnership assets, including the good will and trade marks of the partnership business, comes within the class of suits dealt with under Art 106. The fact that there were unrealized assets outstanding at the death of the deceased partner which were still outstanding at the date of the suit would not alter the nature of the suit. **Mohit Lall Dutt v Raj Narain Dutt. 9 C W N 537**

18.—Accounts—Expenses incurred for partnership not allowable if unseparably mixed up with private affairs.

In taking accounts, it is not possible for a court of justice to allow expenses to the accountable party, even though honestly incurred for the partnership, where, by mixing up his private affairs with those of the partnership and by his omission to keep clear accounts of any kind, he has made it impossible even to conjecture what those expenses are. **Moung Tha Huyin v Mah Thein Myah. 5 C W N 114=28 Cal 53**

Notes—Dist; 11 M L J 353=25 Mad 149.

(c) CUSTOM.

19—Indent form—Inconsistency between printed and written provisions-Custom of trade in Bombay—Indentor—Foreign manufacturer—Liability to account.

Where in an indent form in which the usual conditions of contract are printed there exists some inconsistency between the printed and the written provisions, the Court cannot discard the print, but must as far as possible discover the real contract of the parties from the printed as well as from the written words.

Account-(*Contd.*)

According to the custom of trade in Bombay when a merchant requests or authorizes a firm to order and to buy and send goods to him from Europe at a fixed price net free godown including duty, or free Bombay Harbour, and no rate of remuneration is specifically mentioned, the firm is not bound to account for the price at which the goods were sold to the firm by the manufacturer, and it does not make any difference that the firm receives commission or trade discount from the manufacturer either with or without the knowledge of the merchant. 38 L J Q B 111. ref. to. **Beir v Chhotalal. 6 Bom L R 948=30 Bom 1.**

Notes.—Ap: 29 Bom 310=7 Bom L R 282.
Ref: 30 Bom 205=7 Bom L R 611.

(d) DISHONEST CONVERSION BY PARTNER.

20-Criminal breach of trust-Dishonest conversion by partner—Liability of partner to account for partnership money. In a partnership it is open to a partner to spend the money he receives and to account for it in dealing with the partnership, and such a partner is plainly entitled to be called upon for an account of the expenditure of the money which he has received.

In a case where it was not satisfactorily made out that this was not done, and it could not be made out in the absence of a proper demand for an account, it was held that no dishonest conversion could be found, which would justify the conviction of the partner under S 406 Penal Code

Debi Prasad Bhagat v Nagar Mull. 35 Cal 1108.

(E) HARD & UNCONSCIONABLE BARGAIN.

21.—Hard and unconscionable bargain-Relief—Exceptions—The general rule is that neither excess of interest nor exorbitance of charge will suffice for a court to relieve parties from the incidents of their contracts unless the element of unfair dealing, such as, that the debtor has been overreached, tricked or deceived, or that the money lender has taken an unfair and undue advantage of his weakness and necessities, is shown. The mere fact that a person is in urgent need of money is not sufficient in itself to raise a presumption that the person to whom he applies for the loan will take unfair advantage of his necessity. Undue influence or unfair dealing must be proved before a presumption of pressure can arise. A bargain not in itself hard and unconscionable can

Account-(*Contd.*)

not be held to have become so by reason of delay on the part of the creditor in suing though wilful. 9 All 228 dissented from. The exceptions to the general rule are female debtors standing in a fiduciary relation and expectant heirs 21 W R 352 4 Cal 137; 20 Cal 366; (1901) 2 K B 110 followed 1 B L R O C 31 (note); 7 Cal 245 26 Cal 891, 918 5 C W N 505, 12 Cal 225 (12 I A 215) dist

Umesh Chandra Khasnavis v Golab Lal Mustafi **31 Cal 233.**

Notes. —Ref: 5 C L J 542.

(F) EXECUTOR'S RIGHT TO CALL FOR INVENTORY AND ACCOUNT.

22.—Executor's interest—Executor's right to call for inventory and account from co executors. An executor to whom leave to apply for probate has been reserved has an interest, or at any rate, an appearence of interest so as to entitle him to call for an inventory and account from his co-executors who had already obtained probate.

Obiter:—Probate is made operative as the authenticated evidence and not at all as the foundation of the executor's title and an executor derives all interest from the will itself and the property of the deceased vests in him from the moment of the testator's death. 1 Phill. 239 at 241: 1 Phill 241—1909. Phill. 22 foll.— **Jehangir v Bai Kukibai** **27 Bom 281.**

(G) GUARDIAN'S LIABILITY TO RENDER ACCOUNTS.

23.—Guardian's liability to render accounts-Suit for accounts.—Where a previous guardian failed to deposit the process fee, which he was required to put in, for the purpose of notice being given to the succeeding guardian to come in and inspect the accounts, and the Court has made no order declaring the previous guardian to be discharged under S 41. cl 4 of the Act, a suit lies for the purpose of calling upon the previous guardian to render accounts. The mere fact that the succeeding guardian has neglected to inspect those accounts, although they were paying in the Court for about a year, is no legal bar to the suit being maintained.

Although a question, as to whether certain properties in respect of which accounts are claimed, really belonged to the estate of the minor or to the previous guardian personally, is a question of right, which cannot properly be gone into in such a suit, still for the purpose of taking an account, it must be seen what are the properties, which the previous guardian took possession of, as guardian of the minor under the orders of the Court; and he is bound to render an account, in respect of all the properties, of which he received charge as such guardian. **Kaniz Fatima v Sajjad Hosain** **34 Cal 211.**

(H) ENTRY IN GOVERNMENT GAZETTEE ACCOUNT BOOK.

24.—Hindu Law—Adoption—Proof of onus Entry in Government Gazettee Account Books, Non—examination of the parties—English and Indian Practice

Their Lordships also based their conclusion on the non-production of the accout books.

Having regard to the wellknown and often proved habits of the Indian people with regard to the keeping of accounts recording their most minute transactions the non-production of such books (in whose possession they are) covers that party's cause with suspicion.

Mussamat Lal Kunval v Chiranji Lal **7 M L T 57=14 C W N 285= 11 C L J 172=12 Bom L R 244= 32 All 140=20 M L J 182= 5 Ind Cas 549 P C.**

(I) LEAVE TO BRING SUIT FOR ACCOUNTS.

25—Leave to bring suit for accounts—Grant of leave—Order, if a decree — Civil Procedure Code (Act, XIV of 1882), section 2—Appeal, Act XX of 1863 (Religious Endowments Act) makes no provision for appeal and an order granting leave to bring a suit for the purpose of having the accounts of a certain religious encowment not being a "decree" within the meaning of section 2 of the Code of Civil Procedure, no appeal lies against such an order.

Mojaffer Ali v. Mirza Hedayet Hossain, **5 C L J 641=34 Cal 564.**

Notes —Ref: 10 C L J 505.

(J) RECEIVFR'S ACCOUNTS.

26.—O 40 rr 1 to 3 S.104; O 43 r 1. Ss 22; 23 (3) (1882 Ss 503 and 588 cl.) Receiver's accounts, order in passing appeal. The directions which a Court gives in passing a Receiver's accounts are not appealable under cl of S 588 of the Civil Pro Code. **Rani Keshabati Kumari v W O Mac Gregor** **12 C W N 648=35 Cal 568.**

Account-(*Contd.*)

(K) COMMISSION TO EXAMINE

27-Civil Procedure Code (Act XIV of 1882), Sec. 398 Amount, Commissioner to examine—Commissioner's duty—commissioner, when to take evidence under section 398, Civil Procedure Code—Commissioner, not a Judge or an Arbitrator—Decision of commissioner, value of.

On an application by the parties, the appellate court ordered a certain vakil to be appointed commissioner with powers under section 398, Civil Procedure Code, to examine the accounts and objections to the same, and it was further ordered that the vakil should submit to the court his report on the said accounts and objections.

Held that the object of the order was to refer to the commissioner the examination of the accounts for the purpose of enabling the court to see what the accounts were, and duty of the commissioner was to make out an account showing to the court exactly, what the accounts in the books stood and nothing else. The business of the commissioner was practically to place himself in the position of an assistant to the court, so as to give the court all the information which the accounts gave and thus to enable the court to come to a decision.

Held further, that under section 398 of the Code of Civil Procedure, the commissioner is entitled to take evidence in the matter referred to, so as to be able to report to the court for the purpose of enabling it to give a judgment on the points at issue.

The commissioner cannot deal with the case as if he is the Judge or an arbitrator appointed by the parties.

If the commissioner's report does not show what the accounts are, but merely contains a decision in favour of one party, the report is waste paper and is of no assistance to the court, whatever. **Tincowri Debi v Suttya Doyal Ranerji. 6 C L J 105**

28—Direction to take, not contained in a decree.

A decree contemplated an account being taken between the parties but it was silent on the question as to how that account was to be taken, whether by the Commissioner of the Court or by some person selected by both the parties. The Court of first instance decided that where the direction as to account ought to have been incorporated in the decree when passed it was competent to the Court at any stage of proceedings to direct necessary inquiries or accounts to be made or taken

Held, on appeal, that as some account was taken under the decree by a person appointed jointly by the parties a new agreement had come into existence superseding the decree and the Court was not competent to make the order appealed against. **Sir Jehangir Cowasji Jehangir v The Hope Mills, Ltd. 33 Bom 273 =10 Bom L R 488; reversing 33 Bom 216 =9 Bom L R 1380.**

29—Negotiable Instruments—Object of parties having dealings with each other—Presumption.

Prima facie the object of a promissory note is to show that the particular transaction represented by the note is a separate transaction, and it is intended that the remedies in respect of that transaction, should be separately pursued, even though the parties had several dealings with each other and there is a running account between them. **Issur Singh v G Bergamaun. 30 Cal 627.**

Account—During inquiry of suit plaintiff found entitled to sum in excess of court's jurisdiction not ousted thereby. See **8 C P L R 86**

Account—Duty of party impeaching settled account. See **15 C P L R 61.**

Account—Whether balancing of an account is account stated. See **7 Ind Cas 270.**

Account—Acknowledgment of debt. See Limitation Act arts 64, 115.

Account—Right to inspect account books relating to caste property. See **11 Bom L R 1267 =4 Ind Cas 569.**

3. OTHER CASES.

Account—Suit on accounts—Best evidence available to be produced. See **63 P R 1897**

Account—Suit for, against deceased guardian's representatives—Maintainability. See Guardians and Wards Act 1890 S. 41.

Account—See Limitation Act 1908 S. 22 Art 120.

Account—Suit for—against widow of a deceased Hindu—Non-joinder of parties. See **12 P R 1905=73 P L R 1905.**

Account-(*Contd.*)

Account—Suit for—jurisdiction of Court—Valuation of suit—Course of appeal—Limitation for suit for, after dissolution of partnership. See **87 P L R 1909=4 Ind Cas 929.**

Account—Plea as to the taking of—raised for the first-time in the High Court maintainability of. See **2 A L J 485=A W N 1905, 125**

Account—Admissibility of Mashkabari and rokhar books in evidence—Absence of khata books. See **9 C W N 421=32 Cal 582.**

Account—Unstamped entry in account book—Admissibility in evidence. See **A W N 1881, 115.**

Account—Order for production of, for inspection—Disobedience to order—Dismissal of suit—Wrong exercise of discretion. See **9 A W N 1905, 62.**

Account—Agreement by mortgagor not to claim accounts—Effect. See **9 Ind Cas 978**

Account—Partner spending honestly for the firm, mixing his—with partnership accounts—Effect. See **28 Cal 53 P C=27 I A 189=5 C W N 114.**

Account—Adjusted account—Settlement on basis of—Final adjustment not signed—Cross demands in partnership account—Limitation. See **15 C W N 882.**

Account—Objections to report of Commissioner for examination of—See **2 I A 34.**

Account—Direction for—Validity—Hindu Law—See Mortgage—General. **7 Ind Cas 921**

Account—Cross-suits between parties one on pro-note and the other on accounts in different Courts—All transactions dealt with in suit for account—Question of procedure becoming one of convenience rather than of right. See **30 Cal 627.**

Account—Liability of executor and administrator to accounts—Suit—Limitation—Effect of delay in suing—See **13 C W N 557=9 C L J 383=1 Ind Cas 289.**

Account—Admissibility in evidence:—See Evidence Act S. 34

Account—Accounts settlement—Re-opening:—Mc Kellar v Wallace (5 M I A 395) Ref See **10 Bom L R at 490**

Account-(*Concld.*

Account—Agreement by mortgagor not to claim accounts—Effect. See **9 Ind Cas978**

Account—Adjusted account—Settlement on basis of—Final adjustment not signed—Cross demands in partnership account—Limitation. **15 C W N 882.**

Account—Suit for, against deceased guardian's representatives—Maintainability. See **78 P L R 1911.**

Accountability.

See Account, suit for

See Mortgage—Accounts.

Account adjustment of.

See cases under:—

(1) Limitation Act (IX of 1908) art 64.

(2) Partnership suits respecting partnership.

(3) Contract Act S. 25.

(4) Limitation Act Ss. 19, 20, 64 120.

1—Contract to purchase land—Necessity to sell land for arrears.

Where an estate was sold under a contract at 10½ years' purchase of the net annual rent collections, and various sums of money were left in deposit with the vendee to meet various charges which were expected to arise, and the amount of these charges was regulated by the vendor's expectations, and formed portions of the stipulations of which the contrat was composed. but the net annual collections eventually fell short of those expectations,—*Held* that the agreement at the root of the contract *viz.*, that the property was taken at 10½ years' purchase, should govern the whole transaction, and that the accounts between the parties should be adjusted accordingly. In a suit to have an account taken of what was payable. and had been paid by either of the two parties in pursuance of the contract and to have a decree for any balance found to be due to either—the contract distinctly providing for an adjustment after the net annual collection and containing a stipulation that any injury accruing to the interests of one party by any laches in the payment of rent by the other should form a ground for compensation :—*Held* that it was not necessary that the land should be sold up for

Account Adjustment of-(*Concld.*)

arrears in default of payment before the account could be adjusted, and that even a decree, taken out by the zemindars against defendant for the rents of the land in suit, did not affect plaintiff's claim to the money owing under the contract

Opender Narain Mookerjee v Gudadhur Dey 25 W R 472 476

2—Proof of adjustment—Parol evidence

The adjustment of an account may be proved by verbal evidence, and need not necessarily be in writing signed by the party to be bound

Purnima Chowdrain v Nittanand Shah B L R Sup Vol 3 W R F B 82.

Accountant.

See Bankers

Account Books, entries in.

See Bankers' Books Evidence Act

See Cases under Evidence—Civil Cases—Accounts and Account Books

See Onus of proof

1—Inspection of account books—Right of a member of a caste to inspect documents and books of account relating to caste property—Injunction where such inspection refused

Where a member of a caste, who was also a trustee of the caste property, was refused inspection of books of accounts, documents etc, by the President of the managing committee of the caste —

Held that an injunction could be granted restraining the President from refusing such inspection.

Every member of a caste, being interested in its affairs, has a right, incidental to his membership, to every information which the books, records, and documents of the caste can give him to enable him to discharge the duties he owes to the caste It is a right similar to that of a partner in a firm to the partnership books and can be taken away from him only by an express caste rule, resolution, or usage. But a trustee or a member of a caste has such right to inspection only for the *bona fide* purpose and in the interest of the caste and not for any purpose hostile or injurious to those interests.

Though a Court will not interfere with the jurisdiction and discretion of a caste as regards its

Account Books, entries in-(*Contd.*)

internal purposes and management with reference to which it is its own master to frame rules and regulations, yet it will interfere in favour of any individual member of the caste as against any other member or members of it, where the Court is asked to give effect to any rule, resolution, or usage, of the caste if the right claimed in virtue of such rule, resolution, or usage, is a civil right congnizable by the Court In giving relief in such cases, the Court so far from interfering with the autonomy of the caste, or encroaching upon its jurisdiction as to its internal affairs, recognises them by giving effect to its rule, resolution, or usage

Chapsey v Jethabhai (9 Bom L R 569 reversed on appeal 11 Bom L R 1172)

2—Account books, Copy of an extract from stamps—Civ Pro Code, 1882, ss 141-A and 142-A—Stamp Act 1899 sch I art 24.

A copy of an extract from an entry in an account book filed under the provisions of ss 141-A and 142-A of the Civ Pro Code, 1882, does not require to be stamped under art 24 of schedule 1 of the Stamp Act 1899 **Kastur v Fakira. 4 Bom L R 293=26 Bom 522.**

Notes—Ref 27 Bom 150

3—Books of account, Presumption as to

According to the Indian Evidence Act, 1872, books of account which have been regularly kept, may be appealed to, not only for the purpose of refreshing the memory of a witness, but also as corroborative evidence of the story which he tells Books of account containing entries referring to a particular transaction are not entitled to the same credit that is given to the books that record that transaction in common with other transactions in the ordinary course of business.

Bhoy Hong v Ramnathan 4 Bom L R 378.

Account books, recovery of—(2) Suit for recovery of account books—Maintainability—Subsequent prayer for recovery of moneys due from defendant—Amendment whether allowable

10 M L T 557

Account made in course of usual dealing.

See acquiescence

Account, mutual, open and current

See Account, suit for and Limitation Act S 5

Accounts

See (1) Decree—Construction of Decree-Account.
(2) Decree—Form of Decree—Account
(3) Mortgage—Accounts. Keeping two sets of.
(4) Bombay Tolls Act, s. 7. Mutual Accounts.
(5) Limitation Act, (1908) arts 85, 89 and 57.
(6) Mortgage (Redemption).

1—Procedure.

Procedure to be observed in a Judicial enquiry into accounts laid down. **Alaiahmad alias Boolaki v Nusibun. 24 W R 70.**

Account sales.

See Evidence—Civil Cases—Account Sales.

See Principal and Agent—Commission Agents.

Account settled.

1—Reopening of.

When a plaintiff sued on a deed which recited that accounts had been settled the defendant may by pointing out existence of irregularities and mistakes in the book of the plaintiff justify reopening the account. **Girdharlal v Hiraji 91, P J 337.**

2—Accounts—Expenses incurred for partnership not allowable if unseparably mixed up with private affairs.—In taking accounts it is not possible for a Court of justice to allow expenses to the accountable party, even though honestly incurred for the partnership, where, by mixing up his private affairs with those of the partnership and by his omission to keep clear accounts of any kind, he has made it impossible even to conjecture what those expenses are. **Moung Tha Huyin v Mah Thein Myah. 5 C W N 114=28 Cal 53**

Notes—Dist: 11 M L J 353=25 Mad 149.

3—Settled account—requisites of—Acquiescence—Accounts settled to be reopened when—Proof—Leave to amend—Suit for account, procedure to be followed.

The requisites for making an account settled depend on the circumstances of each case and mode of dealing between the parties.

Account settled—(*Contd.*)

Although acquiescence in accounts furnished may not, by itself, amount to settlement, when acounts have been delivered with opportunity for inspection where they have been duly examined and no exception has been taken, and where they have been acquiesced in, they cannot be opened unless upon distinct and specific averment of errors proved or of fraud, mistake or collusion proved.

If a settled account is impeached for errors, particular errors must be stated and proved and the same rule holds even where the account is settled "errors excepted."

Where the plaintiff commenced an action on the assumption that no accounts had been rendered, and the case proceeded on the question of the liability of the defendant to render an account and the appeal was argued on the same footing, leave ought not to be granted to convert the suit into one for re-opening the accounts on the ground of errors contained therein.

Where a person seeks an account from another alleged by him to be his agent the first question to be decided is the *factum* of the agency. If that question is decided in favour of the plaintiff the next question to be tried is whether the defendant as agent is liable to be called upon to account. If he answers that accounts have been settled between him and his principal, that question ought to be tried next. If the accounts have not been settled, they have then to be taken. In suits of this description, if the liability to account is denied, that is the fundamental question to be tried first It is only after an adverse decision upon this question against the defendant, that he may be called upon to render an account.

Mohesh Chunder Bose v. Radha Kishen Bhatta Charjee. 6 C L J 580.

4—Accounts—Limitation Act Sch. II. Arts 57 and 85—Account-current-Account, open mutual.

An open account is one, which is continuous or current, uninterrupted or unclosed by settlement or otherwise, consisting of a series of transactions.

An account-current is an open or running account between two or more parties, or, an account which contains items between the parties, from which the balance-due to one of them is, or, can be ascertained.

Mutual accounts are such as consist of recip

Account settled-(*Contd.*)

rocity of dealings between the parties and do not embrace those having items on one side only though made up of debits and credits.

An account, under which one party has merely received and paid moneys on account of the other, is not a mutual account properly so-called. Each party must receive and pay on account of the other.

A shifting balance, sometimes in favour of one side, sometimes in favour of the other, is a test of mutuality but its absence is not conclusive proof against mutuality.

The mere circumstance that, on one solitary occasion there was a sum to the credit of the defendants in the books of one plaintiffs, does not make the account, between the parties, a mutual account in which there have been reciprocal demands between the parties. 6 (M H C R 142 and 17 Mad 293=4 M L J 140 Ref: 18 Beav.575 (579); 52 E R 225; 23 L J Ch 657: 18 Jur 763; 2 Phillips 7: 8; 3 Drewry 183 (192) 61 E R 873 (876) 2 Y and C. C. C 620; 9 Harg 471; 68 E R 596: 79 N Y II 35, Am Rep 490 Ref: 2 Ind Jur N S 241; 3 All 523;5 Cal 759=6 C L R 112; 6 Bom 134 Ref: 5Cal 759=6 C L R II2, Fol.) **Ram Pershad v Harbans Singh 6 C L J 158.**

Notes:—Fol: 32 All 11=6 A L J 921=4 Ind Cas 201.

5—Suit for—Procedure—Principal and Agent.

In a suit for accounts all that is necessary for the plaintiff to show, to entitle him to a decree, is that the defendant is a person bound to account. When this is established, the Court ought to fix a date for the furnishing of the accounts under S. 215 A C P Code, and order accounts to be taken. The law does not impose any duty on a plaintiff, who calls on his agent to account, first to satisfy the Court that there is, or ought to have been some surplus in the hands of the agent. A W N (1883), 218, Refd.) **Ram Das v Bhagwat Das A W N (1905), 1.**

5A—An account to be a settled account need not be signed, provided it is submitted to the party sought to be made liable on it and he has by words or conduct acquiesced in its correctness. **Haji Abdul v Haji Bibee. 7 Bom L R 151.**

6—Accounts—Accounts settled—Omission of plaintiff to party for re-opening of accounts on the basis of fraud—Plea of defendants that no accounts were rendered—Finding that plaintiff accepted payments after hearing accounts read—Whether amounts to a finding that accounts were.

A finding, in a suit for settlement of accounts, that plaintiff accepted payments after hearing accounts read, is not finding that accounts were settled between the parties.

Where the defendant, in such a suit, admits that he had not rendered any accounts to the plaintiff and was not liable to do so, the Court should presume that there was no settlement of accounts, and plaintiff's suit is not liable to dismissal on the ground that he did not pray in his plaint for re-opening of accounts on the ground of error or fraud. **Pattath Manakkal Narayanan v Manakkal Narayanan. 8 M L T 424=7 Ind Cas 853**

7—Mode of taking.

In orders relating to the taking of accounts it is irregular to direct the amounts to be taken, irrespective of the plea limitation. **Asghar Ali v Kurshed Ali. 3 Bom L R 576= 24 All 27.**

8—Account suit for—Suit for accounts against executor—Accounts on the footing of wilful default.

In an action against executor for accounts, it is not necessary, when making a reference to the Commissioner to take accounts, to give leave to the plaintiff to make an application to have accounts taken on the footing of wilful default pending the reference.

Modern practice allows of an order charging wilful default being made at any time during the continuance of the action on a proper case being shown. **Ayshabai v Ebrahim Haji Jacob. 10 Bom L R 117=32 Bom 364.**

9—Settled accounts—Error—Re-opening—Surcharge and falsification—General words of release—What passes.

B and S, partners, had the partnership accounts strictly adjusted, and Rs. 39,465-7-0 was found due to B. By a deed of assignment, B, in consideration of Rs. 34,000, assigned and released his share in the firm to S. By common mistake, Government promissory notes for Rs. 7,000 were omitted from the accounts. On discovery of the mistake, B sued for a share of the notes,

Account settled-(*Concld.*)

Held, either the whole account may be re-opened, or leave may be given to B to surcharge and falsify. The latter is the more proper course on the facts of this case.

General words of release in a deed can only operate to pass what the parties had in contemplation, and not something with which they had no intention of dealing. (5 M I A 372, 9 Beav. 503, 9 Ch D 547, Ref: 4 H L 610, 14 Ch D 829 Fol. **Baney Madhub Mullick v Subal Chunder Law.** **11 C W N 776**

10—Account settled—Suit on—Account not signed—Limitation.

An account settled must be signed by the debtor, and the creditor has three years from the date of the debtor's signature.

Chinnasawmi Naidu v Venkatasami Naidu. **7 M L T 372=6 Ind Cas 719.**

Accounts Settled.—Accounts settled—Hypothecation bond for balance due—Obligor preventing registration thereof—Suit on accounts stated—See **11 All 13=A W N 1888, 280.**

Account settled but not signed.

See Limitation Act Ss. 2, 19, 20.
„ Limitation Act Art 64.

Account Stated.

See (1) Accounts.
(2) Contract Act (IX of 1872,) S 25.
(3) Limitation Act (1908) S 19. and Sch II, 62.
(4) Pleadings.

Account stated—See Limitation Act, (1908) S. 19.

1.—Account stated—Limitation Act, sch ii art. 64.

When account shewing reciprocal demands between two parties is made up, a balance is struck, and the debtor signs an acknowledgment that the balance is due, there is an account stated within the meaning of art. 64 schedule ii of the Indian Limitation Act which evidences a new contract and upon which a suit may be brought. **Musammat Jhapkan v Ram Dayal.** **7 O C 166**

2.—Suit on account stated—Hypothecation bond for the amount due—Obligor presenting registration of bound denying execution.

The plaintiff sued (i) for registration of a hypothecation—bond executed by the defendant; (ii) in the alternative, for recovery of the amount of the bond upon an account stated. The defendant denied execution of the bond, and that she had any dealings or stated any account with the plaintiff. The Courts below disallowed the first claim as barred by limitation, and disallowed the second on the ground that the bond had effected a novation of the contract implied by the statement of accounts :—*Held*, that this decision was wrong, and that the plaintiff was entitled to sue upon the account stated. 4 All 30 Dist. **Kiam-ud-din.** **11 All, 13=8 W N 280.**

Account stated-(*Contd.*)

3.—Cause of action—Evidence of the existing debt—Fresh contract interest—Damdupat.

In June 1883, the plaintiff's father advanced a loan to the defendant at compound interest. The account of this debt with interest was adjusted and signed from time to time. In June 1893, it was adjusted and signed, the amount found due being Rs. 28-8-0. In February 1896, the plaintiff sued to recover this amount. *Held*, that the account (ruzukhata) was merely an acknowledgment of the debt and of the correctness of the calculation of interest upon it. *Held*, also, that the plaintiff was not entitled to treat the amount so found due as principal and to claim interest upon it. The debt to be sued on was the amount originally advanced, and the interest recoverable was limited by that amount according to the rule of damdupat. By English law an account stated could be sued on as implying a promise to pay. Formerly this was the rule also in Bombay (as shown by the earlier cases), where the account was signed. If, however, it was not signed, it could not be sued on as a new contract. The Indian Limitation Act required an acknowledgment or admission of a debt to be signed; and an admission not made in the manner prescribed by law (i. e. signed) for the purpose of preventing a debt from becoming barred does not imply a promise to pay it if it should become barred. According, however, to the later authorities, an account stated or adjusted (ruzukhata) cannot be sued on as a fresh contract. The suit must be brought in respect of the original transaction, and the subsequent stated or adjusted accounts are only evidence of the debt arising from them, and serve to prevent the operation of the Act of the Limitation. **Shankar v Mukta.** **22 Bom 513.**

Account stated-(*Contd.*)

Notes.—Fol: 23 All 502. Con: 26 Mad 186; 12 M L J 441 Dist: 24 Bom 394, 25 Bom 387. Ref: 32 Mad 284; 19 M L J 372.

4.—C. P. C. O. 2 r. 2 (1882 : S. 43)—Cause of action—Account stated—Mortgage transaction.

The defendant traded in Zanzibar as the agent of one Khimji, who owned five shops within the German jurisdiction. To release from attachment these shops, the defendant obtained from the plaintiff a sum of Rs. 7,000 out of which he applied Rs. 5,859 in discharge of the attachment, and returned the balance to the plaintiff. As a security for the repayment of Rs. 5,869, the defendant became personally responsible for the amount, and as part of the same transaction, he got a mortgage in his own favour from Khimji of the five shops and in turn sub-mortgaged them to the plaintiff. As a result of these transactions, the plaintiff debited Rs. 2,753 in the general account which was in the name of the defendant. The plaintiff then brought Suit No. 193 of 1899 against the defendant to recover the balance due on this general account; and a few days later he brought another Suit No. 196 of 1899 for the purpose of enforcing certain rights under the sub-mortgage. The first suit was decided in the plaintiff's favour, but the second was thrown out on the ground that it was barred under Section 43 of the Civil Procedure Code.

Held, that the second suit was not barred by Section 43 of the Civil Procedure Code, since the two claims were not in respect of the same cause of action. The cause of action in the earlier suit was an adjusted account, in respect of the transaction arising out of the mortgage; and the mortgage constituted a cause of action in itself in the second.

An account stated respecting a debt constitutes a new and distinct cause of action, the consideration being the ascertaining of the previously uncertain state of the transaction between the parties, while a promise to pay is implied by the admission of the balance.

Hansraj v Lalji. **6 Bom L R 454= 28 Bom 447.**

5—Acknowledgment—Limitation Act, s. 19 & Art. 64 of schedule II—Promise to pay—Account stated.

C. C. J.

Account stated-(*Concld.*)

A bare acknowledgment under s. 19 of the Limitation Act, does not imply a promise to pay on which a right of suit could be based.

An account so acknowledged is not an account stated within the meaning of article 65 of schedule II of the Limitation Act. 1 Bom 590 . 2 Bom 230 ; 13 Moo I A 37 ; 6 Bom 683 ; 8 Bom 405 ; 9 Bom 516 , 7 Bom 414; 15 All 1 & 10 Cal 284, referred to. **Beohar Raghubir Singh** through the Courts of Wards **v Udechand Agarwal 11 C P L R 65.**

6—Limitation Act s. 19—Acknowledgment of debt—Stamp duty.

The mere fact of a document being an acknowledgment of debt within the meaning of s. 19 would not make it liable to a stamp duty, under Sch I Art 1 of Act 1, of 1879. It should be intended to supply evidence of a debt.

Ambica Dat v Nityanund Singh. 30 Cal 687.

7—Guardians & Wards Act, VII of 1890—Minor—Guardian—Debt—Acknowledgment of liability—Limitation of time]

A guardian appointed under the Guardians and Wards Act can sign an acknowledgment of liability in respect of, or pay part of the principal of a debt so as to extend the period of limitation against his ward in accordance with ss. 19 & 20 Limitation Act, provided it be shown in each case that the Guardian's act was for the protection or benefit of the ward's property.

Annapagauda v. Sangadigyapa. 26 Bom 221; See 20 Bom 61, 17 All 198.

Account stated or adjusted (ruzu-khata).

See 1 Account Stated
2 Limitation Act S 19.
3 Mortgage—Accounts.
4 Limitation Act Art 64.

Account, suit for.

See 1 Bengal Rent Act (VIII of 1869), s. 30.
2 Costs.
3 Dekhan Agriculturists Relief Act. s. 15 D.
4 Guardian and Wards Act s 41.
5 Mortgage—Accounts.
6 Principal & Agent.

Account suit for-(*Contd.*)

6 Partnership—Suits Respecting Partnership.
7 Plaint—Form and Contents of Plaint—Frame of suits Generally.
8 Small Cause Court, Mofusil—Jurisdiction—Account, Suit for.
9 Valuation of Suit—Suits.

Account, suit for

(1) Liability to account (1)
(2) Lumberdar (2-3)
(3) Mahomedan widow in possession for dower. (4)
(4) Mother appointed administratrix of minor son (5)
(5) Right to an account—Person with title barred by lapse of time (6)
(6) Landlord and Tenant (7)
(7) Principal and Agent (8-19)
(8) Refusal to account (20-21)
(9) Right to Re open settled account (22-26)
(10) Running account for portion of which hundis are given(27)
(11) Necessity to go into accounts in suits for profits (28-84)
(12) General Cases. (85-88)

(1) LIABILITY TO ACCOUNT.

1—Liability to account—Administrator General as Executor of the surviving trustee of religious endowments.

An account was decreed against the Administrator General, who had been appointed the executor of the last surviving trustee under the will of the founder of a religious institution.

Thacoor Dass Sett v Hogg. Cor 68

(2) LUMBERDAR.

2.—Lumberdar—Account of rents uncollected.

Held, that a lumerdar is ordinarily bound to account for rents not collected if he does not exercise his power of distraint with due diligence. **Sees Ram v Chait Ram. 2 Agra 266.**

3—Account of rents uncollected.

Held, that a lumberdar is not liable for the rent which he, without any wilful default on his part, has never received, if he shows that he has done his duty in endeavouring to collect the same.

Enayet Hossein v Gholam Ally. 2 Agra 276.

Notes:—Ref: 12 All 301 F B.

Account suit for-(*Contd.*)

(3) MAHOMEDAN WIDOW IN POSSESSION FOR DOWER

4—Mahomedan widow in possession for dower—Suit not framed for an account.

In a suit by the only brother and heir-at-law of a Mahomedan of the Shiah sect, claiming the whole of the deceased's estate, and for mesne profits, the issues raised by the pleadings were, first, whether a marriage had taken place between the deceased and the party in possession, who claimed to be his widow, and secondly, the validity of a deed of dower executed by the deceased in her favour. The Courts in India found these issues in favour of the widow, and dismissed the suit. The Judicial Committee, in affirming the Court's decrees upon these points, held further that, although the estate of the husband was hypothecated for the dower, yet as the heir-at-law would be entitled to the residue after satisfying the widow's claim, he was by right entitled to an account, but as the plaint was so framed as not to admit of an account being taken, the appeal was affirmed, without prejudice to a suit being brought for administration of the deceased's estate upon the footing of the marriage and deed of dower being admitted in the suit. **Ameeroonnissa v Moradonnissa. 6 Moore's I A 211.**

(4) MOTHER APPOINTED ADMINISTRATRIX OF MINOR SON.

5—A mother appointed under Sec. 6 of Act XX of 1864 administratrix of her minor son's estate is not bound, as is a curator appointed under Sec. 9, to present accounts. After the minor's death the only way in which she can be called to account is by a suit instituted by a person interested. **Narmadabai. P J (1883) 308= I L R 8 Bom 14.**

(5)RIGHT TO AN ACCOUNT-PERSON WITH TITLE BARRED BY LAPSE OF TIME.

6—Right to an account—Person with title barred by lapse of time—Hereditary Office, administration of trusts of.

The Plaintiff brought a suit to establish his right to and for possession of the hereditary office of dharmakarta of a pagoda and to remove the defendant, but it was held that his title was extinguished by lapse of time. *Held* that plaintiff, having no longer any title to the property,

Account suit for-(*Contd*)

was not in a position to treat defendant as a trespasser and to call upon him for an account of the past administration of the trust upon that footing; and further, that the suit being substantially one to remove the defendant from the trust and establish plaintiff's title to the hereditary office, or on failure of this, to secure the appointment of a fit and proper person to fill defendant's office, the account was only prayed for on that understanding, and, therefore, the plaintiff was not entitled to call for an account of the past administration of the trust, as a person interested in the religious trust. **Manally Chenna Kesavaraya v Vaidelinga. 1 Mad 343.**

(6) LANDLORD AND TENANT.

7—Tenancy—Advanced set off against the account of rent due—Suit for rent—Limitation Act (XV of 1877) arts. 85, 89 sch. II—Form of decree.

The plaintiffs executed a lease in favour of the defendant No. for nine years. An annual rent was fixed payable by instalments. The defendant as instructed by the plaintiffs, paid on their behalf from time to time Government revenue, cesses, expenses of litigation etc. The defendant used to set off those sums against the rent due to plaintiffs under the lease. The plaintiffs instituted this suit for an account against the defendants after the lease had expired:—Held that the suit for an account was not maintainable, the lease created between the parties the relationship of landlord and tenant and the only relief which the plaintiffs could not ask is a decree for rent if any still remains due. **Bhekdhari Lal v Badhsingh Dudharia. 27 Cal 663.**

(7) PRINCIPAL AND AGENT.

8—Account—Agent—Civil Procedure Code, Act X of 1877 Sections 394 and 395.

Procedure to be observed in taking accounts discussed. **Annoda Persad Roy v Dwarka Nath Gangopadhya. 6 Cal 754= 8 C L R 321.**

9—Sch II Art. 85—Suit for balance on running account.

When an account between a principal and his agent shows what balance is due from either party at different times, but is never finally settled, it is a running account, and the limitation begins to run from the date of its being closed under Art 85, Limitation Act. **Prem Kaur v Mohan Lal. 198 P L R 1909.**

Account suit for-(*Contd.*)

10—Arts 89, 116, 132—Contract of service in writing registered-Principal and agent-Accounts, suit for.

Art 89 of Sch II of the Limitation Act expressly applies to the case of a principal suing his agent for an account, whilst Art. 116 applies to a suit 'for compensation for the breach of a contract in writing registered'. To ascertain which article of the schedule applies, it is necessary to see what is the relief which the plaintiff claims. The expression "moveable property" in Art 89 of Sch. II of the Limitation Act includes money. 27 All 27; 8 C W N 113: 1 C L J 147: 1 C L J 232. A suit not merely for an account, but also to enforce in the plaintiff's favour the charge created to secure the moneys which might be found due from the agent to his principal on his account, falls within Art. 132 of the 2nd Schedule of the Limitation Act, and the period of limitation is twelve years from the time when the money sued for becomes due. **Hafezuddin Mandal v. Jadu Nath Saha. 7 C L J 279=35 Cal 298 =12 C W N 820.**

11.—Arts 89, 120.—Suit for accounts by Zemindar against naib—Principal agent. A suit by a principal against his agent for an account and for money that may be found due upon such account being taken is governed by Art. 89 Sch II of the Limitation Act. **Jogendra Nath Roy v Deb Nath Chatterjee. 8 C W N 113.**

Notes:—Fol: 32 Cal 719=1 C L J 232; 35 Cal 298=32 C W N 820=7 C L J 279= 14 C W N 121.

12—Principal's suit for accounts — Distinction between a decree for an account and a decree made upon the hearing—Costs.—

A principal brought a suit against an agent, who was employed as a dewan for drawing and expending the money of the principal, alleging that the agent has drawn more than he had spent for him and the balance was misappropriated by the agent. He also claimed any other

Account suit for—(*Contd.*)

sum which might be found payable to him The agent denied having received any money and also his liability to an account thereunder The court found that the relation of agency subsisted between the parties The Appellate Court dismissed the suit on the ground that though an attempt has been made to prove a balance due, still from the evidence adduced at the hearing, it was impossible to decide, how much of the principal's money was unaccounted for:—*Held*, that such a suit was essentially a suit for an account and the Lower Courts should have ordered an account to be taken of the defendant's dealings with plaintiff's money. This was without any expression of opinion that, in a suit for an account, an issue may not be raised, at the outset, so clearly as to be ready for decision. But the general rule being the other way, this suit was an example of it. **Hurrinath Rai v. Krishna Kumar Bakshi.14 Calc 147=L R. 13 I A 123**

Notes:—Dist 32 Cal 719=1 C L J 232: 20 Mad 418: 13 C W N 212 Fol. 1 A L J 722 Ref: 27 All 371=(1905) W N 3: 6 C L J 580: 12 C W N 28.

13—Form of suit for account—Procedure on taking accounts—Civil Procedure Code (Act X of 1877), ss. 250, 395, and 396, sch. IV, form 157—Form of keeping accounts of joint property in mofussil—

In a suit for an account by a principal against his agent, the plaintiff should ask in his plaint that a proper account may be taken. If the defendant is found liable to render such account for a certain period, the Court should make an interlocutory decree declaring that he is so liable, and direct him to file an account in Court within a fixed period. This decree may be enforced under s. 260 of the Civil Procedure Code. After an account has been filed, the plaintiff should be allowed reasonable time to examine it. If the objections are numerous, the procedure prescribed by ss. 394 and 395 and form 157 of Sch IV of the Code should be followed. When the accounts have been taken, the court must determine the amount due, and the final decree should be for the payment of this amount and also, if necessary, for the delivery of any papers, vouchers, or other documents which have come into the hands of the agent in the course of his employment. Form of keeping accounts of joint property in the mofussil considered.

Degamber Mozumdar v. Kallynath Roy, 7 Cal 654=9 C L R 265.

Account suit for—(*Contd.*)

14-C P C O. 22, r 4, S. 107 (2), O, 22r.11 (1882 Ss. 368, 582)—Limitation Act. Art.175 C.—Death of respondent—Legal representative necessary for prosecution of appeal-Application for substitution of legal representative made within six months of obtaining probate of deceased respondent's will, but more than six months after his death—Abatement of appeal—Sufficient cause.

In a suit which was in substance one for taking the accounts and winding up the affairs of a partnership which had subsisted between the plaintiff and several defendants to that suit, a final decree was made binding the plaintiff and some of the defendants to contribute in certain proportion a sum of money of which a portion was directed to be paid to another defendant A. Pending an appeal before the High Court, preferred by some of the former, A (respondent) died leaving a will. About four months after A's death A's son obtained probate of the will. The appellants applied for substituting the name of A's son for A within six months of his obtaining the probate, but more than six months after A's death. *Held*, that the appeal could not have proceeded in the absence of a representative of A, and no sufficient cause having been shown for not applying for substitution within six months of A's death, the appeal had abated under Ss. 368 and 582, C. P. C., and Art. 175 C. of Sch. II of the Limitation Act. 14 M. L. J. 147. **Raj Chunder Sen v. Gangadar Seal 1 A L J 145=31 Cal 487=8 C W N 442=31 I A 71 P C=14 M L J 147.**

Notes.—Ref: 11 C W N 698 ; 5 C L J 310.

15—Fraud or specific error in account, Allegation of.—M sued for an account of all moneys received and paid on his behalf by T, deceased (represented by his widow), and F as his agent from 1st August 1859 to 30th April 1865. It was alleged in the plaint that M "left India in 1858, and has since resided in Scotland; that at the time he left he was, and still is, possessed of extensive property in the Province of Bengal, chiefly landed property;" that T and afterwards T and F were his agents and managers. In his written statement, M stated that "in the month of June 1861, the deceased rendered an account to the plaintiff

Account suit for-(*Contd.*)

showing that all moneys due to him by the plaintiff in respect of his salary and commissions up to the 31 st January 1861, being the whole of deceased's claim against him up to that date under their above mentioned arrangements, had been duly paid by the plaintiff. In the month of April 1865, the deceased transmitted to the plaintiff the agency accounts of himself and his firm with the plaintiff in continuation of the accounts rendered by him as mentioned in the preceding paragraph brought down to the end of February 1865; and again in May 1865, the deceased transmitted the continuation of the said account brought down to the 30th April preceding, being the date of the termination of the agency. The said accounts rendered have been examined by the plaintiff, who verily believes that the true balance now due to him thereon exceeds Rs: 1,00,000. without including interest." There was no allegation in the plaint, written statement or opening of counsel, of fraud or specific error. *Held* that M, in his plaint and written statement had not disclosed any cause of action.

Mackintosh v. **Temple 2 Ind. Jur N S 333**

16—Suit against gomasta—Duty of Court to look into accounts.

In a suit against a gomasta to obtain accounts of moneys which had come into his hands, it was held that it was not enough for the Lower Courts to make a decree ordering the defendant to render nikash papers to the plaintiff; it was the business of the Court to have these papers brought before it and examined, and to determine whether they were correct and fair accounts between the parties. **Shushee Shekhur Audhikaree v. Suleem Biswas 22 W R 191.**

17—Decree for account against agent.—

Where a decree requires an agent to render accounts, he can only discharge himself by accounting for all the moneys that have come into his hands,and it is always open to the decree-holder to show that this has not been done. **Woomanath Roy Chowdhry v. Sreenath Singh 15 W R 260.**

18—Principal and agent—Specific sums of money credited by agent to himself, suit for, if one "for account"—Cognisability by Provincial Small Cause Courts, Act IX of 1881, s. 31.—

Account suit for-(*Contd.*)

Where plaintiff sued for specific items of money due by his agent, on account of moneys, with which the agent wrongfully credited himself, and an objection was raised that it was a 'suit for an account' and as such not cognisable under art. 31 of Act IX of 1887. *Held*, that it was not a suit for "an account" and was cognisable by the Court of Small Causes, **Sankara Reddi v. Errama Reddi 19 M L J 113.**

19—Execution proceedings transferred to a Collector—Court's power under S. 324 A—Collector's duties.

A Collector acting under S. 320 of Civil Procedure Code has power to include on the debit side only such charges as can be incurred under the provisions of the chapter; and the Court is perfectly justified under S. 324 A in regarding as at its disposal, the balance which is left after such charges have been deducted; and if there be any charges which have been not so incurred, but which have been inserted in the accounts, such charges, being improper, cannotiaffect or restrict the disposing power of the Court over the balance. The power of the Court as to the application of the balance is complete although the fund itself remains in the hands of Collector as trustee.

The amount of maintenance to be determined for the judgment debtor is a matter for the Court to consider and decide and one which it cannot allow the Talukdari Settlement officer (acting as a Collector) to decide.

The Collector, like an agent, though bound under S. 324 A to render accounts, cannot be compelled to give up the account books into Court nor does the section require him to pay the balance into Court. **Rupali v. Kalyansing: Rupali v. Gambhirsingji (6 Bom L R 825).**

(8) REFUSAL TO ACCOUNT

20—Refusal to account—Destruction of account books—Where a defendant refused to render accounts, and there was evidence of spoliation of the banking books, the Court charged him with the principal sum for which he was accountable. with interest at 12 *per cent per mensem* in lieu of the profits he failed to account for.

Rampershad Tewarry v. **Sheo Churn Doss; Thookra v. Rampershad Tewarry 10 Moore's I. A., 490.**

Account suit for-(*Contd.*)

21—Limitation Act Arts 85 116—Account, suit for, limitation—Demand-Breach-Limitation Act (XV of 1877), Sch. II. Arts. 89, 115, 116.

When there is a contract to render accounts year by year, Art, 116 of the Limitation Act applies if the contract is registered, and Art. 115 if it is unregistered.

Neglect to comply with the demand to render accounts is tantamount to a refusal within the meaning of Art. 89.

Where the contract was to render accounts year by year and there had been successive demands and breaches at the end of every year, and plaintiff brought a suit for accounts within three years of the last breach.

Held, whether Art, 89 or Art. 115 applied, he was entitled to accounts for one year only. I C L J 211, Fol, 3 L R 446, Relied on. **Easin Sarkar v Baroda Kishore Acharyya Cnowdhury 11 C L J 43=5 Ind Cas 186.**

(9) RIGHT TO REOPEN SETTLED ACCOUNT

22-Right to re-open settled account-Principles of Court of Equity in re-opening accounts—Principles which regulate a Court of Equity in opening stated and settled accounts—Accounts of long standing and great complication of a mercantile firm at Calcutta one of the partners of which afterwards acted as agent in England, involving charges for agency and partnership transactions were mutually agreed to be investigated and closed. After long negotiations and discussion respecting some of the charges, an agreement was come to, the parties agreeing to strike the general balance at a given sum, reserving one item of the account amounting to a considerable sum, for future investigation This reserved item was subsequently settled by the acceptance of a bill of exchange for a lesser amount, as such reserved-item, if re-opened would have disarranged the settled general account. The bill of exchange was dishonoured and an action brought to recover the amount. A bill was then filed for an injunction for the cancelment of the bill of exchange, and praying that the accounts so settled might be opened. The Supreme Court at Calcutta held that the reserved item being left open was evidence that the account was not finally closed, and decreed the accounts to be opened, referring the cause to the Master On appeal, held by the Judicial Committee (reversing such decree, and dismissing the bill with costs) that the transaction amounted to an adjustment of the general account between the parties, subject to the reserved item which was subsequently settled, and that the accounts so settled and closed could not, in the absence of fraud be re-opened **Mc. Keller v. Wallace 5 Moore's I A 272**

Account suit for-(*Contd.*)

23—Examination of accounts, waiver of—settlement of account—No fraud or undue influence used in settlement—Promissory note for the amount found due—Re-opening of accounts, not allowed.

Where two persons have mutual dealings and accounts and one of them of his own free-will and accord and without any fraud practised or undue influence exerted by the other waives his right to an examination of the accounts for the purpose of ascertaining the balance due and agrees to treat a gross sum as due from him and executes a promissory note for the amount, the promissory note must be treated either as the result of a settled account or as a settlement by compromise, and in either case it cannot be re-opened.(5 M I A 395 Fol) **Magniram Khupchand v Laxminarayan Rampratap 10 Bom L R 281=32 Bom 353**

24—Hindu Law—Partition-Account-Account for partition nature of-Mitakshara joint family—Manager's liability to account—Settled account when to be reopened or impeached-Right to correct account-Pleadings. When accounts have to be taken with a view to a partition of joint family properties, the account which has to be taken of the entire family property in the hands of the different members is mainly an enquiry into the existing assets: the head of the family cannot, in general be called upon to defend the propriety of the past transactions of the family.

Although the Court is always reluctant to re-open account which has been settled with deliberation and with tolerable fairness, relief will be granted where fraud or mistake is established; and it does not matter whether the error in the accounting occurred by accident or design: nor is it necessary that the error or mistake should be mutual If an item has been omitted in the account by mistake it may be recovered.

Account suit for-(*Contd.*)

A settled account is only *prima facie* evidence of its correctness; it may be impeached by proof of unfairness or mistake in law or in fact ,and if it be confined to particular items of account it concludes nothing in relation to other items not stated in it. But the right to correct an account is confined to cases in which no element of estoppel has intervened or where there is no obligatory agreement between the parties as upon settlement and mutual compromises.

Ordinarily, where a party seeks to open a settled account, there must be some direct, distinct and specific averment of errors to entitle the party to open the accounts, but where no objection was taken by the defendant to the frame of the suit and even after the preliminary question of the liability of the defendant to render an account had been decided in favour of the plaintiff, and the accounts had been elaborately examined without any objection as to the course adopted being taken, the Court will not allow an objection of this character to prevail when it is not suggested that the defendant has been in any way prejudiced by the omission of the plaintiff to specify the errors in the plaint.

Bhowani Prasad Shaha v Jugger-nath Shaha 13 C W N 309= 9 C L J 133=3 Ind Cas 241.

24 A—C P C S. 2 (2) (1882 S. 2)—Decree—Settled accounts, order directing reopening of.

Plaintiff, a solicitor, advanced money to a client on a mortgage bond and three further charges. The consideration for the third further charge was not paid in cash, but was made up of (1) amounts due to the plaintiff on several promissory notes in the plaintiff's favour (2) certain promissory notes executed by the client in favor of a third party, which the plaintiff is said to have "taken up" (3) balance of amount due as interest on the mortgage and 2 further charges and (4) a certain amount stated to have been found due to the plaintiff as costs for acting for him in various suits, upon a settlement made of amounts due under various taxed and untaxed bills, a large remission having been allowed in consideration of all the bills not being taxed. In a suit by the plaintiff against the heirs of his deceased client to realize the amount due on the mortgage and the three further charges, the plaintiff obtained a decree on the 1st three bonds,

Account suit for-(*Contd.*)

but the 4th bond was ordered to be reopened and it was directed that the plaintiff "do get all his bills of costs upto the 3rd August 1903 taxed by the Taxing officer of the High Court, and then refile the bills in this Court, that then a Commissioner be appointed to take accounts in the light of the observations in this case, that after the Commissioner's Report is received and the parties are heard thereon the final decree will be drawn up under s. 89 of the Transfer of Property Act. *Held*, that this order was a decree. The fact, that the Subordinate Judge intended hereafter to adjust the equities arising out of the contract, did not in any way do away with his adjudication that the contract, as it stood, was not binding on the defendants. 9 Bom 183 dist and doubted 15 Bom 155 s c L R 18 I A 6 at p 8.

Shamuldhone Dutt v Srimutty Susila Bala Debi. 12 C W N 1102=36 Cal 493= 2 Ind Cas 553.

25—Where the Court is asked to reopen accounts on the ground of fraud, at least two or three instances of particular items must be established which the Court can take as false and fraudulent. **Boo Jeenut Boo v. Sha Nagar Wallab Kanji, P J (1886), 175=11 Bom 78.**

Notes:—Ap: 16 Mad 311. Fol: 17 Bom 755. Ref: 14 Bom 279; 16 Bom 186; 21 Bom 424 F B; 7 Bom L R 836.

26—Settled accounts — Suit for accounts—Pleading—Procedure.

The requisites for making an account a settled account depend on the circumstances of each case and the mode of dealing between the parties. 1 Ball and Beatty 420 at 428; L R 2 H L 1 (1867); 5 Moo I A 372; 8 Moo P C 378 (1858), referred to. If a settled account is impeached for errors, particular errors must be stated and proved and the same rule holds even when the accounts have been settled errors excepted. Where the plaintiff made no averment in his plaint that accounts had been settled but commenced action on the footing that no accounts had been rendered. *Held*—That the plaintiff could not after the suit had been tried out on that footing be allowed to convert the case into one for reopening of accounts on the ground of errors contained therein. Procedure in account suits indicated, and that adopted in the present case condemned. In a suit for account, if liabi-

Account suit for-(*Contd.*)

lity to account is denied by the defendant the question of accountability is to be tried first It is only after an adverse decision against the defendant upon this question that he may be called upon to render an account (LR 14 Cal 147(1886)

referred to **Mahesh Chandra Bosu v Radha Kishore Bhattacharjee 12 C W N 28**

(10) RUNNING ACCOUNT FOR PORTION OF WHICH HUNDIS ARE GIVEN

27—Running account for portion of which hundis are given—Obligation to sue on hundis —

Where there is a running account between the parties, a portion of which relates to an amount due upon dishonoured hundis plaintiff is not bound to sue upon the hundis but may base his claim upon the running account

Ram Chand v. Punna Lal 3 N W 323

(11) NECESSITY TO GO INTO ACCOUNTS FOR PROFITS

28—Necessity to go into accounts in suit for profits,—

The mere fact that in a suit for profits by a co-sharer it is necessary to go into the accounts will not alter the character of the suit and make it one for settlement of accounts **Dabee Deen v Doorga Pershad 3 N W 49.**

Notes —Ref 16 All 28 F B

28A — Usufructuary mortgage constituting mortgagee Agent and Receiver — Mortgagor's rights to demand accounts—Suit for redemption — Construction of deeds — Amount for which mortgagee liable to account —

Where a usufructuary mortgage-deed constitutes the mortgagee the Agent and Receiver of the mortgagor the mortgagor is entitled to call upon the mortgagee to furnish accounts of receipts and payments. The amount for which the mortgagee is liable to render an account is not the gross rental of the lands but only such amount as was actually received by him or on his behalf and such sums, if any, as might have been received by him but for his own neglect or fault

Banarsi Prasad v Ram Narain 7 C W N 514 =25 All 287=30 I A 66 (P C)

29—Plaintiff in possession of account papers, it may be allowed to sue—Relief in equity to be granted only to honest plaintiff—

Account suit for-(*Contd.*)

A plaintiff who is in possession of the account papers, cannot be allowed to sue the defendants for accounts unless he produces the papers in Court with a succinct of statement what they contain and what the balance is whether in his favour or against him Until he does that it is impossible to call upon a defendant to answer a charge of misappropriation of money or being liable to the estate on the accounts A person who seeks equity must do equity (19 W R 14 Fol)

Upendra Kishore Rai Chaudhury v Ramtara Debya Chaudhurani 13 C W N 696=4 Ind Cas 542

30—Oudh Rent Act s 108 cl (15)—All co sharers necessary parties to suit—Mis joinder of parties—Act XIV of 1882 s 28 —

The plaintiffs being sharers in a village brought a suit against all the other sharers for settlement of accounts —*Held* that there was no mis joinder of parties—*Held* further that in a suit for settlement of accounts under s. 108 cl. (15) Oudh Rent Act all the co sharers in the estate (whether it be *mahal thol patti* or other subdivision of a *mahal*) to which the suit relates and in respect of which accounts are to be settled are necessary parties to the suit (Ref 7 O C 84 13 O C 251). **Thakur Baksh v Bhagwan Din 1 O C 215**

31-C P C. s 372 Partition suit Preliminary decree, death after—Right of substitution accruing from day to day—Limitation

Where a decree was made declaring that a party was entitled to a share in a certain property and *directed the taking of accounts* of the property and the said party applied to have the death of certain defendant who had died after the decree to be recorded and the names of his heirs substituted before the final decree *Held*, —That Sec 372 of the Civil Procedure Code applied and that the right of the petitioner to apply for such substitution accrued from day to day and was not barred under Sec 178 of the Limitation Act. The ratio in such cases is not whether the decree directs a partition or a taking of accounts, but whether there is a pending suit I L R 5 Cal 731 (1880), I L R 8 Cal 420 (1882), 3 C W N 757 (1899), followed.

Surendra Keshub Roy v Khetter Krista Mitter, 7 C W N 817=30 Cal 699.

Account suit for-(*Contd.*)

32—What is an open and current account—With reciprocal demands — Indian Limitation Act, IX of 1908, art 85 —

Held, that it is an open mutual and current account with the reciprocal demands where one party supplies the other with capital by Hundies, and the latter in turn supplies the former with goods, and there is sometimes a balance against the one and sometimes against the other and the formal balance struck within three years from the close of the account between them is a balance contemplated under art 85 of Limitation Act. The fact that the parties used to as certain every year a balance in order to see how the account stood between them is immaterial and does not alter the nature of the account

(11 Bom 134, Fol.) **Imrat Lal v Lal Chand, 99 P W R 1910=75 P R 1910= 7 Ind Cas 715=124 P L R 1910**

33—Debtor and creditor—Only relationship —Right to sue for account —

The mere relationship of creditor and debtor is not enough to enable the creditor to sue the debtor for an account. (Ref 186 P R 1882)

Gurditta v Azam, 122 P R 1881

34—Court fees-Accounts, suit for—Property laid in Munsiff's court as originally valued—Petition to increase valuation after finding by commissioner—Valuation increased to amount exceeding court's jurisdiction—Return of plaint for presentation to the proper court — Material irregularity —

A suit for account was filed in a Munsif's court The Munsif appointed a commissioner to take an account, and it was found that the plaintiff would be entitled to a larger sum Plaintiff amended the plaint with the leave of the court, and the valuation of the suit was accordingly increased The Munsif returned the plaint for presentation to the proper court *Held* that the Munsif had acted with material irregularity in permitting the valuation of the suit to be revised and that he ought to have tried the case —

Arogya Udayan v Appach Rowthan, 12 M L J 35=25 Mad 543=L D 9 C L J 367=13 C W N 493=5 M L J 360

35—Arts 123 127—Suit for partition Misjoinder—Liability of heirs of Karnavan—Receipt of assets.

Account suit for-(*Contd.*)

Where 6 divided branches of a Malabar Tarwad and a seventh divided branch sued for their shares of the property which had belonged to an eighth branch which became extinct *held*, that the suit was one for a distributive share of the property of an intestate and that Art. 123 and not Art 127 applied to the suit The Karnavan of the defendant's branch came into possession of the properties of the extinct branch and was apparently managing the same till his death on behalf of all the branches entitled to them *held*, that the defendants as his heirs were not liable to account for such properties to the plaintiffs' branches unless they came into possession of his assets or he spent any of the properties for their benefit *held* also that the six branches of the plaintiffs were entitled to institute a single suit for their six seventh share of the properties and the suit was not bad for misjoinder of cause of action **Ammu v Kunhuni Menon. 4 M L J 43**

36—Claim based on account—Arbitration

Held, that claims based on account were proper subjects for reference to arbitration or assessors **Goona Mull v Khema Mull 5 P R 1866**

Acounts suit for See Decree form of **3 W N 218**

37—Suit for balance of accounts—Evidence-Account stated—Acknowledgment—Act XV of 1877 Sch II Art 64

A mere acknowledgment signed by a debtor in the account book of his creditor showing a balance standing against the debtor on an account which is not a mutual account, is neither an account stated to which Article 64 of the II Schedule of the Limitation Act applies, nor is it evidence of a new contract which can be the basis of a suit 15 Bom 1 & 22 Bom 513 followed **Ganga Prasad v Ram Dayal 23 All 502**

38—Contract Act S 25 (3) Account Balance—Promise to pay interest—Bond—Limitation

Held that a balance of account struck by a debtor in his creditor's books, which contains a distinct promise to pay interest thereon is more than a mere acknowledgment of pre existing debt and amounts to a bond, and consequently is a good contract under S 25 (III) even if it consists

Account suit for-(*Contd.*)

of time-barred items. **Nanak Chand v Diwan Chand. 135 P W R 1910.**

39—Evidence Act s. 34—Accounts-Proof and corroboration of.

Where there are entries in plaintiff's *bahi* account book, which, according to the report of the Commissioner, is correct and regular according to village custom in the part of the country to which the parties belong and their is also the plaintiff's own statement on solemn affirmation that the account is correct, *held* that certain disputed items interested in the account should not be disallowed simply because they were not admitted by defendants and no specific evidence was adduced in regard to them, as there is no reason why such fictitious items should have been interspersed in an otherwise true account.

Hanwanta v Akbar Khan 80 P R 1910= 147 P L R 1910=117 P W R 1910

40—Accounts Suit for—Procedure—Fixing date under Civil Procedure Code, S. 215 (A)—suit for accounts—Procedure.

When once the plaintiff establishes that the defendant is his agent and that he is an accounting party, defendant ought to prove his receipts and disbursements. Where the agency is established, the Court ought to fix a date directing the defendant to furnish accounts If he fails to furnish the accounts within the time fixed, the plaintiff may take advantage of the provisions of S. 260, Civil Procedure Code. 13 I A 123 (P C) and A W N 1905, Refd to **Ragunath v Ganpatji. 1905 A W N 3=27 All 374.**

41—Taking of accounts in partnership suits—Set off.

In suits for account, as in partnership or partition suits each party however arrayed formally becomes in turn either plaintiff or defendants, although he has not claimed a set off. **Nanchand v Mussa. 6 Bom L R692.**

42—Maintability of suit for—Receiver appointing Tahsildar—Agent and sub-agent—Indian Contract Act (IX of 1872), Ss. 191 & 192.

A suit for accounts is not maintainable by the owner against *Tahsildar*, who was appointed by receiver to his agents.

Account suit for-(*Contd.*)

The *Tahsildar* (defendant) as a sub-agent under the receiver, who may be regarded as the agent of the principal (plaintiff), and, as sub-agent, he is liable to render accounts to the receiver, and not to the principal. **Jotindra Narain Acharja Chowdhury v Rajendra Kishore Das. 8 C L J 114=12 C W N 1035**

43—Mortgage held by banker against customer—payment from customer's current account-Banker's duty—Interest;

In the absence of special direction to that effect, a banker is not bound to pay off a mortgage which has against his customer from the latter's current account, and interest is properly charged upon it until the customer directs that the principal should be paid off.

Thakur Jawahir Singh v Lachman Das, 9 C W N 745 P C

44—Accounts, suit for-Valuation-Larger sum found due—Additional duty demanded-Dismissal for non-payment-Relinquishment :

In a suit for accounts, the valuation which the plaintiff puts upon his claim determines the jurisdiction of the court and the amount of court-fees. In such suit a decree may be passed for a larger amount, though the decree cannot be executed until the fee is paid for the additional amount. In a suit for accounts, on finding that a larger sum might be due than was claimed in the plaint the court insisted on the payment of additional duty in the course of the suit. The plaintiff offered to relinquish the claim and dismissed the suit for default in paying the fee :—*Held*, that the order was erroneous and that the relinquishment made in consequence of such erroneous order was not binding on the plaintiff, especially as he had not been permitted to relinquish his claim.

Sellamuthy Servagar v Ramaswami Pillai 12 M L J 66.

44A—Jurisdiction-Account suit valued at less than ten thousand rupees before Munsif—Final decree exceeding pecuniary limit—Appeal.

In a suit for accounts and recovery of papers brought before a Munsif who had pecuniary jurisdiction to try suits upto Rs. 1,000 in value, the claim for recovery of papers was valued at Rs 80 and that for accounts at Rs. 180, with a prayer

Account suit for–(*Contd.*)

that additional court-fees would be paid for any amount to be found due in excess ; after the preliminary decree the amount due was ascertained to be Rs. 8, 424 ;

Held that the Plaintiff cannot obtain a decree for a sum above Rs. 1,000 i. e. in excess of the limit of the Munsif's pecuniary jurisdiction.

That the plaintiff ought to be called upon to relinquish the excess and thus place the case formally within the pecuniary jurisdiction of the Court of his deliberate choice or the Court may in such a case remit the excess or presume the excess to be remitted. **Galap Singh v Indra Coomar Hazra 13 C W N 493.**

45—Practice—Court—Decree—No specific direction as to accounts—Decree contemplating accounts.

Direction can be given at a subsequent stage. Where there is no existing direction as to accounts in a decree , but the decree does contemplate an account (which direction ought to have been incorporated in the decree when passed), it is competent to the Court at any stage of the proceedings to direct necessary inquiries or accounts to be made or taken. **Sir Jehangir Cowsaji Jehangir v Hope Mills, Limited. 9 Bom L R 1380**

Notes:—Ref: 10 Bom L R 1057.

46—Principal and agent—Accounts—Agent's liability—Extent—Limitation:

It is the duty of an agent to be constantly ready with his accounts (1819 J & W 135) ref to: he must further be always ready to explain them and produce vouchers 6 Cal 754 and 7 Cal 627 ref to ; and not only that, but also to be constantly ready to pay the money that may be found due by him. 3 T L R 689 ref to. **Shib Chandra Roy v Chandra Narain Mukerjee. 32 Cal 719 at 725=1 C L J 232**

Notes:—Fol: 9 C L J 107 , 14 C W N 121 : 4 C L J 198 : Dist 35 Cal 298=12 C W N 820=7 C L J 279.

47—Minor—Principal and Agent—Accounts—Advances made by agent—Benefit of minor—Application of advances.

He who seeks equity must do equity.

Account suit for–(*Contd.*)

When a minor on attaining majority comes to court to have an account taken as between himself and his agent and it is found on taking that account that the agent has made certain advances to the guardian, the only person to whom he could make them as representing the minor-and this have been applied for the minor's benefit the agent ought to be allowed those advances in taking the account. A guardian cannot bind his minor by a personal covenant. **Surendra Nath Sarkar v Atul Chandra Roy 7 C L J 87= 34 Cal 892.**

48—Presumption in taking, when account cooked.

When the accounts of a party are found cooked everything should be presumed against him in taking accounts. **Sakharam v Krishnaji. 90 P J 350**

49—*Held*, that Judicial Circular of 14th March 1859, regarding a day-book as well as a ledger, was not to be too strictly construed or enforced. **Sheokurn v Khoda Baksh P R 93 of 1866.**

50.—Jurisdiction of court—Valuation of suit—Accounts, suit for—Course of appeal-Contract Act (IX of 1872), s. 253 (10) partnership—Dissolution of, by death of a partner who is member of a joint Hindu family—Limitation Act (XV of 1877) sch. II Art 106—Accounts, suit for, after dissolution of partnership—Evidence Act (I of 1872), s. 92. Evidence—Oral evidence as to contents of a document.

In a suit for accounts, where, the plaintiff has valued his claim at a sum not exceeding Rs.5,000, the appeal against the preliminary decree passed in favour of the plaintiff lies to the Divisional Court and not to the Chief Court.

Where in a case, appeal lies to the chief court, but is filed in and heard by Divisional Court, and a further appeal is filed in the Chief Court, the further appeal may be converted into a first appeal, if this course does not prejudice any of the parties.

In the case of a joint Hindu family carrying on a trading business, the ordinary rules of partnership do not apply in toto: the concern must be governed also by rules of Hindu Law, and one of such rules would be that the death of one member of the family cannot operate to dissolve

Account suit for-(*Contd.*)

the family partnership. But it is equally clear that, where a partnership is composed of certain individual members of a joint Hindu family and outsiders, the relations of the parties are governed by the ordinary law of contract and not by Hindu Law.

Some of the members of a joint Hindu family entered into a partnership. The deed did not show that the members of the family were acting on behalf of the family. It was contended that, on the death of one of the members of the family the partnership was dissolved. *Held*, that the contention was valid.

Held, also, that no extraneous evidence was admissible to prove that the members of the family were acting on behalf of the family in the concern and not in their individual capacity.

A suit for accounts after the dissolution of a partnership is governed by Art. 106 Limitation Act (1877).

Copies of documents required by s. 78 or s 86 of the Evidence Act to be certified are not admissible in evidence when they are not duly certified.

The Chief Court held that the several acknowledgments relied on by the plaintiffs did not extend the period of limitation, as they did not fall within the purview of s. 19 of the Limitation Act. 58 P R 1902 and 46 P R 1906=94 P L R 1906; 31 Cal 365 distin; 25 All 378; 21 Mad 344, ref. **Ram Pershad v. Rattan Chand. 87 P L R 1909.**

51.—Account stated—General account.

Held that where a suit on accounts stated failed because the plaintiff could not establish it, the plaintiff was not on such ground debarred from recovering such sums of money as had been advanced by him to the defendant within three years next before the institution of the suit.

Ram Prasad v. Jamna. 2 W N 93.

52.—Arts 145, 120—Suit to recover Government securities deposited by way of loan—Limitation—Debtor taking possession of the estate of his creditor as executor—Death of such executor—Appointment of new administrator—New cause of action. Art. 145, Sch. II of the Limitation Act governs the case of a deposit of Government securities, even if the transaction is considered as a *loan* of such securities and not mearly as a *deposit*. A debtor taking possession of the estate of his creditor as executor, is accountable for the amount of his debts to the estate as assets. On the appointment of a new administrator after the death of such debtor executor, a new cause of action arises rendering the estate of the said debtor executor accountable both as regards his own said debt as also regarding the general estate of the said deceased creditor remaining in his hands at the time of his death, and a suit by the new administrator to recover from the executor of the deceased debtor's estate, the property and effects of the deceased creditor—to which Art. 120, Sch. II of the Limitation Act applies—would not be barred within 6 years of the death of such debtor executor.

Kristo Kamini Dassi v. Administrator General of Bengal. 7 C W N 476.

53.—Accounts.

A suit framed as one for a settlement of accounts should not be dismissed because the plaintiff fails to prove the settlement. Evidence into the items composing the account ought to be gone into. **Kishun Pershad v Bhagwanee Din. Agra F B 47.**

Ram Sahay v. Seethoo. 1 N W P 28.

54.—Ss. 257, 258—Partnership—Suit for account only. One partner may sue another for account, during the subsistence of the partnership without asking for its dissolution, if there exist certain circumstances which excuse a departure from the general rule under which account and dissolution should be asked for together; what those circumstances may be will depend upon the facts of each case. **Raghubar Dayal v. Sheoram Das. 1 A L J 94.**

55.—Account between debtor and creditor—Special directions as to sums borrowed by an agent in collusion with creditor—Restriction of the principal's liability to those debts only which were shown to have been just—Burden of proof.

Fraud and undue influence having been found, with the result that a decree cancelled transfers executed in favour of a creditor by a talukdar whose manager had received in his name money forming the consideration for the trans-

Account suit for-(*Contd.*)

fers, an account was directed to be taken of the sums actually due and payable by the principal Directions were given for the payment not of all the money received from the creditor by the manager but only of sums (a) shown to have been lent by the creditor to the principal himself personally and of those (b) received by the manager on behalf of the principal in the course of a prudent management. The burden of proof lay on the creditor of showing that any particular advance fell within the class (b); and where the advance having been received by the manager had been partly used in payment of Government revenue, due on the estate managed by him: *held*, that the Court below had rightly presumed that the rents should have covered the revenue due; and this presumption having to be met, it was for the creditor to bring proof to overcome it.

Partap Bahadur Singh v, Chitpal Singh. 19 Cal 174=19 I A 33.

56.—Accounts—Whether bound to account for a period antecedent to his executorship—Obligation to account is continuous—Stale claim.

It is the duty of an executor when he comes of age to take the accounts of the administrator durante minoritate and the beneficiaries are entitled to call upon the executor to render an account not only for the period of his executorship but also of the period during which the estate was in charge of the administrator durante minoritate. When the administration determines by reason of the cessation of the minority of the executor, the administrator durante minoritate may be and ought to be called upon to account by the executor or other person who succeeds him in the administration, and it is the duty of the latter to get the whole of the estate of the testator into his possession, to call upon the personal representatives of his predecessor in office to render account of the estate and to recover damages, if necessary, for waste and mis-appropriation by his predecessor, and, if required, by the institution of appropriate judicial proceedings. If he fails to do so, he must be held liable to the extent to which the estate would have been benefitted if he had faithfully performed his duty.

3 Atlkyns 603.
1 Modern 175.
1 Cas. Temp. Lee 15.
1 Strobh Eq (S C) 393.

Account suit for-(*Contd.*)

3 Cranch C. C. 355; 22 Fed, Cases 456.
60 Texas 704; 1 S. W 803.
160 III 203; 43 N. E. 385.
117 Ind 139; 19 N. E. 758.
115 N. C. 415; 20 S. E. 516.
130 Alabacna 436, 16 Southern 25.

So far as an executor or administrator is concerned, his obligation to account may be treated as continuous and the person who is entitled to call for an account has the right to demand an account at every moment of the time during which the administrator acts as such; his right to demand an account runs with the duty of the administrator and may be asserted as long as it remains unperformed.

If a person entitled to an accounting delay for a great length of time, his right may be barred by the presumption that the estate has been fully administered or by the rule of equity which discountenances stale claims. This effect of the lapse of time may, however, be obviated either by the facts of the case or by the evidence shewing a subsisting right in the petitioner and a corresponding obligation on the part of the executor or administrator; for instance lapse of time may not bar an accounting delay if it is proved that there are assets in the hands of the executor or administrator, or if no account has ever been filed.

1 Bradf. N. Y. 24.
2 Curties 919.
2 Strobh Eq. (S.-C.) 27.
13 Peter 381.

Baroda Prosad Banerjee v. Gajendra Nath Banerjee. 9 C L J 383= 13 C W N 557=1 Ind Cas 289.

57.—Guardians and Wards Act S. 34—Obligations of guardian—Accounts—Majority—Summary powers of court, limits to.

The summary powers created by S. 34 of the Guardians and Wards Act cease as soon as the minority of the ward ceases. The object of that section is to give the court as representing the interest of the minor certain summary powers for the protection of his property during minority.

Nabu Behari v. Sheik Mahomed. 5 C W N 207.

Notes:—Diss: 16 M L J 286.

58.—Plaintiff's claim was on a bond, unregistered. The bond was held therefore inadmis-

Account suit for-(*Contd.*)

sible. He kept no daybook, and the amount of the bond was not brought down as a balance in any subsequent account. Roberts, J.. dismissed the suit. **Missuroo Dhera v. Bhugwan Singh, P R 81 of 1866.**

59—Account Books—Evidence.—

In a suit for balance of account, account books kept in the ordinary course of business are admissible only as corroborative and not as independent evidence of the balance claimed as due. But to let in the books as corroborative evidence, it is not essential for plaintiff to show that defendant attested or acknowledged the balance; it is sufficient for plaintiff himself, or some one else acquainted with the fact, to testify that the balance claimed was due by the defendant to plaintiff. **Mohkum Dass v. Buldeo Dass. P R 61 of 1868.**

60—Hill owned by several persons—Lease granted by some co-sharers to cut and quarry stones in the hill—Suit by remaining co-sharers for account, damages and injunction for cutting and quarrying stones, maintainability of—Action of trespass, trover as between co-sharers when maintainable.—The defendants, second party, were the plaintiff's co sharers in a hill. They granted a lease to the defendant, first party, to cut and quarry stones from the hill. Hence the suit by the plaintiff for accounts, injunction and damages for cutting and quarrying stones from the hill.

Held, that the suit was not maintainable, inasmuch as the act of the defendants did not amount to ouster of the plaintiff, the cutting and quarrying stones was the proper mode of enjoying the hill, and the hill was not affected in any appreciable degree by the act of the defendants in cutting and quarrying stones.

Mohesh Narain v Nawbut Pathak 1 C L J 437=32 Cal 837.

61—Liability to keep—Trustee of Durga liable to keed accounts:— **Miyaji v Sheik Ahmed. 18 M L J 205.**

62—Limitation Act Art 89-Account suit for—Principal and agent-Death of principal-Agency termitation of-Indian Contract Act, Sec 201—Limitation Act, Sch II, Art 89-Period from which limitation runs. The defendant was a *gomasta* of the plaintiff's father, and after his death in 1901 of the plaintiffs. He was dismissed in 1902. The plaintiffs instituted a suit for accounts from 1892 to 1902, in 1905.

Held, that the suit for accounts up to the time of the death of the plaintiffs' father was barred by Art 89. Sch. II of the Limitation Act. That as regards agency under the plaintiff's father, limitation began to run from the date of the plaintiffs' father's death. 1 C L J 232=39 Cal 719 Fol. **Mohendra Nath Ghosh v Jadu Nath Mullik 9 C L J 107=8 Ind Cas 684.**

63—Suit for accounts—Plaintiff—Settled account—Plaint—Surchrge—

A plaintiff who seeks to open a settled account must specify in his plaint the grounds on which he claims permission to surcharge or falsify, otherwise he will not be allowed to prove errors at the hearing. The proper procedure is laid down by Justice Filed in 7 Cal 654. **7 Cal 654** *referred to.* **Moulvi Nizamuddin v Seth Kasturchand. 15 C P L R 61.**

64—Re-opening accounts stated.-The defence that accounts have been taken and settled is a good one: but it is open to a party to show error in the accounts, the *onus* of proving the error resting on the party who alleges it. **Kokoo Mull v. Sheikh Nutha P R 47 of 1866.**

65—Mortgage accounts—Mode of taking accounts—Duty of court in taking them-Practice—Accounts, accuracy of—Onus of proof—

Per *Fulton*, J—A mortgagor seeking to redeem must prove how much of the debt and interest has been repaid. It is the duty of a mortgagee in possession to keep full, true and accurate account of the actual receipts and disbursements. When an account is presented the judge of fact on whom rests the responsibility of coming to a true decision must examine it and before arriving at a conclusion as to whether it is such an account as a prudent man ought to accept, he must consider the detail and ascertain whether it has been kept on principles which indicate that it is probably correct. Before accepting or rejecting accounts in suits between mortgagor and mortgagee it is usually necessary to examine them critically. The omission of the mortgagor

Account suit for-(*Contd.*)

to assist by criticising the items may of course be taken into consideration. In some cases such omission may be accepted as showing that the accounts cannot be attached, or, in other words, are known to be correct. But in other cases it may merely indicate ignorance of the proper course to take or inability on the part of the client to give suitable instructions to his pleader. No general rule can of course be laid down. While it is true that no general rule as to the value of accounts can be laid down, still it is clear that in such a case all the circumstances must be considered, such as the relative positions of the parties to each other, the trade or caste of the mortgagor and any other matters likley to be material. It is for the party who puts forward the accounts to explain them and support them in such a way as to convince the judge that there is such a probability of their accuracy as to make it reasonable for a prudent man to accept them—

Kundammal v Kashibai.

4 Bom L R 42; 26 Bom 363.

66—Account suit for—Pro-Small C C Act art 31. A suit was brought to recover a specified sum alleged to be due by the defendant on a settlement of account between the parties. *Held*, that merely because it is necessary to look into the accounts it cannot be *held* that the suit is one for account within the meaning of art 31 of the Pro small C courts Act. **Konduru v Subbiah Seth. 98 Mad 394.**

67—Partnership—suit to enforce a term in the partnership agreement—Maintainability of a such a suit without a suit for dissolution.

Held, that, a partner can maintain a suit to enforce a particular term of a partnership agreement or to restrain its breach without bringing a suit for dissolution of the partnership.

(15 M L J 142; 18 Mad 134; 26 Cal 254 Ref; 39 E R 427 and 428 Ref. and Fol. 67 E R 432 Fol. 2 M H C R P 28 Cons and Dist.; 2 N W P H C R 90; (1862-63) M H C R P 341; 1 C L R 545 Ref.) **Kari Venkatareddi v Kollu Narasayya. 4 M L T 456=19 M L J 10=32 Mad 76=1 Ind Cas 384.**

68—Decree against estate—Effect on co-parceners—satisfaction in parts from time to time by different judgment-debtors—Decree, payment of

Account suit for-(*Contd.*)

by person holding money derived from estate on behalf of co-partners, but on separate accounts effect of. R, the 12 annas share-holder of an estate, and after his death his successors in-interest remained in wrongful possession of the remaning 4 annas share from 1826 to 1854 when the true-owners recovered possession. In 1862, they instituted a suit for mesne profits from, 1826 to 1854 against the "co sharers Zemindars of the 12 annas share" and got a decree in the first Court in 1875 against persons who were co-partners in the estate at the date of the decree On appeal the High Court merely reduced the amount decreed (in 1882). Between 1854 and 1882 several changes had taken place in the distribution of interests amongst the different branches of R's family. On a question subsequently arising as to what amount each co-partner was liable to contribute in paying off the decretal amount the High Court *held*, that this was to be determined according to the share which each of them had in possession from 1826 to 1854.

The decree was satisfied by payments made from time to time on behalf of the several co-partners from 1883 to 1889 and during this period interest ran on so much only of the amount of the decree as for the time being remained unsatisfied. In a suit for contribution instituted by one of the co-partners against the others in respect of the amounts so paid.

One of the items paid on account consisted of a sum of money held by the Garo Hill Government Treasury to the credit of the co-partners in seperate accounts and derived from a portion of the estate which lay in the Garo Hill District.

This amount was drawn in 1883, but one of the co-partners H, proved that before that he had by suit established his right to a larger share in the estate than was represented by the amount held by the Treasury to his credit. The High Court in passing accounts held that H was entitled to a credit out of the sum drawn from the Treasury proportionate to his share in the estate.

Held, (reversing the judgment of the High Court)—That the money not having been held on joint account, H was not entitled, for the purpose of the present suit, to credit for a larger sum than that which stood to his account.

Jotindra Mohan Lahiri v Guru Prosun Deo Lahiri. 8 C W N 695=31 Cal 807=1 1 A 94 P C.

Account suit for-(*Contd.*)

Notes—Affirm 7 C L J 484 P C=35 Cal 303 P C.

69—C P C s. 586—suit of the nature cogni zable by a Court of small causes—Appeal.

The plaintiff sued as widow of a deceased Brahman priest to recover from the defendant certain books containing lists of the clients of her late husband and also a sum of Rs. 60, on the allegation that the defendant had been enstrusted with the books and had realized the money as her agent for the purpose of carrying on the business of her deceased husband and contrary to the terms of the agency, had not handed over the money which he had obtained from the clients to her- *Held* that this was a suit of the nature cognizable by a Court of small Causes within the meaning of s. 586 of Code of Civ. Pro and that the suit was not a suit for account within the meaning of Art 31 of the Provincial small Cause Courts Act. **Hans Raj v Ratni alias Jwala Dei. 1904 A W N 227 also 15 M L J 142.**

70—Pleadings—Suit for share of property—Point not raised in the pleadings-suggestion before Court below that account should be taken—Separate suit for that purpose necessary.

In a suit for recovery of a share of a deceased Muhammadan's estate by right of inheritance the plaintiff alleged that the dower-debt amounting to Rs. 40 due to the widow who was in possession, had been satisfied out of the usufruct, and also asked for a conditional decree in the event of anything being found as due to the widow. The reliefs asked for were (1) delivery of possession of the share, (2) mesne profits for three years and (3) cost of the suit. The widow contended that her dower was a lakh of rupees and that she had been in possession of the property in lieu thereof. The suit was dismissed. Upon appeal to the High Court it was argued that at all events, an account ought to have been directed to be taken of the profits set off against the dower-debt.

Held that the contention could not prevail. If the plaintiff was desirous of claiming an account of this kind, she ought to have done so in the prayer to her plaint. The question would be best raised in a suit for an account. 14 M. I A. 377 fol. **Humera Bibi v Zubeda Bibi 2 A L J 485=1905 W N 125.**

71—S. 50 Revocation of Probate-Section how far exhaustive—The explanation of the words 'just cause' in S. 50 is not merely illustrative but exhaustive. **B G Tilak v. Sakwar bai; Ganesh v. Sakwarbai. 4 Bom L R 637; 26 Bom 792.**

72—Re-opening of account.—In a suit to recover money due on a San-Mortgage, defendants asked that plaintiff's books might be inspected to show that nothing was due from them to plaintiff when he got them to execute the deed. The joint Subordinate Judge decided that the existence of several irregularities and mistakes in plaintiff's books justified the account between the parties being re-opened.

Held, that though the Joint Judge did not act according to the strict rule of the Court of Equity, which requires grand or specific errors to be stated in the plaint, as plaintiff had had opportunity of explaining the mistakes and irregularities, there was no reason for interfering with the decree on second appeal. **Girdharlal Hargovan v. Hiraji P J 1891. p. 337.**

73—Jurisdiction of Munsif—May pass decree for over Rs. 1000—Bengal Civil Courts Act, S. 19.

The Court of the Munsiff is not competent to make a decree in a suit for accounts valued at less than Rs. 1000 for an amount in excess of Rs. 1000 which is the pecuniary limit of its Jurisdiction. (83 Maine 568, 22 Atlantic 476; 25 Nebraska 103; 41 N W 134; 28 L T N S 441 Ref: 21 Cal 550; 25 Mad 543 Expl and Dist. **Gopal Singh v. Indra Kumar 9 C L J 367=13 C W N 493**

74—Decree—Preliminary—If may be questioned in appeal from final decree:—

In an appeal against the final decree in a suit for account, the propriety of the preliminary decree may also be questioned. **Golap Singh v. Indra Kumar 9 C L J 367=13 C W N 493**

75—Evidence,—Account books were admissible as corroborative, but not as independent evidence, under Act II of 1855, (PR 37 of 1867,) (P R 61 of 1868,) The force or utility

Account suit for-(*Contd.*)

of Judicial Circular of March 14th 1859 ("no account books shall be accepted as evidence which do not comprise a day-book as well as a ledger") questioned.—**Gunga Ram v. Kishen Lal P R 34 of 1866 Civil.**

76—Accounts, Court's order to furnish-Company transferring its business to a Limited Company—New Company not bound by the order.

Where a decree directs a company to furnish accounts, and the company in the mean-while transfers its business to a limited company the latter company is not bound by decree as it is a distinct legal person; and the decree does not operate beyond the date of such transfer. **Fraser & Co v. Bombay Ice Manufacturing Co. 7 Bom L R 107= 29 Bom 107.**

77—Sch. 11, Art. 85—Current mutual account—Limitation.

Whether the dealings between the parties are such as to create independent obligations in favour of one party against the other, the account between them is a mutual account. Article 85, Limitation Act of 1877, applies to a case of the nature giving rise to reciprocal demands, and limitation begins to run from the close of the year, in which the last item was entered in the account. 22 Bom 606 Fol: A W N (1896) 186 relied on. **Chittiar Mal v. Behari Lal, 6 A L J 921=32 All 11= 4 Ind Cas 261.**

78—In an action against executor for accounts, it is not necessary, when making a reference to the Commissioner to take accounts, to give leave to the plaintiff to make an application to have accounts taken on the footing of wilful default pending the reference. Modern practice allows of an order charging wilful default being made at any time during the continuance of the action of a proper case being shown.

In a suit brought by the plaintiff against the executors of the will of her grand-father praying for a declaration that in the events that had happened, she was entitled absolutely and solely to the property left by her grand-father and for account of the property in the hands of the executors, the plaintiff is only entitled to accounts from the defendants for six years preceding the suit as she

Account suit for-(*Contd.*)

took no interest under the will and the executors were not trustees for her and the property did not vest in them for any specified purpose in her favour. Such a suit is not a suit for the purpose of following such property in the hands of the executors and trustees.

Ayshabai v. Ebrahim Haji Jacob 10 Bom L R 117=32 Bom 364= 3 M L T 379.

79—This was a suit for money due on an account stated which was instituted on the 16th July 1880 The account was stated on the 27th July 1877. It was not signed by the defendants or by their agent duly authorized in their behalf. The Court observed that the law applicable to the suit was Act XV of 1877; and, as the account on which the claim was based was not signed by the defendants or any agents duly authorised on their account, art 64 sch II of that Act would not apply.

Baldeo v. Chandan Singh 1 W N 29.

80—Deceased wife's sister marriage with—Illegitimate child—Maintenance—Account.

In a case where a decree for nullity of a marriage is decreed, on the ground that the wife happened to be the sister of the deceased wife of the husband, the child would be the illegitimate child of the wife who would be entitled unless a strong case is made out for the custody of the child.

Maintenance for a child may be rightly and properly spent for the purpose of maintaining a joint house for the infant and his or her parent and an account of the amount allowed for the maintenance will not be ordered so long as the infant is properly maintained. **Bom Setsch v Bom Setsch 35 Cal 381.**

See—also cases under:—

(1) **Hindu Law**

(2) **Mahomedan Law**

(3) **Betrothal**

81.—S 19 Balance of account suit on acknowledgment.

Where the defendants had money dealings with the plaintiffs and borrowed money from time to time and on several occasions N as manager of the family acknowledged the amount remaining

Account suit for-(*Contd.*)

due by striking the balance and signing in plaintiff's account book, *held* that the plaintiff was entitled to recover the balance due inasmuch as the acknowledgment is an acknowledgment of the accuracy of details of the account as appearing in the plaintiff's account book. (23 All 502 Distinguished) **Bhola Nath v Net Ram 3 A L J 800=1906 A W N 185.**

82.—*Held*, that a suit for settlement of accounts against the collecting co-sharers, based on a balance sheet prepared and produced by the defendants, could not be successfully defended by their asserting that some of the items entered in the balance sheet were for years previous to that for which they were entered, and therefore barred by time. **Baldeo v Ranjit and others 6 W N 144.**

83.—Evidence, importance of, in evidence—Practice of Indian people to keep accounts.—See **11 C L J 172=14 C W N 285 at 292= 20 M L J 182=12 Bom L R 244= 30 All 104=36 I A G; P C.**

84.—Suit for account by one partner—No prayer for dissolution or winding up:—

An action can be brought by a firm against one of the partners to account for a certain sum of money received by him without bringing a suit for dissolution of the partnership, under circumstances which render it equitable to allow such a suit to be preferred. **Fagadisa Aiyar v Cuppusamy (1905) 15 M L J 142.**

85.—Express trust—Trustee *de son tort*,

If express trusts are created, and some outside trespasser who has no business to interfere does interfere then he becomes a trustee *de son tort*, and as such the Court will make him account as if he were the rightful trustee. Lapse of time will not act as a bar to the action against such a trustee, in virtue of s. 10 of the Limitation Act. **Moosabhoy v Yakubbhai 7 Bom L R 45= 29 Bom 267.**

86.—Balance—Acknowledgment-Basis of suit—Examination of previous dealings-Amendment—Interest——Equitable claim—Laches——Revision (Civil)—Failure to exercise jurisdiction—Narrow interpretation of rulings—Punjab Courts Act (XVIII of 1884) S 70 (1) (a).

Account suit for-(*Contd.*)

A brought a suit on a balance claiming the amount acknowledged as due as well as interest. The first Court held that the plaint should be considered as amended so as to include the previous dealings between the parties, and the previous accounts were filed to enable the Court to deal with the claim. The Appellate Court, on the authority of certain rulings, dismissed the suit as not maintainable being on the basis of a balance.

Held, (1) that the Appellate Court was in error in holding that it was bound to dismiss the suit.

(2) that the narrow interpretation of the rulings by the Appellate Court amounted to a refusal to exercise jurisdiction which justified revision under cl (a) of S 70 (1) of the Punjab Courts Act.

(3) that, as the balance included a good deal of interest and A allowed nearly the full term of six years to run before putting defendant into Court, A was not equitably entitled to charge interest on the balance.

There is no hard and fast rule that a suit brought on a balance is in all circumstances not maintainable. The striking of a balance may in itself merely serve to bring a claim within limitation. But in each case it will be a matter for consideration whether the form of suit requires the Court to go behind the balance and to determine whether the items from which it was made up should be examined. Where the first Court considers a suit brought on a blance as amended so as to include the previous dealings, the suit should not be dismissed as not maintainable. 68 P R 1904=123 P L R 1904 and 119 P R 1908 Expl. **Amir Chand v Sundar Mal 7 P L R 1912.**

87.—Account, suit for—Preliminary decree passed, after taking evidence of defendant on commission, if an *ex parte* decree—Order, setting aside such decree, if made without jurisdiction-Remedy where fraud is alleged—Final or supplementary decree settling the account in the absence of defendant, if *ex parte*—Order setting such decree aside, if without jurisdiction—Account, decree for, nature of.

Where the evidence of the defendant was taken and considered by the Court or, in other words, the case of the defendant was partially entered into, and the Court passed its judgment on the merits of the case, such decree cannot be held to be *ex parte*.

Account suit for-(*Concld.*)

If the decree was obtained by fraud, the defendant would have his remedy by way of review or by a suit properly framed for the purpose.

A decree for accounts is not a mere direction to enquire and report the proceeds and must always proceed upon the assumption that the party calling for it is entitled to the sum found due. It is a decree affirming his rights, only leaving it to be enquired into how much is due to him from the party accounting, and such a decree directing the defendant to account is a final decree and one which is appealable to the Privy Council.

A final decree setting the amount due, if passed in the absence of the defendant who was unavoidably absent and was unrepresented at the final hearing, is a decree passed *ex-parte* and is liable to be set aside, and opportunity should be given to the defendant to be heard on the question of how much is due from him. 35 Cal 1023: 3 Moo I A 175: 18 I A 6 Fol. **Jasod Dassi** v. **Rameshwari Dassi** **14 C L J 603.**

88.—S.11—Suit for account-Procedure when amount decreed exceeds amount claimed—Extension of time fixed for payment of Court-fees—— Power of Court.

The final provision of S 11 of the Court Fees Act does not apply to the conditions set forth in toe first paragraph of that section. 30 (Mad 32: 16 M L J 543. 2 M L T 23 relied upon.

Ganesh Chandra v Promotho Nath 11 Ind Cas 73.

Accretion.

(1) New Formation of Alluvial Land. (1-30)

(1) Beng Reg XI of 1825 (1-11 & 41)
(2) Suit for possession of Chur Lands (12).
(3) Land forming bed of canal (13 & 13A)
(4) Accretion to estate on opposite side of River (14).
(5) Gradual accretion (15-15A).
(6) Right of Zamindar to accreted Land (16-17).
(7) Accretion to riparian Village (18-23).
(8) Evidence (24-26).
(9) Accretion by washing away Lands of another (27-30).

Accretion-(*Contd.*)

(2) Rivers or change in course of rivers (31-61).

(10) Gradual accretion from river receding (31-34).
(11) Gradual accretion from river (35-37).
(12) Bed of Navigable rivers (38 & 38A).
(13) Land dry only in dry season below high-water mark (39).
(14) Beng Reg XI of 1825 (40-41 & 1—11).
(15) Land accreting from bed of Khal (42).
(16) Change in course of River (43-52).
(17) Lands bounded by River (53-61).

(3) Churs or islands in Navigable Rivers (62—86)

(1) Accretion to chur (62 -66).
(2) Formation of chur (67-71).
(3) Fordable River (72-75).
(4) Reformation on old site (76-77).
(5) Navigable River (78).
(6) Unfordable stream (79).
(7) Formation of island in river adjacent to Zamindari (80).
(8) Land forming in river and gradually accreting to land on bank (81).
(9) Formation of Land in navigable river.(82)
(10) Island in Large river (83-86).

(4) Reformation after Diluviation (87-115)

(1) Ownership in reformed land (87-115).

(5) Procedure (116—119.).

(1) Procedure where rules under Beng Reg XI of 1825 are inapplicable (116).
(2) Chur lands, re-formation on old site (117).
(3) Suit for alluvial lands (118-119).

(6) Right of Purchasers to accretions. (120—125).

(1) Reformation since purchase (120).
(2) Increments not mentioned in certificate of sale (121)
(3) Lands taken on settlement from Government (122).
(4) Purchase of Land from Government—Right to increments (123-124)
(5) Property not attached because submerged (125).

Accretion-(*Contd.*

See also cases under —

(1) Evidence—Civil Cases Maps.

(2) Evidence Act Sec 36.

(3) Thak Maps.

(4) Maps.

(5) Landlord and Tenant-Accretion to Tenure.

(1) New Formation of alluvial land.

(1) Bengal Reg XI of 1825.

1—Custom—Reg XI of 1825.—Questions of ownership, in the case of two adjoining estates separated by a river, arising from accretion of dereliction in consequence of the action of the stream, will be decided primarily by the custom of such villages where a custom is clear and recognized but where it is uncertain, then by reference to Reg XI of 1825.

Shera v Sahiba. 53 P R 1867.

Chungar v Bahadoor Singh. 47 P R 1868.

Hug Nowaz Khan v Khanum 72 P R 1869.

Rama v Shere Shing. 15 P R 1872.

1 A—Bengal Reg XI of 1825.-Bengal Regulation XI of 1825 regards accreted land as the right of that party to whose estate the land is an accretion, and does not divide the accreted land according to the extent of each party's loss by diluvion. The mere fact of lessee having received a malikana allowance from the Collector during the period of his temporary lease will not bar the right to a permanent settlement of any party who, under the law of alluvion, is entitled to settlement. **Cally Chunder Chowdhry v Manikurnika Chowdhrain.**

W R 1864, 149.

Bissessuree Dossee v Kalee Koomar Roy.

18 W R 198.

2—Beng. Reg. XI of 1825, Sec 4 application of.—Cl. 1, Section 4, Regulation XI of 1825. applies only to lands gained by alluvion either gradually or suddenly, and not to lands existing as waste lands subject to inundation and in one year rendered culturable by a deposit of earth by the action of the river. **Ramjeeawan Rai v Deep Narain Rai Agra, F B 78 Ed 1874, 60.**

3.—Alluvion and diluvion Act (Bengal) XI, 1825 Sec 4, cl 1.

A non occupancy raiyat can claim a newly-formed land as an accretion to his holding under cl (1) Section 4 of Reg XI of 1825 (16 W R 95 Ref.) **Ahmed Bepari v Toki Mahomed. 8 C L J 538 = 13 C W N 267.**

4.—Alluvion and Diluvion Reg XI of 1825 Bengal Sec 4 cl (1) Non—occupancy raiyat—Accretion.

A non-occupancy tenant can acquire a right to hold a newly-formed land as an accretion to his holding under cl (1) of Sec 4 of Regulation XI of 1825 8 C L J 538, Fol, 4 W R 57 : 4 C L J 63 = 33 Cal 444 Dist. **Amjad Ali v Kaderjan Bibi 8 C L J 537=13 C W N 269**

5.—Alluvion and Diluvion—Bengal Reg XI of 1825 Section 4 gradual and sudden accession—Rights of owners—Gradual accession.

Alluvion is an imperceptible increase and land is said to be acquired by alluvion when it is acquired so gradually that one cannot say how much is added at any particular moment of time.

Where there is an acquisition of land from the sea or a river by gradual, slow and imperceptible means, there the accretion by alluvion is held to belong to the owner of the adjoining land. But where by a sudden change in the course of the river the land emerged on the side of the defendants, held that they did not acquire any title to it (13 M I A 467, L R 2 I A 28 Fol.)

Krishan Chandra v Saidan Bibi

2 A L J 821=(1905) A W N 971

6—Beng. Reg. XI of 1825 cl. 1 s. 4—The appellants owned a two-annas share in a village called A and the respondent owned a village called D. The river *Rapti* flows between the two villages. The appellants sued the respondents to be maintained in proprietory possession of certain lands alleging that such land had appertained to their village A, that it had been submerged by the *Rapti*, and that it had reappeared and accreted to their village. The respondents on the contrary alleged that such land had appertained to their village D; that it had been cut off by the action of the river; and that it had gradually been recovered by them. The lower appellate Court held that the land in suit had been the subject of fluvial action for ten years and in the

Accretion

1 New Formation of Alluvial Land—*Contd*

course of that time had gradually accreted to D, and that therefore under cl. 1 of s. 4 of Regulation XI of 1825 the defendant-respondents were entitled to it. *Held*, that the judgment of the lower appellate Court proceeded on a misunderstanding and misapplication of the law of gradual accession, in cl. 1, s. 4 of Regulation XI of 1825. That the Regulation referred only to cases of gain, of acquisition by means of gradual accession, which an individual proprietor might make from that which was part of the public territory, the public domain, and not to the confiscation or destruction of any private person's property. Diluviated lands re-forming on their old sites remain the property of their original owner and it was immaterial whether the lands have reformed gradually or otherwise. The case was remanded for a finding as to whether the site on which the alluvion has appeared is part of village A or D. (13 Moo; 1 A. 467); (1. L. R: 3 *Calc* 796); (S. A. No. 618, decided on the 3rd December, 1879) followed. **Ramcharan Tiwari** v **Jasai Pandey. (1882) 2. W. N. 8.**

7—Regulation XI of 1825 applies only to land gained by gradual accession from the recession of a river or sea, and has no application to land formed by the drying-up of a bhil or marsh. Suroop Chunder Mozoomdar v Jardine, Skinner & Co. Marshall's Rys. 334, relied on **Khondekar Abdul Hamid v. Mohini Kant Saha. 4 C W N 508**

Notes—Ref: 10 C L J 458. Doub 13 C W N 635.

8—s. 4. cl. 1 Alluvion—Title to land acquired by gradual accretion—Limitation.—Cl. 1 of s. 4 of Regulation XI of 1825 does not depend for its operation on the capability of identification of the accreted lands. Whether the accreted lands are capable of identification or not, the clause applies where the lands have been gained by gradual accession by the recession of a river. In the case of gradual accretions, the ordinary rule of acquisition by prescription does not apply, but each accretion as it occurs comes under the same title as that upon which the land to which it is made is held. **Debi Bakhsh Singh v. Tirbhawan Singh (1897) 17 W N 39= 19 All., 238.**

9—Suit for accreted land—In a suit for possession of alluvial land, which plaintiffs

Accretion

1 New Formation of Alluvial Land—*Contd.*

claimed by right of accretion under the provisions of Regulation XI of 1825 and in which the question of accretion was put in issue, the lower Court's judgment was held not to be good in law, because it contained no clear finding as to whether the lands in dispute had re-formed on the original site of diluviated lands of plaintiff's estate, or whether they were accretions to that estate by recession of the river. **Wise v. Juggobundoo Bose 12 W. R. 229**

Affrmed on review, **Juggobundoo Bose v. Wise 12 W. R; 409**

10—S. 4 Cls. I and 3. In a suit for possession where certain lands were decreed to plaintiff on the ground that, having formed opposite to his villages, they subsequently became contiguous thereto by the gradual silting up of the bed of the river which had previously flowed between. *Held*, that the decision was not in conformity with cl. I or cl. 3, s. 4, Regulation XI of 1825, and that is was necessary to determine how the land formed, whether it was thrown up as an island in the bed of the river, or was formed by gradual accretion to an estate; and if by gradual accretion, to what lands it so accreted. **Unnopoorna Debia v. Sreemutty Dassee 14 W R 254.**

11—Proprietor of resumed mehal.—The Government, when it holds a resumed mehal on its rent-roll as its khas property, holds it as, and with all the rights and liabilities of, a private zamindar, and is therefore entitled, under Regulation XI of 1825, to claim accretions to the khas estate. **Collector of Pubna v. Surno Moyee 17 W. R 163.**

(2) SUIT FOR POSSESSION OF CHUR LAND.

12—Suit for possession of chur lands.

The plaintiff sued for possession of a chur which he alleged had accreted to the remnant of the plaintiff's original estate, which had been left when all the rest of his estate was washed away, —*Held* that the Court must decide what particular parcel (if any) was the remnant of the original estate, an must also decide whether the chur claimed was formed by accretion to that remnant. **Rashmonee Dossee v. Bhubonath Bhuttacharjee 12 W R 252.**

Notes.: Ref: 2 Bom 19.

Accretion

1 New Formation of Alluvial Land—*Contd.*

(3) LAND FORMING BED OF CANAL

13—Land forming bed of canal—Beng. Reg. XI of 1825 s. 4 cl. 4.

Land forming the dry bed of a canal belongs to the estate in which the canal itself was included, in cl, 4, s. 4, Regulation XI of 1825, the words, "subject to the provisions stated in the first clause of the present section" do not apply to the formation and position of the newly-accreted land, but to the owner's rights in them in relation to the Government. **Syoollam v Bhutton alias Buttessur. 10 W R 68.**

13 A—Ss. 17,4 cl (1)-Adminissibility Dastak-Registration Act (III of 1877) S. 17 cl, (d)—Non-occupancy raiyat—Accretion.

An unregistered *dastak* which merely allows the plaintiff to take possession of the land and to cultivate it, is not a lease for any term exceeding one year, or a lease from year to year or a lease reserving a yearly rent, within the meaning of cl (d) of S, 17 of the Registration Act, and is, therefore, admissible in evidence.

A non-occupancy raiyat can claim a newly, formed land as an accretion to his holding under cl (1) s. 4 of Reg. XI of 1825. 16 W R 95 Ref.

Ahmed Bepari v Toki Mahomed 8 C L J 538 = 13 C W N 267.

(4) ACCRETION TO ESTATE ON OPPOSITE SIDE OF RIVER

14—Accretion to estate on opposite side of river-Accretion on one side of a river is not claimable as belonging to an estate on the opposite bank. **Punchanun Mullick v Heera Lall Seal. 1 W R 173**

(5) GRADUAL ACCRETION

15—Gradual accretion—Lakhirajdar.

Gradual accretion may be claimed by a lakhirajdar as his property. **Puthuram Chowdry v Kuthenarain Chowdhry 1 W R 124.**

Notes—4 Ref; 2 Bom 19.

15A-Diluvion—Gradual accretion explained.

Alluvion is an imperceptible increase; land is said to be acquired by alluvion when it is acquired so gradually that one cannot say how much is added at any particular moment of time. But if by the violence of a river, a portion of land is added to the estate of an adjoining owner, the land continues to be the property of the original owner. (13 M I A 467 2 A L J 821 27 All 65 Ref.) **Narendra Bahadur Singh v Achhaibar Shukul. 3 A L J 453= 28 All 647=A W N 1906, 169.**

(6) RIGHT OF ZAMINDAR TO ACCRETED LAND

16—Right of zamindar to accreted land.

As long as any portion of an estate is in existence, the zamindar is entitled to claim the land accreting to it as forming by law part of that estate. **Bhoobunmohun Sircar v Watson & Co. W R 1864, 64.**

17—Mortgage—Foreclosure——Redemption.

When the usufructuary mortgage of a property during the continuance of his mortgage, took a conditional mortgage of the holding of a tenant and after the expiry of his own mortgage foreclosed the tenant, his mortgagor is entitled to treat the holding as an accretion and recover possession upon payment of what is due on the usufructuary mortgage by way of conditional sale.

Musst Ketki v Dinbandhu Patnaik 10 C L J 83=3 Ind Cas 395,

(7) ACCRETION TO RIPARIAN VILLAGE.

18—*Held* that the ownership of land acquired by alluvion rests upon the title upon which the original village is held, so that if the riparian village is ancestral the other property must be ancestral too. **Ram Prasad Rai v Radha Prasad Singh 7 All 402=5 W N 65.**

19—Hereditary cultivator.

About ten years before suit the land of the plaintiffs (hereditary cultivators) was carried away by the river with the exception of a small piece of *banjar* which the plaintiffs gave up. Two years afterwards land appeared in the same place where the plaintiffs' land had been submerged and accreted to the piece of *banjar* The defendants took possession of and cultivated the newly formed land and held possession for eight years, when plaintiffs sued. *Held*, that plaintiffs were estopped from claiming the land, as having relinquished it—(P R 19 of 1876) observed upon. **Bakhtawar v Sultan Ahmed P R 83 of 1876**

Accretion

1 New Formation of Alluvial Land—*Contd.*

20—Hereditary Tenants – Abandonment—Estoppel.

Where land has been submerged and forms by accretion part of a particular estate, hereditary tenants have the right to take possession of the land. Delay in taking possession or in asserting occupancy rights may operate as an equitable estoppel, and bar the claim, without regard to the law of limitation. **Ruttu v Mal Singh P R 122 of 1876.**

Notes:—Fol. 8 P R 1901 Rev=54 P L R 1901

21.—Hereditary cultivator.

Where land which has been submerged reforms and forms by accretion part of a particular estate, the owner of that estate is entitled to it. This rule refers to accretions to the land cultivated by a tenant with right of occupancy and gives the tenant the right to take possession of and cultivate the land so re-forming. Such tenant has distinct rights of property, qualified though they be, in the land of which he is tenant. The fact that the land remained submerged or unclaimed for several years, *held*, not to affect the tenant's right: for, though cultivating rights are lost by abandonment or voluntarily ceasing to occupy, ordinarily the only legal bar is the twelve years, limitation. **Sahib Rai v Khair Shah P R 19 of 1876.**

22—Rule of "mahaz."

The meaning of the term "mahaz," as used in a rule laid down in the Settlement Record that in cases of alluvion each of two or more adjoining villages is entitled to the land in front of (*mahaz*) such village discussed. P R 67 of 1887, ref. to. —**Fazal v. Ghulam Ali Shah 45 P R 1888**

23—Custom—Alluvion and diluvion—"Deep stream rule"—Mauza Mianwal, tahsil Phillour and Mauza Bholewal, thasil Ludhiana—Riwaj-iam.

Found that by custom obtaining in the villages of Mianwal, *tahsil* Phillour, and of Bholewal *tahsil* Ludhiana, if any area, though capable of identification, lying on one side of the river (the Sutlej) is in consequence of a change in the course of the river, washed up and thrown on the other side, the proprietors of the village to which it has been so annexed come into proprietary possession thereof.

Accretion

1 New Formation of Alluvial Land—*Contd.*

The weight to be given to the *Riwaj-i am* discussed. **Hashim v. Nathu 13 P R 1900= P L R (1900) 347**

Notes—Ref 107 P R 1901=117 P L R 1901 =63 P R 1903=131 P L R 1903.

(8) EVIDENCE

24—Evidence—Alteration of surface of land —Obliteration of landmarks.

The question whether land is formed by gradual accretion depends on evidence; but it would be an error in law to consider it as conclusive of that fact that the surface of the land had all been changed, and the marks all obliterated, so that no old houses, or trees, or mounds, or vestiges of boundary could be found, and that all the surface of the land was fresh land which had been brought down by the river. 6 B L R 121, commented on. **Pahalwan Singh v. Mahessur Buksh Sing v. Megburn Sing 9 B L R 150 16 W R P C 5.**

25—Lands gained by alluvion—Hereditary cultivators, right of, to share in—Practice—Absence of provision in wajib-ul-arz as to rights in alluvial land.

Plaintiffs, hereditary cultivators, held 16½ ploughs and defendants, proprietors, 18 ploughs of the village of Jodhwal, the revenue of the village being assessed on ploughs. On several previous occasions plaintiffs obtained a share of the land added to the area of the village by alluvion, the revenue payable by them being proportionately increased, but there was no provision in the *wajib-ul-arz* or settlement papers as to the distribution of alluvial lands.

The proprietors having now refused to divide the land added by alluvion, according to former practice, plaintiffs sued for a share, alleging that they were entitled to it by the custom of the village and surrounding locality. *Held*, that the practice hitherto followed was insufficient, in the absence of express provision in the *wajib-ul-arz*, to raise a presumption of right in plaintiffs, hereditary cultivators, to share in the land added by alluvion and that the proprietors were competent to object to division, discontinuing at the same time the rule to charge plaintiffs with additional revenue. **Jharra v. Kashi Ram P R 52 of 1879.**

Accretion

1 New Formation of Alluvial Land—*Contd*

26—Alluvion and diluvion—Rights of *adna maliks* in submerged land—Custom—Mauza Bullewahan, tahsil Muzaffargarh—Effect of entry in Wajib-ul arz—Burden of proof.—The plaintiffs, who were *adna maliks* in mauza Bullewahan, *tahsil* Muzaffargarh, sued to recover from the *ala maliks* certain lands which had been submerged by river action, and on their reappearance had been taken possession of by the *ala maliks*. The defendants pleaded that under the provisions of the *Wajib-ul-arz* of 1879 the plaintiffs' rights had been lost in consequence of the submersion. The first Court finding the custom set up by the defendants not to be ancient, and against justice, equity and good conscience, decreed plaintiffs' claim. The Divisional Judge found that the entry in the Wajib-ul-arz being in favor of defendants, *held* that the onus of burden of contradicting and setting aside its provisions was on the plaintiffs, and finding that they had failed to discharge it dismissed their claim.

Held, that as the rule, that the owner of land which is under water retains his right to the site, is a principle not peculiar to any system of Municipal Law, but is one founded on universal law and justice, the burden of proving the custom under which deluviation works forfeiture was on defendants, and that the evidence produced in its support which consisted chiefly of the provision in the *Wajib-ul-arz*, which was a one-sided entry opposed to all principles of law and justice, was quite insufficient to establish it.

An entry in a *Wajib ul-arz* should not be considered as conclusive of a custom, especially where the custom set up is one opposed to the principles founded on universal law and justice. (V Beng. L. R. 521) (59 P R 1877. F. B.) (96 P R 1879) (102 P R 1883) (XXIX Calc 518) followed. (98 P R 1894, F B.) and (125 P R 1889) dist **Mohay-ud-din v. Faiz Bakhsh 97 P R 1902.**

(9) ACCRETION BY WASHING AWAY LANDS OF ANOTHER

27—Accretion by washing away lands of another.—The party to whose lands new formations accrete is entitled to them, though the accretion may have been caused by the washing away of the lands of another person. **Adoo Mean v. Shibo Soondooree 2 W R 295.**

Notes—(J V B) Ref; 9 W R I F B.

28—Terms of holding accreted land.—The person to whose land the accretion is formed is entitled to hold the accreted land on the same terms as that by which the land to which it is an accretion is held. (4 C L J 63=33 Cal 444 Expl. 21 Cal 233 Fol:) **Miajan v. Akram Ali Bhuiya 8 C L J 541.**

Notes—Ref: 8 C L J 537.

29.—Receiver, accretions to property, if vest in—Accretion, title to, prevails against all persons not claiming under prior title—*Bona fide* tenants under a *de facto* proprietor, if acquires raiyati rights—Non-occupancy raiyat, if entitled to possession of accretions-Crim. Pro. Code, (Act V of 1898), Ss. 145, 146,—Receiver appointed under S. 146, rights of.

As a general rule, a receiver takes no title in property acquired by the person formerly in possession.

But a receiver is entitled to any accretion to the property vested in him, upon general principles and the policy of the law by which a proprietor acquires a title to accessions to his property.

Where a receiver has been appointed under S. 146 of the Crim Pro Code, in respect of any property in dispute, the receiver is entitled, unless some special circumstances is established, not only to the subject-matter of the proceedings under S 145, but also to the accreted land, and gives good title to a tenant under him.

Such title will prevail against a trespasser, but not against a person who establishes a title to the accreted land acquired prior to the vesting of the lands in the receiver.

Semble.—Whether a tenant, who enters upon a land held under a *de facto* proprietor, can acquire a raiyati interest therein, even though the *de facto* possessor ultimately turns out to be no real owner, in case the tenant should have entered on the land in good faith.

Where a tenant has acquired the status of a non-occupancy raiyat in respect of any land, he is entitled to possession of land which has accreted to his holding. 10 C L J 55 Ref; 20 Cal 708; 8 C W N 315=5 C L J 9; 21 Cal 233; 4 C L J 63 =33 Cal 444; 13 C W N 269=8 C L J 537; 13 C W N 267=8 C L J 538; 8 C L J 541 Ref. **Madhu v Sabar Ali 14 C W N 681=6 Ind Cas 177**

Accretion-*Contd.*

1 New Formation of Alluvial Land *Contd*

30.—Alluvion and diluvion—Practice-Claim for land subject to river action-Decree in respect of land under water.

The plaintiffs claimed possession of 13 *Kanals* 10 *marlas* of land subject to river action. It was found that nearly half of the land was under water and the Divisional Judge was of opinion that decree should be given only for the land which was above water.

Held, that, since plaintiff's title to the whole land was established they were entitled to a decree for the whole. **Khan Mulk v Pir Bakhsh 152 P L R 1906.**

Accretion —to mortgaged property—what is not—Transfer of Property Act.

11 Ind Cas 808

(2) RIVERS OR CHANGE IN COURSE OF RIVERS --(31-61)

(10) GRADUAL ACCRETION FROM RIVER RECEDING.

31.—Gradual accretion from river receding-Riparian proprietors—Beng Reg XI of 1825, s. 4, cl 5 —

In a suit for lands gradually gained by recession of a river the plaintiffs and defendants are equally bound to prove their titles, and where they fail to do so the accretion under the 5th clause of s. 4 of Regulation XI of 1825 should be so divided that the owners of the land forming each bank of the original bed of the river must receive the land newly formed opposite their respective holdings. **Bhageerattee Dabea v Greesh Chunder Chowdhry 2 Hay 541**

32.—Alluvion—River—Accretions in a river-Neighbouring owners—Rights over accretions.

The plaintiff and the Government (defendant) were neighbouring owners of land each possessing a village and lands on both of the banks of the Godavari river, the defendant's village Tatapudi being higher up the stream than the plaintiff's village Kapileswarpuram. At some time not precisely ascertained an island was formed commencing at a point in the river between the banks which were owned by the defendants, and extending gradually till its lower extremity protruded between the banks

Accretion-*Contd.*

2 Rivers or change in course of Rivers-*Contd*

which were owned by the plaintiff. The defendant took possession of this island. This island went by the name of Tatapudi lanka, and ever since it had been the property of the defendant without dispute. The plaintiff now brought a suit to recover the latter formation which was in contact with Tatapudi lanka, alleging that it was within the village of Kapileswarpuram. The defendant alleged that it was an accretion to Tatapudi lanka:—

Held, that the plaintiff had no right to bring this suit, because the disputed lanka was not formed by gradual accretions to definite visible portions of her land. It was found by both the lower Courts that the lanka was an accretion to Tatapudi and not a vertical accretion in the bed of a river.

If the *terra firma* of Tatapudi pushed out a promontory by gradual imperceptible deposits that would, in the absence of special circumstances to show title in another, enure to Tatapudi. The same could be said of an island which was part of the Tatapudi estate. **Balsu v Collector of Godavari 1 Bom L R 696 = 22 Mad 464 - 26 I A 107 = 3 C W N 777.**

Notes—Fol. 1 M L T 101.

33.—Alluvion diluvian—Gradual accretion explained:—

Alluvion is an imperceptible increase, and land is said to be acquired by alluvion when it is acquired so gradually that one cannot say how much is added at any particular moment of time. But if by the violence of a river, a portion of land is added to the estate of an adjoining owner, the land continues to be the property of the original owner. 13 M I A 467; 2 A L J 821; 27 All 655 Ref.

Narendra Bahadur Singh v Achhaibar Shukul. 3 A L J 453 = 1906 A W N 169 = 28 All 647.

34.—Alluvion and diluvion—Title to land transferred by gradual accretion—Custom with respect to land bordering the Sutlej river between Jullundur and Ferozepore Districts.

Riwaj-i-am—Found, that by custom prevailing in respect of land bordering the Sutlej river between the Jullundur and Ferozepore Districts the proprietors of village become entitled to any area of land whether it is the whole or a portion of a

Accretion-*Contd*

2 Rivers or change in course of Rivers-*Contd*

village, which, in consequence of a change in the course of that river is thrown up by gradual accretion.

Held, that as in the river Sutlej, between the Jullundur and Ferozepore Districts, the changes of deep-stream are more considerable and sudden than in English and Italian rivers, the rules applicable to gradual accretions of the descriptions contemplated by the English and Roman Law should not be followed.

All disputes relating to such accretions should be decided by giving full effect to the provision of the *Riwaj-iam* of the villages concerned.

(97 P R 1902) (13 P R 1900) (36 P R 1898) and (5 Beng L R 521 P C) referred to.

Bandu Khan v Mussammat Umri. 63 P R 1903=131 P L R 1903.

(11) GRADUAL ACCRETION FROM RIVER

35-Gradual accretion from river.—Land gained from a river by gradual accretion belongs to the owner of the adjacent soil by the title of occupancy. **Nasavanji v Nasarvanji Darasha B H C 366 2nd Ed 345.**

36,—Alluvion—River bank—Alluvion—Gradual accretion—New land—Right of the owner of adjoining land.

Accretions, by alluvion from the sea or a river by gradual, slow and imperceptible means, of land being new land and not merely old land reappearing, belongs to the owner of the adjoining land. (22 Mad 464 Fol. 13 M I A 467 Fol. 27 Cal 768 Dist). **Kasakurti and Vaka Nara Reddy v Pooloori Sreeramulu 1 M L T 101.**

37.—Nadi bharati.—

Nadi bharati, or land raised out of the river is not an accretion, and belongs to the person to whom the river was released by the Resumption Authorities. **Hari Kishore Dutt v Collector of Dacca 3 B L R Ap 116.**

(12) BED OF NAVIGABLE RIVERS.

38—Bed of navigable rivers.

The East India Company as representing the Indian Government had a freehold in the bed of navigable rivers in India, and to the land between high and low water mark. Land formed by gradual accretion belongs to the owner of the adjacent soil. **Doe *d* Seebkristo v East India Company. 6 Moore's I A 267.**

Accretion-*Contd.*

2 Rivers or change in course of Rivers-*Contd*

38A—1847 IX, ss 3, 5, 6—Assessment of revenue—Lands, formerly part of the bed of the Brahmaputra, if included in the Permanent Settlement—Onus of proof—Presumption—Public navigable river, bed of, if can be presumed to have been permanently assessed.

Thak and survey maps, value of, as evidence, generally, and also when the question is as to the land being included in the Permanent Settlement. Act IX of 1847 has no application to lands included in the Permanent Settlement of 1793; and no new assessment of such lands can be lawfully made. In every case, the question what lands were included in the Permanent Settlement is a question of fact which may or may not be satisfactorily proved by subsequent survey maps. The onus of proving that any particular lands were so included is on those who affirm that such was the case. The question was whether certain pieces of land which were in the year 1881 assessed with Government revenue as fresh additions and surplus accretions to the Appellant's estate under Act IX of 1847 were or were not lands which were included in his permanently-settled estate: the revenue and survey maps of 1851-53 shewed these lands, which were then under water in the bed of the Brahmaputra, as forming a part of the Appellant's estate: *Held*—That the onus still lay on the Appellant to shew that the lands were included in the Permanent Settlement of 1793, and the *thak* and survey maps of 1851-53 could not have the effect of shifting that burden on to the other side. That supposing that the lands had formed a part of the bed of the Brahmaputra in 1793, the Brahmaputra being a public navigable river, the Court could not properly assume that its bed was included in the assessment then permanently fixed. Nor could the Court assume that a state of things existed different from what appeared from any evidence before the Court, *viz.*, that the lands were dry lands in 1793. It was consequently competent for the Court to decide that they were new accretions and as such properly assessable under sec. 6 of Act IX of 1847. Maps and surveys made in India for revenue purposes are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible and valuable evidence of the state of things at the time they are made. They are not conclusive and

Accretion-*Contd.*

2 Rivers or change in course of Rivers-*Contd*

may be shown to be wrong: but in the absence of evidence to the contrary. they may be properly judicially received in evidence as correct when made. Where the lands are admitted not to be within the Permanent Settlement, the last survey made under sec. 3 of Act IX of 1847 is to be taken as the starting point for deciding, when the next survey is made, whether the lands are within secs 5 and 6 of that Act. But when the question is whether lands shown on a particular *thak* or survey map made since 1793 were or were not included in the lands charged with the assessment permanently fixed in 1793. the enquiry is enlarged and a Court dealing with the evidence ought not in all cases to act on those maps as decisive in the absence of evidence to the contrary.

Maharaja Jogadindra Nath Roy Bahadur v The Secretary of State for India in Council (P C.) 10 C W N 103—30 Cal 291.

(13) LAND DRY ONLY IN DRY SEASON-BELOW HIGH-WATER MARK.

39—Land dry only in dry season below high-water mark—Private property.

A strip of land which. in the dry season only, is left dry between the permanent bank and the river cannot be private property until it rises beyond high-water mark, so as to become fit for cultivation; and when it does so rise, the public will be entitled to the same access to the river as before. **Odhiranee Narain Koomaree v Nawab Nazim of Bengal. 4 W R 41.**

Notes:—Ref: 8 C W N 676.

(14) BENGAL REG. XI OF 1825.

40—Beng Reg XI of 1825, s. 1, cl. 4 -Right of jalkar.

Before cl. 4, s. 1, Regulation XI of 1825, can have the effect of depriving a party of the title given by cl. 1, the opposite party must prove that the land in question was the bed of a small and shallow river which, with the jalkar right of fishing over it, was recognized as the property of such opposite party. **Ram Shurn Shaha v Bhote Kinkur. 14 W R 268.**

41—Alluvion—Acquisition—Regulation XI of 1825—Adverse possession—Increment. Hindu Law.]

Accretion-*Contd.*

2 Rivers or change in course of Rivers-*Contd*

In the case of gradual accretions by alluvion the ordinary rule of acquisition by prescription does not apply, but each accretion as it occurs comes under the same title as that upon the land to which it is made is held. (13 Moo I A 467; 18 W R 113; 23 W R 8; 25 W R 242; 22 Mad 464, referred, 19 All 238 Appr.) **Krishna Bhaoo v. Ganpat Singh. 14 C P L R 97.**

(15) LAND ACCRETING FROM BED OF KHAL.

42—Land accreting from bed of khal.

Land which accretes to an estate from the bed of an adjoining khal, not being a canal, but a river. belongs by law to the owner of the estate.

Dataram Nath v Eshan Chunder Law. 11 W R 116.

Notes:—Ref: 2 Bom 19.

(16) CHANGE IN COURSE OF RIVER.

43—Change in course of river—Alluvion and diluvion.

Land gained by the gradual accession of a river, and added by the operation of nature to A's tenure. must be held to be A's property although it be also established by evidence that this land has re-formed on a site which was formerly part of B's property. If it should be proved that the river flowed over the original site, and, receding, left the new formation and a fordable channel between it and B's property, B would be entitled to retake possession of the newly-formed land on the old site, and he would not be deprived of it because the river was either fordable on A's side, or had wholly dried up. **Maseyk v Hedger. W R 1864. 306.**

44—Alluvion and diluvion—River changing its course—Ownership of formation—Regulation XI of 1825. S. 4 (2).

If by the irruption of the waters of a river, tidal or non-tidal. a new channel is formed in the land of a subject. although the rights of the Crown or of the public may come into existence and be exercised in what had thus become a portion of the river, the right to the soil remains in the owner, so that if at any time thereafter the waters shall recede, and the river again change its course leaving the new channel dry, the soil becomes again the exclusive property of the owner, free from all rights whatsoever in the Crown or

Accretion-*Contd.*

2 Rivers or change in course of Rivers *Contd*

in the public. **Thakurain Ritraj v Thakurain Sarfaraz** 7 Bo n L R 879=15 M L J 349= 9 C W N 889=27 All 655=2 C L J 185= 32 I A 165 (P C)=2 A L J 693=8 O C 293

Notes.—Ref: 28 All 617=3 A L J 453=A W N (1906) 169.

45—Public navigable river, fishery in—Arm of the river ceasing to be an arm of the flowing river, effect of.

When, on account of a change in the course of a public navigable river, an arm of the river ceases to be an arm of the flowing river, the person who had a right of fishery in the river ceases to have any right to it; it becomes the property of the adjacent owner. 21 W R 27; 32 Cal 1141; W R (1864) 108 Ref. **Ishan Chandra Dass Sarkar v Upendra Nath Ghosh.** 12 C W N 559.

46—Sutlej river—Lahore and Ferozepur districts—Mauzahs Machiwaia and Gholam Hoseinwala—Kishtibunna Custom.

Certain land belonging to Mauzah Gholam Hoseinwala, on the Ferozpur side of the Sutlej river, was thrown up in a recognizable form before Mauzah Machiwara on the Lahore side of the deep stream, which the proprietors claimed to retain. *Found* that the *Kishtibunna* custom, or deep stream rule, did not prevail at the part of the Sutlej where the land in dispute was affected by the action of the river, and *held* therefore that the original proprietors of Gholam Hoseinwala were entitled to recover the land.

Bhana v Balanda. P R 48 of 1879.

47—Nalla running between two neighbouring fields—Change in its course—using bed of old streamlet.

A *nalla* ran between the fields of plaintiffs and defendants but outside their boundaries. By inundation it changed its course and ran through plaintiffs' field. The plaintiffs applied to and got permission from the Collector to cultivate the old bed of the streamlet which was now dry. The bed was entered in Survey Records as Government waste. The plaintiffs took possession of it but were subsequently resisted by the defendants. *Held*, that this was not a case of alluvion by gradual accretion and that the plaintiffs were entitled to succeed. **Govind v Mahadu.** 92 P J 191.

Accretion-*Contd.*

2 Rivers or change in course of Rivers-*Contd*

48—The custom of dhardhara applies to lands thrown up or formed by fluvial action either in one year or in the course of a number of years. Whether it is equally applicable to chuckee formations or tracts of land severed by a sudden change in the course of a river, and yet preserving their identity of site and surface after the severance, must be determined by proof of the extent of the custom. **Musammat Ranee Katiaynee v Sheikh Mahomed Shurf-ood-deen.** 3 Agra 189.

48A—Bengal Regulation XI of 1825, s. 4—Alluvion—Gradual accession—Change of course of a river within a short space of time.

Certain land belonging to village P on the river Gomti, was submerged, and, after remaining submerged for a not very lengthened period, again re-appeared. But, on its re-appearance, it was found to be on the opposite side of the river and adjoining village T. *Held*, that the land thus cut off from village P could not be said to have become part of village T by "gradual accession" within the meaning of s. 4 of Bengal Regulation XI of 1825, but was rather land merely separated from the village of which it formed a part by a sudden change in the course of the river, and this being so, no change of ownership had occurred. "Gradual accession" or "alluvion" means an imperceptible increase and land is said to be acquired by alluvion when it is acquired so gradually that it cannot be said how much is added at any particular moment of time. (13 M I A 467, 2 I A 28, Ref:) **Rai Krishna Chandra v Saidan Bibi.** A W N 1905 271=2 A L J 821= 28 All 256.

49—Land capable of identification.—Semble.

That the general law of alluvion in India, as well as in Europe, does not entitle a landholder to land which is annexed to his estates by a sudden change in the course of a river, and is still capable of being identified as part of the estate of another.

Isree Singh v Shurfoodeen 1 N W 142 Ed 1873, 224

Pragdutt Raoot v Luchmun Pershad 3 N W 111

50—Identification of land-Regulation XI of 1825—If there be no custom to the contrary land carried away to the opposite bank of the river may be followed by its owners, provided it be identifiable.

Accretion-*Contd.*

2 Rivers or change in course of Rivers-*Contd*

(P. R. 15 of 1872,),*and* (P. R. No.12 of 1870). The re-forming of land which has been removed by sudden alluvion in a river to which Regulation XI of 1825 applies, does not render the land re-claimable unless its identity is proved; and it is not to be presumed that land lost to an owner by the erosion of the river bank is recovered when an equal quantity of land is left dry by the river taking another course. Independently of custom, a title to such reformed land is not necessarily established by mere proof of general inclusive boundaries at a time long preceding the reforming of the land, but if a custom is proved it is to be followed.——(P. R. 72 of 1869,). P. R. 47 of 1868,), the Chief Court held that land could not be identified by the laying down of survey boundaries; the mode of identification was indicated in Clause 2. Section 4 of the Regulation.

Plaintiffs, zemindars of Mouza B, on the Sialkote side of the Chenab, sued the defendants (zemindars of Mouza M, on the Gujrat side of the river) for alluvial land situated on the Sialkote side. The parties admitted that the case was governed by Section 4, Regulation XI of 1825. The land had been carried across from Mouza M but not bodily, and its identity was destroyed. The defendants as well as the plaintiffs were entitled to take by accretion any land which was thrown up between their land and the main stream. Another piece of land besides that in dispute had come bodily across from Mouza M to Mouza B., of which the defendants still kept possession. The land in dispute did not lie between this piece of land and the river. *Held*, that plaintiffs were entitled to the land sued for. **Noordeen v Futteh Ali.**

P R 65 of 1869,

51—Submersion.

Village Kalu-wal was entirely submerged about nine years before suit, and the river (Sutlej) flowed along the boundary of village Ajayab Singh-wala. cutting away a portion of that village. Three years before suit, land began to reappear as the river receded from village Ajayab Singh-wala. To this land plaintiff laid claim alleging that it formed a part of village Kalu-wal. The Lower Courts found that the land was identified as having belonged to village Kaul-wal, and that by custom plaintiff (proprietor of the village) was entitled to it.

Accretion-*Contd.*

2 Rivers or change in course of Rivers *Contd*

The Chief Court (Lindsay and Melvill J.J) remanded the case, not being satisfied with the evidence as to the custom and holding that by law the land belonged to village Ajayab Singh-wala and that, if it belonged by custam to village Kalu-wala, still village Ajayab Singh-wala was entitled to a portion of the land equivalent to that which it had lost.

Found after remand (by Boulnois and Lindsay JJ), that by custom as well as law plaintiff had no right to the land. **Shere Singh v Kalu P R 7 of 1873.**

52—Beng Reg XI of 1825. s. 4, cl. *2*—Land separated from estate.

When a part has proved that land which formed part of his estate has by a sudden change in the course of the river, been separated, he is entitled to recover such land under cl 2, s. 4, Regulation XI of 1825. **Rai Manik Chand v Madhuram 3 B L R, P C, 5=11 W R, C P 42=13 Moore's 1 A 1.**

(17) LANDS BOUNDED BY RIVER.

53—Lands bounded by river— Custom of dhardhoora—Riparian proprietors.

Held that the mere fact that the river forms the constant boundary between two district cannot, in the absence of any dhardhoora custom affect the rights of riparian proprietors.

Dhoolhin Hurpaul Koonwaree v Ubruck Singh. 3 Agra 18

54—Custom—Kishtibunna — Alternation of custom by contract.—

The parties to the suit were proprietors respectively of Mauzah Soomrao and Mauzah Thalee, between which the Beas flowed. From annexation up to the commencement of 1867 claims to alluvial land between villages on opposite banks of the Beas were uniformly decided by the Courts of both districts according to the *Kishtibunna* or deep stream rule, *i. e.*, the transfer both of proprietary right and of cultivating possession followed the transfer of the land from one bank of the deep stream to the other, and this change of property and cultivation took place even when the land was transferred bodily to the opposite bank by a sudden change in the course of the river which did not carry away the surface of the ground or destroy its identity. On the 5th February 1867, a meeting was convened by the

Accretion-*Contd.*

2 Rivers or change in course of Rivers-*Contd*

Deputy Commissioner at Noushera Ghat of the zaildars of other villages similarly situated, but none of the lambardars or proprietors of either Soomrao or Thalee were present at this meeting. From the answers of the zaildars thus assembled to questions put in reference to the *Kishtibunna* rule, it appeared that the rule had existed from time immemorial. The zaildars agreed that the rule was bad and should be abrogated; and they put their seals and signatures to a document agreeing to lay down boundaries for themselves which they would abide by in future irrespective of changes in the course of the river.

Held, that the custom of *Kishtibunna* was established, and that it governed this case: and that the agreement of the 5th February 1867 was not in any way binding upon the parties to the suit.

Held, also, that the custom of *Kishtibunna* could be altered by contract between the parties interested, *i. e.*, the proprietors of two coterminous villages on apposite banks.-**Sodha v. Futteh Khan,** **P R 56 of 1869.**

55—Plaintiff's village was on the west side of an old bed of the river Indus, and this old bed was made the eastern boundary of the plaintiff's village long after the river had changed its course, in proceedings taken in 1859. Defendant had for many years cultivated the land situated between this old bed and the main stream. Plaintiff in this suit claimed this land on the ground that it had accreted to his village by change of the course of the river. — *Held*, that under the circumstances the question was not one of alluvion and diluvion, but one of boundaries only.— **Mullick Sohara v. Gholam Mahomed,** **P R 23 of 1869.**

56—River boundaries between British and Independent Territory.—

With regard to river boundaries between British and independent territory, in the case of alluvion, the main stream forms the boundary irrespective of other circumstances; but in cases of avulsion, the boundary question should in each case be determined on its own merits.—

Yoosuf v. Sirdar Dewa Singh, **P R 12 of 1870.**

57—Boundary fluctuating Agreement as to

Accretion-*Contd.*

2 Rivers or change in course of Rivers *Contd*

mode of fixing boundaries—Riparian proprietors—Custom—Beng. Reg. XI of 1825. S. 2.—

The plaintiffs sued to obtain possession of land on the ground of the existence of a custom in the district that where land which had once been alluvial lies between two branches of a river or two rivers, and from time to time the volume of water shifts, so that alternately one of those channels is deep, and the other is fordable, then the whole of such intermediate land belongs to the land-owner on the side of the channel which at any given time is fordable. *Held*, (without deciding whether such a custom falls within s. 2, Regulation XI of 1825), no clear and definite usage had been established. A fluctuating boundary between zillas does not necessarily affect the rights of landed riparian proprietors. An ikrarnama between two zamindars as to the mode of determining the boundaries of their estates, in the event of changes in the channel of river, cannot bind persons claiming under one with whom the perpetual settlement was subsequently made as to the lands in his possession, he being a stranger to that ikrarnama.

Bissessurnath v. Mohesour Buksh Sing Bahadoor, **11 B L R 265=18 W R 160=L R, I A, Sup Vol 34.**

58—Custom—Reg. XI of 1825.—

Where two adjoining estates are divided by a river, questions as to proprietorship arising from accretion or dereliction by the action of the stream will be decided primarily by the well established usage of those two villages; but if the usage be doubtful, then according to the rule laid down by Regulation XI of 1825. (33 of 1867, 47 of 1868, 72 of 1869. **Rama v. Shere Singh.** **P R 15 of 1872.**

59—Accretion by gradual accession — Riparian proprietors — Effect of sudden change in course of boundary river—Beng. Reg XI of 1825, S. 2 and s. 4, cls. 1 and 2.—

The lands in suit in Tirhoot were settled under Regulation XI of 1825, s. 4, cl. 1, with the plaintiff's predecessor in 1837, as the proprietors of an estate to which the lands had become an accretion by gradual accession, and the plaintiffs continued in possession thereof till the expiration of the settlement in 1847, which was made on

Accretion- *Contd.*

2 Rivers or change in course of Rivers *Contd*

the same principle. Prior to the renewal of that settlement in 1857, the river, which was to the south of the plaintiff's zamindari in Tirhoot, and to the north of the defendant's in Sarun, had suddenly and so completely changed its course that the lands in suit, which were formerly on the north side of the river. were capable of being identified on the south side of it, and were, notwithstanding, summarily settled with the defendant, who obtained possession of them: — *Held*. that, in the absence of proof of usage within the meaning of s. 2 of the Regulation, that the river should be not merely the boundary between the two districts of Tirhoot and Sarun, but also the boundary between the two zamindaries, the plaintiffs were entitled to the lands —

Raghoobur Dyal Sakoo v. Kishen Pertab Sahee. 6 I A 211.

59*A*—Land formed by alluvion—Recession of river—Land "annexed"—Reg. XI of 1825 (Bengal), s. 4—Riparian and accreted lands, titles to.-

The plaintiff and the defendant were riparian owners on the same side of a river and the question in the suit was whether the plaint lands which had been formed as an "accretion" within the meaning of s. 4, Reg. XI of 1825, was "annexed" to the land of the plaintiff or of the defendant The Court of first instance, on remand by the lower appellate Court, found (1) that the land formed gradually during the period that intervened between the last preciding quinquennial settlement and the institution of the suit and that it formed as an accretion to the defendant's land, (2) that the river remained stationary at the quite westerly point of plaintiff's land, while it receded from time to time to the south of the defendant's land and formed a great piece of land in connection with it. *Held*, accepting these findings, that the plaint lands formed as an "accretion" to the defendant's land under s. 4 of Bengal Regulation XI of 1825, because the plaintiff's village had no frontage in these lands. in the sense of the law of alluvion and diluvion at the time when the lands began to be accreted Accretions to a riparian village must, when gradual, in a legal sense, be governed by the same title as the village itself. **Kishen Dat Pandey v. Permeshuri Prasad, A W N 1885, 173**

59*B*—Accretions—— Law relating thereto—Blocks of land originally formed as islands but subsequently joined to mainland——Whether they belong to Crown or to the owner of the mainland.

Where the plaintiff claimed a certain block of land situated on the coast near the mouth of a river as an accretion to the mainland which belonged to him but where it was found that it was first formed as an island, separated from the mainland by a strip of water of greater or less breadth, which gradually dried up, with the result that it was added on to the mainland, *held*, it cannot be treated as an accretion to the plaintiff's land and that it belongs to the Crown.

The accretion must be gradual and imperceptible. When it is sudden or preceptible, the land gained belongs to the Crown. 33 Mad 1; 22 Mad 464; 13 Mad 369 Ref. **Raja Venkata Kumara Mahipati Surya v Secretary of State for India 2 M W N (1911) 261.**

60—Formation of alluvial lands-Character and change in a tidal navigable river. Cause and nature of a change in High-water line—The principles of English Law as regards the alluvial lands affecting the rights of the Crown and riparian owners are applicable to British India unless included by some law or usage. Hence when the tenants of riparian owners by some unlawful Acts caused a change in the natural high-water line in a tidal navigable river in Madras, held that the accretion caused by such variation belonged to the crown against the riparian owners. **Secretary of State for India v. Kadirikutti 13 Mad 369.**

60*A*-Distinction between accretion and alluvion—Rights of riparian owners—Changes in the channel of a river—Ben. Reg XI of 1825, S. 4, cls 1 and 5—The current of a river alternately encroached upon either bank The effect of this change of current was that land was detached from one bank, at the same time it added to the opposite. The river followed a course more eastern than the original one. The area of the defendant's village which was till then partly on the western side, inasmuch as the river traversed it throughout, now appeared entirely in the west bank. The river continued its eastward tendency and so some land of the plaintiff's village on the eastern side was

Accretion-*Contd.*

2 Rivers or change in course of Rivers-*Contd*

also carried away. By another change in the opposite direction, the current resumed its original channel more westwards with the effect that the piece of land that had belonged to the defendants village, and had been submerged when on east bank during the above change in the river's course, emereged in the end on its former site on the east bank. This restored land was such as could be identified. But the owner of the village on the eastern side now laid a claim to it as an accretion by alluvion to his property adjoining which it stood. *Held*, that the right of property remained in the original owner, the defendant. The owner of the adjoining village on the eastern side could not make out a title to it either under cl., 1 under cl. 5 of S. 4 of Regulation XI of 1825, or in virtue of any known principle. The custom of giving land account of contiguity was not proved, and and there had been no gain to him from the river by alluvion within the meaning of the Regulation. **Jaggot Singh v. Brij Nath Kunwar** **27 Calc 768; L R 27 I A 81; 4 C W N 555**

Notes—Dist 1 M L T 101.

60 *B*—Chur lands—Alluvion—Limitation—Possession—Dispossession—Limitation Act (XV of 1877), Sch II Arts 142, 144.

In a suit for declaration of title to and recovery of possession of chur lands which had been diluviated more than twelve years before the suit, the plaintiffs proved their title and possession up to the time of diluviation, and alleged that the disputed lands had re-formed within twelve years of the suit. The defendants alleged and it was found that the lands in question came into existence some 30 years ago and have been gradually forming since then. How much was formed yearly and whether the chur was fully formed in five year could not be determined:

Held, that the case should not be treated as though it were one of adverse possession falling within Article 144, Limitation Act, whereas the appropriate Article was article 142 7 Cal 225. 8 C L R 126, Fol) **Bilash Chandra Mukhopadhya v. Amjud Ali Patwari** **9 Ind Cas 554.**

Accretion-*Contd.*

2 Rivers or change in course of Rivers-*Contd*

61—Accretions—Alluvial lands——Re-formations in situ—Possession, recovery of, suit for settlements made by Government with defendants—Government, right of, as lords, paramount of the soil, to be put in possession, on defendant's refusal to take settlement—Government, right of, to assess and settle lands, in the absence of title—Declaratory decree, changing character of suit, it may be made—Act IX of 1847.

Where Government brought a suit to recover certain alluvial lands on the allegation that it was the proprietor of them and was put out of possession by the defendants, but it appeared that the Government had no right to them as proprietor, and that on the contrary the "maliki" or proprietary title in them was in the defendants, and that they were alluvial lands which accreted to the estate of the defendants and the right of the Government to assess revenue upon them was declared long ago, and they were converted in separate estates, and temporary settlements in respect of them were made by the Government with the defendants, and, on their expiry, held them khas, in its own hands adversely to the defendants *Held*, that, having regard to the allegation of title on which the Government based the suit and the past conduct of the Government in reference to those lands, the Court ought not, at this stage of the case in appeal, to change the entire form of the suit and to make a declaratory decree, in the event of the Court deciding the question whether the lands appertained to the plaintiff's or to the defendant's estate in favour of the Government, to enable it to take hereafter the necessary steps for assessment and settlement. When alluvial lands appertaining to a parent estate are converted into separate estate solely for purposes of assessment and settlement and never lose their relation to the parent estate but are made the subject of temporary settlements, and are treated for fiscal purposes only, as separate estates, and any of the alluvial lands disappear by reason of submergence under the river, they can no longer be treated as constituent parts of those estates, and in the event of their reappearance, they will have to be dealt with as new alluvial formation to which the provisions of Act IX of 1847 would be applicable. **Sarada Prasad Gangully v. Secretary of state for India in Council** **14 C L J 98.**

Accretion- *Contd.*

3-CHURS OR ISLANDS IN NAVIGABLE RIVERS (62-86)

(1) ACCRETION TO CHUR

62—Accretion to chur—Fordable channel—An acretion to a chur belongs to the owner of the chur whether the channel between the main land and the chur is fordable or not. **Kallynath Roy Chowdhry v Lawrie 3 W R 122**

63—Under Reg XI of 1825, chur land belongs to the proprietor of the estate to which it accretes, provided it is not separated from such estate by an unfordable stream. **Shibchunder Ghuttuck v Collector of Tipperah 5 W R 139**

64—Formation of churs—Beng Reg XI of 1825, s. 5, cls 1 and 4—Right of fishery.

According to cl 4 s. 4 Regulation XI of 1825, churs thrown up in small and shallow rivers, the beds of which are private property, belong to the proprietor of the bed of the river : but by cl 1 of the same section churs thrown up in rivers, not small and shallow, the ownership of the beds of which remains in the public, are an increment to the tenure of the riparian owner to whose land or estate they are annexed. The fact of the right of fishery being in another person, does not take the case out of the operation of the former clause. **Chundermonee Chowdhrain v Chowdhrain 4 W R 54**

65—Diluvion—Reformation-Title-Beng. Reg. XI of 1825, s. 4—

Where a chur formed in the middle of a river, and was settled with *A*, and by the recession of the river new land appeared, which was really a deposit on the ancient site of *B*'s lands, though adhering to the chur, it was held to be *B*'s land. The first rule established by s. 4. Regulation XI of 1825, does not apparently contemplate land other than that commonly known as alluvion, *viz.*, land gained by gradual and imperceptible accretion, the *incrementum latens* of the civil law. There is no express provision in the Regulation for the case of land which has been lost to the original proprietor by the encroachment of the sea or a river, and which, after diluviation, re-appears on the recession of the sea or river, and there is nothing to take away or destroy the original proprietor's right; such a case is to be determined by the general principles of equity and justice

Accretion-*Contd.*

3 Churs or islands in navigable Rivers-*Contd*

under the 5th rule contained in s. 4. A title founded on the original ownership and identification of land re-appearing is to be confined *prima facie* to the reformation on that site. 4 *Moores I A, 403* ; *6 B L R* 121; *2 B L R P C* 5 commented on. **Nogender Chunder Ghose v Mahomed Esof. 10 B L R 406: 18 W R 113.**

66—Beng, Reg XI of 1825 s. 4 cl. 3—

If alluvial land be surrounded by water fordable at any point, the owner of the land to which the chur adjoins has a *prima facie* title to it under cl. 3, s 4, Regulation XI of 1825. **Wise v Ameerunnissa Khatoon 2 W R 34**
Wise v Abdool Ali. 2 W R 127
Poresh Narain v Watson 5 W R 283.

Notes—Fol. 2 W R 127 ; 5 W R 283 Dist. 3 W R 122; 7 W R 513. Ref. 9 W R 259; 2 Bom 19.

(2) FORMATION OF CHUR.

67—Formation of chur—Alluvion—Beng. Reg. XI of 1825 s. 4—Re-formation on old site—

Under Regulation XI of 1825, a right of property in land gained by alluvion from a river (the bed of which is not the property of an individual) is acquired in two modes; first, where the land is mined by gradual accession by the recess of the river, in which case it becomes the property of the person in possession of the estate to which the land is an increment; and secondly, when a chur or island is thrown up in a large navigable river, and the channel between such chur and island is fordable at any season of the year, the accession is an accession to the land or tenure most contiguous. **Mohini Mohun Doss v Juggobundoo Bose. 9 W R 312.**

Notes—Fol. 12 W R 252; 21 W R 115. Dist. 14 W R F B 25. Ref. 22 W R 52.

68—Gradual accretion—Land "most contiguous."—Beng Reg. XI of 1825, s. 4, cl. 3—The land "most contiguous" to a chur, as that phrase is used in Regulation XI of 1825, s 4, cl.3, is intended only to comprise the state or estates with which the chur comes into contact along the length of the fordable part of a channel : and the whole

Accretion-*Contd.*

3 Churs or islands in navigable Rivers-*Contd*

chur becomes an accession to the land and part of the tenure of the party to whom such estate belongs, and no portion of it will cease to belong to him merely by reason of the deep water between it and the estate of another becoming shallow and fordable. *Held*, also, that after the chur had, by the first occurrence of the fordable channel, become part of *A*'s property, all further accretions to it, if gained by "gradual accession," would also belong to *A*, even though the result would, in the aggregate, be a prolongation of the chur in front of estates on the river bank not belonging to him. **Golam Ali Chowdhry v Gopal Lall Tagore. 9 W R 401.**

Notes—Fol. 12 W R 534.

69—Navigable river—Rights of riparian proprietors—

Where a chur or island is thrown up in a large navigable river, originally surrounded by deep, unfordable water, but between which and the estate of the zemindar a fordable channel has since been created, the criterion for deciding whether the Government has the right of disposing of that island, or whether the owner of the land to which it is most contiguous has that right, is to consider the state of circumstances at the time of the formation of the island,—that is, at the time when it was thrown up, and not the state of things at any subsequent or fluctuating period, such as the subsequent silting up of the bed of the river between the island and the contiguous estate so as to form a fordable passage.

Budrunissa Chowdhrain v Prosunno Kumar Bose. 6 B L R 255=14 W R F B 25 Cannon v Bissonath Adhicaree. 15 C L R 154.

Notes:—6 Bom L R 255 See 33 Bom 22.

70—Custom prevailing in villages on the Soan river in the Una Tahsil of the Hoshiarpur district—Kishtibunna or deep stream rule—

Plaintiffs, who represented the proprietors of Panjawar, a village on the right bank of the Soan river in the Una Tahsil of the Hoshiarpur district, sued to obtain from the proprietors of Bhera, a village on the left bank of the same river, certain land which had been transferred by avulsion from the Bhera to the Panjawar side. Defendants pleaded, *inter alia*, that though the rule that the deep stream should be the boundary was prevalent on

Accretion-*Contd.*

3 Churs or islands in navigable Rivers-*Contd*

the Soan, the rule was only applicable as regards land which had been transferred from one bank to another by gradual accretion, and that it was not applicable when the land had been transferred by avulsion.

Held, that the general custom in the tract in question was proved to be in accordance with a strict observance of the deep stream rule, whether or not the land had come over by avulsion and was indentifiable. **Mahar Singh v Achra. P R 164 of 1883.**

71.—Limitation Act. 1877, Section 13, and 2nd Schedule, Articles, 142. 144—Alluvion and diluvion—Custom of Bias river—Land taken over by avulsion—Dispossession or discontinuance of possession—Exclusion of time of defendants' absence from British India.

Plaintiffs, the proprietors of a village on the Amritsar side of the Bias, claimed certain land lying between their village and the present deep stream, alleging that the said land originally formed part of their village, but was transferred in Sambat 1923 to the Kapurthala side of the river, returning to the Amritsar side in Sambat 1927-28, but remained part of Kapurthala territory till Sambat 1937 or 1938. The transfer on each occasion was found to be by a sudden change in the course of the river or what is generally called "avulsion," and it was found by the lower Courts (and the finding was accepted as correct by the Chief Court)that by the custom of the Bias, when land is transferred from one side of the river to another by a sudden change, there is no disturbance of proprietary right; but the lower Courts considered that the plaintiffs had lost their rights because they had not been in possession of the land, or any part of it, within twelve years before suit.

On the question of limitation, *held* that the case was governed by Article 142 of the 2nd Schedule of the Limitation Act, as plaintiffs were certainly dispossessed or discontinued of possession in Sambat 1923 when the land went over to Kapurthala.

But *held* further that in reckoning limitation plaintiffs were entitled to deduct the period from Sambat 1923 to Sambat 1937-38, during which the land remained part of the Kapurthala ter-

Accretion-*Contd.*

3 Churs or islands in navigable Rivers *Contd*

ritory under Section 13 of the Limitation Act, as the defendants were certainly absent from British India during that period, and the fact that the subject-matter of the suit was also so absent was rather an additional than a less reason for holding that the section applied.

Gulab Khan v. Peera. 34 P R 1889.

(3) FORDABLE RIVER.

72.—Fordable river—Bengal Reg. XI, Sec 4. cl. 3—Island in navigable river—Right of riparian proprietor to.

Under cl. 2, S. 4, Regulation XI of 1825, a riparian proprietor has no right to an island thrown up in a large navigable river, when the channel which intervenes between his land and the island is, under ordinary circumstances, and at the most favourable seasons, unfordable for sixteen out of twenty-four hours. **Nobin Kishor Roy V Jages Prasad Gangopadya. 6 B L R 343=4 W R 352**

73.—Bengal Reg. XI of 1825, cl. 3.

A river that can be crossed from one side zigzag in the dry season only, when the water is breast-high, and the main stream of which is indubitably on the other side, is not a "fordable" stream within the meaning of cl. 3, Sec 4, Regulation of XI of 1825.

Issurchunder Sein v Kalee Doss Hajrah. 3 W R 95.

74.—Formation of Chur.

The fact that, under certain circumstances, a river is in some places, and at extreme time of low water, fordable, does not warrant the presumption that the river was a fordable stream at the time of the formation of the chur.

Wise v Ameeronissa Khatoon. 3 W R 219.

Notes:—Ref: 1 C W N 682.

75.—When the Government sues for alluvial land as an ordinary riparian Zamindar, it is bound to prove, under the latter part of cl. 3, s. 3, Regulation XI of 1825, that the stream between the chur and the main land is fordable at some time of the year, and that it was fordable when the alluvium formed.

Tabira v Government. 6 W R 123.
Affirmed on review Government v Tabira. 7 W R 513.

Notes: Ref 2 Bom 19.

Accretion-*Contd.*

3 Churs or islands in navigable Rivers-*Contd*

(4) REFORMATION ON OLD SITE.

76.—Reformation on old site—Bengal Reg. XI, Section 4, cl. 3—Island in navigable river—Right of Government.

Under cl. 3, section 4,, Regulation XI of 1825 Government has no right to land thrown up as an island in the bed of a navigable river, when such is formed on the site of land which had been washed away. **Mani Lall Sahu v Collector of Sarun. 6 B L R Ap 93= 14 W R 424.**

77.—The Government is not entitled, under cl. 3, s. 4, Regulation XI of 1825, to take possession of land which has re-formed on an old site of land belonging to another, although the reformation forms an island, and is surrounded by a channel which is not fordable. **Collector of Rajshahye v Shamasoonder Debea. 14 B L R 219=22 W R 324.**

(5) NAVIGABLE RIVER.

78.—Navigable river—Bengal Reg. XI of 1825, S. 4, cl. 3.

The words "a large navigable river" in cl. 3, s. 4, Regulation XI of 1825 are not applicable to the Goomta, but to such rivers as the Ganges and the Megna, upon which navigation can always be carried on. **Mohinee Mohun Doss v Assanoollah. 17 W R 73.**

(6) UNFORDABLE STREAM.

79.—Unfordable stream—Land cannot be legally proved to be an accretion to a talukh, or a re-formation of diluviated land of that talukh on its original site, where the stream between the land in question and the talukh is found to be an unfordable stream, nor can possession under such circumstances give a plaintiff a right to a declaration of his title. **Nobeen Kishore Roy v Jogesh Prokash Gangooly. 10 W R 272.**

(7) FORMATION OF ISLAND IN RIVER ADJACENT TO ZAMINDARI.

80.—Formation of island in river, adjacent to zamindari—Zamindars, Right of—Waste lands—

Where an island was formed in a river, the lands adjacent to the banks of which were part of zamindari,—*Held* that the island was not the waste land of any village, or a portion of the holdings of any raiyats in the zamindari, but

that the zamindar possessed in it all the incidents of ownership, including the power of making leases. **Subbaya v Yarlagadda Ankinidu 1 M H C 255.**

(8) LAND FORMING IN RIVER AND GRADUALLY ACCRETING TO LAND ON BANK.

81.—Land forming in river and gradually accreting to land on bank—Beng. Reg XI of 1825—Right of Government.

Where land came up originally from the river as a small island, and gradually joined on to the plaintiff's estate after having been taken possession of by the defendant.—*Held*, by Trevor J., that the Government alone was entitled to the land, and not the plaintiff, to whose estate the land had joined. *Held*, *contra* by Glover, J, that as the land was an accretion to the plaintiff's estate, he was entitled to take possession of it under Regulation XI of 1825, the defendant's possession notwithstanding. **Mohineemohun Doss v Juggobundoo Bose 7 W R 103.**

Notes: Ref: 18 Cal 188; 29 Mad 426 F B= 16 M L J 372=1 M L T 145.

(9) FORMATION OF LAND IN NAVIGABLE RIVER.

82.—Formation of land in navigable river—Proof of title.

The re-formation of land in the bed of a navigable river is not *prima facie* to be ascribed to a loss from any particular riparian estate, nor is the land which has been removed from an estate by sudden avulsion reclaimable, unless the circumstances supply evidences of indentity. A title by accretion is not established by mere proof of general inclusive boundaries at a time preceding the formation of the chur, but there must be proof of the nucleus of accretion. The land gained will follow the title of the particular land forming the nucleus. **Ekowri Singh v. Hiralall Seal 2 B L R P C 5=11 W R P C 2 12 Moore's I A 136**

Sham Chand Bysack v Kishen Persad Surma. 18 W R 4 =14 Moore's I A 595.

(10) ISLAND IN LARGE RIVER.

83.—Island in large river—Proprietorship of alluvial land—Beng Reg XI of 1825 S. 4.

Though an island or land thrown up and surrounded by a river may become vested in Government, under the provisions of Regulation XI of 1825, S. 4, cl. 4, it does not follow that, if the river which separates the island from the main land dries up after the island has been resumed by Government, the bed of the river becomes the property of Government in cases in which the bed of the river is not gained as an accretion to the island by gradual accession within the meaning of cl. 1. **Surnomovee v Jardine. Skinner & Co; Surnomoyee v Watson & Co 20 W R 276**

84—Formation of lands—Beng Reg XI of 1825.

In a suit brought on the 11th March 1872 to recover certain plots of land (a) as re-formations after diluviation of lands which had belonged to the plaintiffs and as accretions thereto; (b) under a title by prescription, it appeared that the lands had formed in the bed of a river in 1859, and that the plaintiffs took possession thereof as of reformed lands, and had been maintained in possession under awards under Act IV of 1840, but that in 1868 they were ousted by the Collector, who assessed the same under Regulation XI of 1825 and settled them with his co-defendants.—*Held* that, whether or not in consequence of Act IX of 1847 the Government were entitled to assess the lands, they were entitled to oust the plaintiffs and to take possession of lands as lands which had originally formed as an island, and were at their first formation surrounded by water which was not fordable. **Wise v. Ameerunnissa Khatoon. Wise v. Collector of Backergunge 7 I A, 73**

85—Formation and attachment to estate of island chur formed in river.—

Defendants were owners, by purchase from Government, of a property called Ooian Chur, which in its origin was an island thrown up in the bed of the river. Plaintiff was owner of the original estate of K, of which a great part was cut off by a stream channel of the river; but afterwards re-appeared, and for some time lay in contiguity with defendant's chur, and separated from plaintiff's estate by the said channel. By

Accretion-*Contd.*

3 Churs or islands in navigable Rivers *Contd*

the gradual filling up of the sota reformation became more and more extensive until the land again lay in contract with the plaintiff's estate. As it had been clearly ascertained by boundary marks and measurements that the re-formation took place on the original site of the plaintiff's land, the right of the plaintiff as by re-formation was held to be preferable to that of the defendants, which rested upon accretion.

Buddun Chunder Shaha v. Bepin Beharee Roy. 23 W R 110.

85A—Lanka (formation in the bed of a river) —Gradual accretion, rule of—Accretion to land washed on both sides by the river—Sub aqueous ownership, presumption as to—Vertical accretion in the bed of a river. The principle of law that gradual accretion enures to the land which attracts it, applies also to Madras. The above principle applies where the land attracting the gradual accretion is washed on both sides by the river as well as where the land is washed only on one side. There are grave doubts whether the presumption is applicable to little English rivers.that the proprietor of each bank of a stream is considered *prima facie* as the proprietor also of half the land covered by the stream *usque ad medium filum aquæ*, applies to great rivers such as the Godaveri. **Sri Balsu Ramalakshmamma v. The Collector Of Godaveri. 3 C. W. N. 777=22 Mad 464 = 26 I A.107 (P. C.)**

85B—Accretions—Alluvial lands—Reformations in situ—Possession, recovery of, suit for—Settlements made by Government with defendants —Government, right of, as lords, paramount of the soil, to be put in possession, on defendants' refusal to take settlement—Government right of, to assess and settle lands, in the absence of title—Declaratory decree, changing character of suit, if may be made.

Where Government brought a suit to recover certain alluvial lands on the allegation that it was the proprietor of them and was put out of possession by the defendants, but it appeared that the Government had no right to them as proprietor, and that on the contrary the "maliki" or proprietary title in them was in the defendants, and that they were alluvial lands which accreted to the estate of the defendants and the right of the Governments to assess revenue upon them was declared long ago, and they were converted into separate estates, and temporary settlements in respect of them were made by the Government with the defendants, and, on their expiry, held them *khas*, in its own hands adversely to the defendants:

Held, that having regard to the allegation of title of which the Government based the suit and the past conduct of the Government in reference to those lands, the Court ought not, at this stage of the case in appeal, to change the entire form of the suit and to make a declaratory decree, in the event of the Court deciding the question whether the lands appertained to the plaintiff's or to the defendants' estate in favour of the Government, to enable it to take hereafter the necessary steps for assessment and settlement.

When alluvial lands appertaining to a parent estate are converted into separate estate solely for purposes of assessment and settlement and never lose their relation to the parent estate but are made the subject of temporary settlements, and are treated, for fiscal purposes only, as separate estates, and any of the alluvial lands disappear by reason of submergence under the river, they can no longer be treated as constituent parts of those estates, and in the event of their re-appearance, they will have to be dealt with as new alluvial formation to which the provisions of Act IX of 1847 would be applicable. **Sarada Prasad Ganguly v. Secretary of State for India in Council, 14 C. L. J. 98.**

86—Questions for consideration in cases of alluvion and avulsion—River boundaries between British and independent territory:—In respect of river boundaries between British & independent territory, the main stream, in cases of alluvion, forms the boundaries, regardless of other circumstances; but in cases of avulsion, the question of boundary should, in each case be decided on its own merits. **Yoosuf v. Sardar Dewa Singh 12 P. L. R. 1870.**

4—RE-FORMATION AFTER DILUVIATION (87—115)

(1) OWNERSHIP IN REFORMED LAND.

87—Ownership in re-formed land—Ownership in soil is not lost because the subject of it becomes submerged; the owner or the site or sub soil remains owner of the surface, and on re-formation of the surface soil takes whatever falls within his known boundaries. Ordinarily there

Accretion-*Contd.*

4 Re-formation After Diluviation-*Contd.*

can be no right of accretion when the new formation is on the site of what was formerly held by an individual as his private property. **Dwarkanath Roy v Dinobundhoo Singh Chowdhry 15 W. R. 461.**

88 S. 4. Cl. 3—Accession, meaning of—Government rights-Submission—continuity, presumption of—Where land which has been submerged reforms and is identified as having formed part even by accretion of a particular estate the owner of that estate is entitled to it.

(2 I. A. 28; 14 Bom. L. R. 268. appl).

Where Government acquires property under Cl. (3) of sec 4 of Regulation 111 of 1825.either as an island surrounded by an unfordable channel or as an accession to lands held by government, it does not become a trustee for the public; it is entitled to land with the property in the same way as any other part of the territory of the state at its disposal if it permanently or temporarily settles the estate to which it has thus acquired title, the holder of the settlement is entitled to the benefit of the principle of reformation, and when the question arises between Government itself and a neighbouring riparian owner, Government should not be placed in a worse position than a person who has derived titled from it and it is not precluded from claiming the land upon submergence and after re-appearance.

(13 M I A 467; 5 B L R 521; 10 Bom L R 406: Ref.)

No inflexible rule can be laid down as to the manner in which an intention not to abandon submerged lands may be proved. but it would depend upon the circumstances of each particular case.

Where submergence of lands in the possession of Government does not operate in law as an abandonment on its part and a reversion thereof to the public territory.

Ananda Hari Basak v. Secretary of State for India in Council. 3 Cal L J 316.

See also Cases under:—

(1) Riparian rights.

(2) Water rights.

89.—Accretion--Alluvial lands-Abandoument —Estoppel.

Accretion-*Contd.*

4 Re-formation After Diluviation *Contd.*

The plaintiff, and hereditary tenant, between the years 1863 and 1866, lost part of his land by the action of the river Jhelum. The land was submerged for a considerable period. and the river having receded, re-appeared *insitu* in 1868 and 1869. When the land re-appeared, the defendants, the proprietors,took possession and made arrangements for its cultivation. The land which was not carried away became *banjar* of the village, and the revenue on it was paid by plaintiff. The revenue on the land submerged was paid by defendants.

The land in dispute was, at the time of its submersion, not land bounded by a shifting river bank. but land bounded by fixed lines and susceptible of being at any moment ascertained. It was not claimed immediately on its re appearance because tenants did not know, until recently, that they retained any rights in land after it was once submerged; such non-claim was not shown to have induced the proprietor to alter his position for the worse, the fact being that both parties were under a mistaken impression as to their respective rights.

In a suit instituted by the plaintiff, a tenant, to recover the occupancy of his land recovered from the river, *held* (by Boulnois, Lindsay and Fitzpatrick, JJ.) no custom to the contrary being proved, that the tenant did not lose his occupancy rights by reason of the land being submerged.

Held, further that the tenant had not voluntarily abandoned his land on its re-appearance.

Held, further, that under the above circumstances, the tenant was not estopped from ascertaining his rights merely by reason of his having stood by and allowed the proprietor to act as if those rights had been abandoned.

Sultan Khan v Syad Mahomed Shah. P R 59 of 1877.

89A.—Rights of *adna maliks* in submerged land—Custom—Mauza Muradpur, tahsil Alipur, Muzuffargarh District—Wajib-ul-arz—Haq juri.

The plaintiffs, who were *adna maliks* in mauza Muradpur, tahsil Alipur, in the Muzuffargarh District, sued for a declaration of *adna malkiyat* rights in certain land which had been submerged

Accretion-*Contd*

4 Re-formation After Diluviation-*Contd*

by river action, which, on its re-appearance, in accordance with a provision in the *wajib-ul-arz*, had been recorded as the sole property of the defendants. The provision of the *wajib-ul arz* was to the effect: " that in this village there are two kinds of property *ala* and *adna*. If the land belonging to any *adna malik* is washed away at the time of its being thrown up, it becomes the property of the *ala maliks*. *The adna matiks* retain no right in the land. The *adna maliks* after paying *haq juri* to the " ala maliks will be entitled to get possession. Without paying *haq Juri* they will have no right. If the *ala maliks* intentionally refuse to " juri the *adna maliks* are not entitled to take " possession. The arrangement as to juri, is to " depend upon the value of the land and the sta- " tus of the *adna malik*. But it shall not be less " than Re 1 per Bigha or more than Rs 2 per " *bigha*. The *adna maliks* shall have the same " power, whether the whole or a portion of any " wells are carried of: " *Held*, that as the payment of *haq juri* or an institution fee for the recovery of land cannot be considered opposed to the principles founded on universal law and justice, it was for the *adna maliks* to rebut the presumption in favour of the correctness of the entries in the record of custom and to prove that they were not bound to pay it, and that the plaintiffs failed to rebut the entry in question or to prove that they were entitled to the land without payment of *haq juri*. (97 P R 1902, 125 P R 1889 Ref.) **Ahmad Shah v Khuda Buksh 33 P R 1903.**

90.—Beng Reg XI of 1825 s 4 cl 1.—

Where new land is formed, whether it be a reformation on an old site or whether it is formed where no land ever previously existed, ownership is determined by the ownership of the adjacent land to which it has accreted. To defeat or prevent the right by accretion, the person who claims the land as re-formation of his old land is required to prove some continuing right of property in himself; it is not enough for him to rely merely on identity of site. **Kattemonee Dossee v Monmohinee Dabee B L R Sup Vol. 353 = 3 W R 51.**

Lyon v Gray 11 W R 189.

91.—Land inundated and re-formed.

Accretion-*Contd.*

4 Re-formation After Diluviation-*Contd.*

The owner of land before it is inundated remains the owner of it when it is covered with water and after it becomes dry. **Imam Bandi v Hur Gobind Ghose 7 W R, P C 67: 4 Moore's I A 403.**

91A.—Chur and jungle lands—Re-formation of land on old site—Limitation—Possession—Presumption—Evidence Act (I of 1872), s 114.

During the period when a piece of land is submerged under water, the true owners must be held to be in constructive possession, and when it re-appears and does not become fit for actual enjoyment in usual modes, it may be presumed that the previous possession continue until the contrary is proved. (5 C W N 617 = 29 Cal 518. Fol. 9 Cal 744, 16 Cal 473 Ref) **Madhabi Sundari Dassya v Gaganendra Nath Tagore 9 C W N 111.**

91B.—Custom—Deep stream rule Ownership in bed of river—Jago Kalan village in the Gujrat District and Kakshal village in the Gujranwala District.—

The principle of general application in cases of submersion of land, which is founded on universal law and justice, is that the owner of land under water does not lose his right to the site. The deep-stream rule, where it is in existence, must be enforced within the limits prescribed by custom. And subject to its special conditions, the general rule of ownership in the site must be maintained. In the absence of any special custom, the deep-stream rule does not operate to transfer the bed of a river from the original owners of it to the proprietors of the land on the other side of the river. (5 B L R 531 P C; 59 P R. 1877, F B 36 P R 1898; 29 Cal 518 Ref. **Jalal v Samail 18 P L R 1904.**

91C.—Submersion of lands of occupancy tenants—Lands thrown up again, right of tenants to recover—Custom of village Pakhiwan in Gurdaspur District Punjab Tenancy Act s 38.

The main question for decision was whether, by custom of the village *Pakhiwan* in the Gurdaspur District, the land of occupancy tenants, recovered from the river Ravi after submersion, will be restored to the occupancy tenants or will revert to the proprietors. The tenants were the plaintiffs and the lower appellate Court gave them a decree for the entire area claimed. Overruling a contention raised on behalf of the pro-

Accretion -*Contd.*

4 Re formation After Diluviation-*Contd.*

prietors that, by the mere fact of submersion and the consequent cessor of cultivation by the tenants their rights are forfeited under the wording of the Tenancy Act, on the ground that *vis major* is a sufficient cause within the meaning of s 38 of the Act and taking an equitable view of the hard ship that would otherwise result to the occupancy tenants, the Chief Court *held* that, under the custom in question, the rights of tenants are not forfeited by reason of submersion of their holdings by diluvion and it is competent for them to claim such lands when thrown up again by alluvion. **Dewa Singh v Bishambar Das 80 P R 1905=184 P L R 1905.**

92.—Beng Reg XI of 1825 s 4 cls 1, 2, 3—

Claims to alluvial lands under cl 2 s 4 Regulation XI of 1825 (i e to lands as *re-formed lands*), are not superior to claims under cls 1 and 3 of s. 4 or under s 5 of that Regulation, i e, to lands as newly alluviated. **Wise v Ameerunnissa Khatoon 2 W R 132.**

Notes—Ref: 9 W R 259.

93.—Beng Reg XI of 1825, s 4 cls 1 and 3—Re-formation on old site.

Proof of re-formation on an old site will not suffice to establish a claim under Regulation XI of 1825. Re-formations are governed by cls 1 and 3, s 4, Regulation XI of 1825. A claim to hold the land has not been diluviated but cut off by a change of the stream. **Kenny v Sumeeroonissa 3 W R 68.**

Kalee Monee Debia v Collector of Mymen-Singh 5 W R 55.

Notes:—Fol 9 W R 312. Ref: 5 W R 55; 7 W R 103.

94.—Land diluviated by river—R'parian proprietors.—

Where property is wholly submerged by a river, lands forming afterwards on the site will, when the ownership of that site is proved to exist in the former owner, remain in him, and the accretion will not belong to the adjacent proprietor. The decision in B L R Sup Vol 533, is erroneous in not regarding the site of the increment

Lopez v Maddan Mohan Thakoor 5 B L R 521= 14 W R P C 11; 13 Moores I A 467.

Accretion-*Contd.*

4 Re-formation After Diluviation-*Contd.*

95.—Quœre.

To whom lands diluviated and afterwards reformed belong. **Kirtee Narain Chowdhry v Protab Chunder Burooah W R F B 129.**

96.—Occupancy rights in alluvial lands–Jhelum river,—

Found that by the custom of Mauzah Kachwala, Tahsil and Zillah Shahpur. tenants with rights of occupancy lose their rights in lands carried away by the action of the river and that such rights cannot be claimed on the lands being again thrown up by the action of the river. **Mian Mahomed Sharaf v Khoda Baksh P R 89 of 1877 Civil.**

97.—Re-formation of lands washed away-Beng Reg XI of 1825. s 4.

Lands washed away and afterwards re-formed the old site, which can be clearly recognized are not lands "gained" within the meaning of s 4, Regulation XI of 1825, they do not become the property of the adjoining owner, but remain the property of the original owner.

Romanath Thakoor v Chundernarain Chowdhry Marsh,136 W R F B 45= 1 Ind Jur O S 44.

Collector of Tipperah v Doorga Persad Paray W R 1864, 302.

Collector of Dacca v Kishen Kishore Chatterjee W R 1864, 273.

98.—Regulation XI of 1825—Section 4—Gradual accretion.

Land which is washed away and which reappears afterwards on the old ascertained site is not land gained by increment within the meaning of Regulation XI of 1825, and it continues to be the property of the original owner unless his title to it, after such reappearance is extinguished by adverse possession for over twelve years on the part of a trespasser. 13 M I A 467; 3 Cal 796; 1882 A W N 8 referred to.

Bahadur Rai v. Ram Janam Rai. 1 A L J 371.

99.—Diluviated lands—Beng. Reg. XI of 1825, s. 4, cl. 2.

Cl. 2, s. 4, Regulation XI of 1825. does not apply to the case of an estate entirely lost by diluvion. **Keshublal L Chowdhry v. Watson & Co. W R 1864, 64.**

Accretion-*Contd.*

4 Reformation After Diluviation-*Contd.*

100.—An old site reformed by Diluvion—Title by long and adverse possession.

The doctrine, that an old site of land reformed by diluvion remains the property of the original owner, inunciated in 5 B L R 521, does not apply to lands in which an indefeasible title is acquired by possession, both long and adverse after their reformation. The only question to be decided, is where the plaintiff has had such adverse possession for twelve years where he relies on an alleged adverse possession for more than twelve years after then reformation.

Radha Prosad Singh v. Ram Koomar Singh. **I L R 3 Cal 796. 1 C L R 259**

Varying on appeal Court of Wards v. Radha Prosad Singh. **22 W R 238.**

Notes.—Fol· 6 Cal 725, Ref: 7 Cal 225; 25 Bom 362; 1 A L J 371.

101.—Land re-formed on site that can be identified.

Where land re-forms by alluvion on a site capable of identification, the right of the owner of the original site to the chur is indisputable.

Sarat Sundari Deby v Soorjya Kant Acharjya. **25 W R 242.**

Notes.—Ref: 2 Bom 19.

101A.—Custom—Identification of land—Regulation XI of 1825.

In the absence of a custom to the contrary, land washed away to the opposite bank of the river may, if identifiable, be claimed by its owners.

Rama v Shere Singh. **15 P R 1872 and**
Yoosuf v. Sirdar Dewa. **12 P R 1870.**

101B.—Reclaiming land—Identity to be proved—Custom—Presumption—Reg. XI of 1825.

The identity of land, removed by sudden alluvion in a river to which Reg. XI of 1825 applies and re-formed, must be proved before such land becomes reclaimable; and land lost to an owner by the erosion of the river bank could not be presumed to be recovered when an equal quantity of land is left dry by the river taking another course. Custom apart, a title to such reformed land will not arise by mere proof of general inclusive boundaries at a time long preceding the reforming of the land, but if a custom is proved it is to be followed. **Huq Newaz Khan v. Khanum.** **72 P R 1869.**

101C.—Identification—Laying down of survey boundaries—Reg. XI of 1825.

Held that land could not be identified by the laying down of survey boundaries and that mode of identification was indicated in cl. 2, s. 4 of the Regulation. **Chungar v. Bahadoor Singh.** **47 P R 1868.**

102—Lands temporarily or permanently settled.

Where lands submerged by a river re-form, and can be identified as having formed a part of a particular estate, they belong to the owner of that estate, whether his estate consists wholly of permanently settled lands or whether it has been partly acquired as an alluvial accretion under temporary settlements made by Government with him as owner of permanently-settled lands. **Hursahai Singh v. Lootf Ali Khan 14 B L R 268; 23 W R 8; 2; I A 28.**

103—Land re-formed on old sites.

When land is gradually re-formed on two old sites, identity of site can give no title to the former owners of the two old sites to the land reformed on such old sites respectively; nor can identity of site give any title to land gradually re-formod, when it is formed by gradual accession partly to one estate and partly to another. A person in possession of land is *prima facie* entitled to it, and to all increments to it. **Muthooranath Muzoomdar v. Tarinee Churn Singh** **8 W R 164.**

Notes—Ref; 2 Bom 19.

104—Submersion of land—Riparian rights—Indentification of site of land.—

In a suit for possession, where it was found that a rivulet had come in from a river and formed a disjunction between the disputed land and plaintiff's property, but that the rivulet was closed up and the river had returned to its proper channel, and on the surface of the disputed land there still remained marks of its having belonged to the plaintiff.—*Held* that the finding sufficiently identified the land in suit as the property of the plaintiff, within the meaning of the Full Bench ruling in *B. L R; Sup. Vol*, **353.** 3.

Accretion-*Contd.*

4 Reformation After Diluviation-*Contd.*

W. R, 51. *Held*, also that,as the last person found to have had the land in occupation was the plaintiff, and as his possession had never been disturbed (the lands having ever since been submerged), there was a sufficient finding of possession to entitle plaintiff to a decree in confirmation of title. **Indurjeet Kooer v. Jumna Doss. 14 W. R., 164**

105—Accretion—Reformation - Taraf-Evidence—Maps—Description in plaint-Administrative divisions—Points not raised in the first Court-Partition—Title.—The word " Taraf " appears to mean a sub-division of a pergunnah, including several villages.

In 1863, two suits were brought by the predecessors in interest of the present plaintiffs to recover the respective shares now claimed by them in the chur which is also the subject-matter of present litigation. A map to the disputed land was prepared by an Amin and was made part of the decrees passed in the said suits,

Held, that the proceedings in the suits of 1863 and the Amin's map were not evidence against the Government, which was not a party to the said suits except for the purpose of showing the nature of the claim made and what lands were recovered by them and explaining the decrees made. For that purpose, the map might legitimately and must necessarily be used.

Held further, that the decision come to in the suits of 1863 was in accordance with the construction then put by the Indian Courts on Regulation XI of 1825. That view of the law was, however, overruled by a Full Bench of the Calcutta High Court in (1870) 6 B L R 255 and the law on the subject has been settled by that case and the case of (1870) 5 B L R 521 decided by the Judicial Committee in the same year.

The allegation in the plaint that the disputed lands appertian to a particular district is merely descriptive and is not restrictive. When the plaintiff claimed the lands in dispute as reformations *in situ* of her diluviated and permanently settled estate pergunnah Luskurpur and succeeded in proving that the said lands were on the original site of the said estate, as it existed at the time of the Permanent Settlement, and the High Court considered that this was not sufficient to entitle her to obtain a decree, because the pergunnah was partitioned in 1839 and different mouzas or parts of mouzas fell to the shares of different co-sharers and accordingly the parties went to trial not upon the broad issue, whether the disputed lands were reformations on the original site of the pergunnah but upon the narrower issue whether they were re-formations on the original site of certain specified *tarafs*; and it lay upon the plaintiff to make out the affirmative of that issue.

Held, that the failure of the plaintiff to indentify the sites of these *tarfas* should not be regarded as fatal to her case. The defendant in his written statement did not traverse the allegation of the plaintiff's title to be a co-sharer of the estate and did not mention the alleged partition, and no issue was directed either to the plaintiff's title or to the partition. The plaintiff should be treated as having a *prima facie* title as co-sharer in every part of the permanently settled estate of Luskurpur which was not shown to have been alienated and no weight should be attached to a suggestion not made in the Court of the first instance, where it might have been explained and met by evidence.

Rani Hemanta Kumari Debi v The Secretary of State for India in Council and Sri Sundari Debi v. The Secretary of State for India in Council. I M L T 175=3 C L J 560

106—Mofidar. Agreement at Settlement to pay batai to—Submersion of mafi land—Effect of, in respect to right of Mafidar,

Plaintiff claimed from defendants value of half produce of certain lands-cultivated by the latter. Plaintiff at Settlement was recorded Mafidar of 57 ghumaos 6 kanals 10 marlas of land (of which defendants were recorded proprietors, and which was cultivated in part by tenants with occupancy rights, and in part by tenants-at-will) with the right to take *batai*, and levied revenue accordingly, until 1869 when the land was submerged.

In 1873 a considerable portion of it re-appeared and was taken possession of by the proprietors, and had since been cultivated in part and in part used by them as grazing lands, the revenue being fixed at Rs. 10-12-0 which the defendants did not dispute their liability to pay in cash.

Accretion-*Contd.*

4 Reformation After Diluviation—*Contd.*

Held, by Plowden and Smyth, JJ. (Elsmie, J. dissenting) that the mutual rights and obligations of the parties survived in their integrity notwithstanding the occurrences above described, and, therefore. that plaintiff was entitled to recover the value of the half produce as claimed, until the completion of a new settlement. **Karim Baksh v Alla Jowaya Khan. P R 61 of 1879.**

107—Custom—Mouza Khairpur, tahsil Khushab, Zillah Shahpur—Rights of hereditary cultivators in submerged lands.

Found that there is no established uniform and general custom in the Shahpur district among the villages affected by river action. by which the right of occupancy of a hereditary cultivator in the holding is destroyed upon its submersion.

Where plaintiffs, who were hereditary cultivators of Mauza Khairpur, tahsil Khushab, in the Shahpur district, sued to recover from the proprietors certain lands which had been submerged by river action and had subsequently re-appeared, *held* (reversing the orders of the lower Courts), that notwithstanding an entry in the *wajib-ul-arz* in favour of the proprietors, no established custom was shown to exist in the village in question by which the plaintiffs had lost their hereditary right of cultivation in the lands in suit, and that, therefore. there was no obstacle to the operation of the general rule laid down by the Full Bench judgment in Civil Ruling No. 59, *Punjab Record* for 1877, and that the plaintiffs were entitled to recover their lands. **Lal Shah v Karim Buksh P R 96 of 1879.**

Notes:—Fol: P R 1901. Rev=54 P L R 1901; 97 P R 1902=121 P L R 1902.

108—Rights of occupancy tenant in submerged land on re-appearance Custom-Mauzah Chak Ramdas, Tahsil Bhera, Zillah Shahpur—Condition in wajib-ul-arz.

Plaintiff, a tenant with rights of occupancy, sued to recover certain land situated in Mauzah Chak Ramdas, tahsil Bhera, in the Shahpur district, which had been submerged by river action and had subsequently re-appeared. It was found that no custom prevailed in the village in question which was opposed to plaintiff's claim, but there was a provision in the *wajib-ul-arz* that in cases of submersion of tenant's holdings the tenant should receive an equivalent out of the *banjar shamilat*, and should pay revenue to the Maliks according to the Khewat of the submerged holding. Previous to this suit the present plaintiffs sued the present defendant for an equivalent of his share in the submerged holding to be made good out of the *shamilat* land but his suit was dismissed on the ground that there was no *banjar shamilat* to give him, and that he had not paid the revenue on the submerged holding. Subsequently the present suit was brought to recover the holding itself which had re-appeared in whole or in part from the river.

Held (following the decision in *Punjab Record*, Civil Ruling No. 59 of 1877), that. there being no custom to the contrary, the plaintiff's title to the right of occupancy claimed was not extinguished, but still attached to the land now that it had reappeared: that the provision in the *wajib-ul-arz* was not inconsistent with the right claimed, though if the defendant had given the plaintiff an equivalent for the land submerged, the plaintiff's right in that land would have been transferred to the defendant; that the non-payment of revenue on the land during the period of its submersion was not fatal, as the plaintiff was not bound to pay that except in case of being supplied with land in its place, and that the plaintiff was therefore entitled to recover the land in suit conditionally upon payment of the revenue paid upon it by the proprietor, the defendant, since the date of its re-appearance. **Morid v Mussammat Ram Davi P R 127 of 1879.**

109—Custom— M. Sadda Kambo, Shahpur—Occupancy tenant's right to land carried away by diluvion on its re-appearance—General rule—Special custom—Tenant preserving his right by payment of revenue during period of submersion.

The plaintiffs, residents of the village of Sadda Kambo in the Shahpur tahsil of the Shahpur district, sued to enforce their occupancy rights in certain lands which had been carried away by diluvion, and which, on their re-appearnce, had been taken possession of by the defendants, the proprietors. The defendants pleaded that according to the custom as stated in the *Wajib-ul-arz* of the village, the tenants lost all their rights on the submersion of lands held by them on a right of

Accretion-*Contd.*

4 Reformation After Diluviation—*Contd.*

occupancy, and the lower Courts finding the custom proved dismissed the plaintiffs' claim.

Held, that the general rule to be applied in dealing with cases of the above description is that, no custom to the contrary being proved, an occupancy tenant does not lose his occupancy rights by reason of the land being submerged: that though there did exist in the plaintiffs' village a custom by which occupancy tenants, became liable, under certain circumstances, to lose their rights on the submersion of their lands, still under that custom the tenants could preserve their rights intact, notwithstanding the submersion of their land, by paying the revenue assessed thereon during the period of submersion, though if they failed to do so during such period, their right of occupancy ceased to exist; and that on the facts of the present case the plaintiffs were entitled to succeed.

Raja v Sarfaraz **P R 152 of 1883.**

Notes:—Fo: 8 P R 1901; Rev: 54 P L R 1901; 97 P R 1902=121 P L R 1902.

110—*Ala* and *adna maliks*—Land submerged—Re-appearance—Right of possession—Wajib-ul-arz.

The parties to the case were *ala* and *adna maliks* of *mauza* Thoa in the Dera Ismail Khan District. As regards the preservation or loss of rights of *adna maliks* in cases of alluvion and diluvion, the *Wajib-ul-arz* provided that the land attached to wells will on restoration belong to the former owner (*adna malik*); that in case of lands not attached to wells, if a *portion* of a field or plot be carried away and be again thrown up opposite the remaining land, the former *adna maliks* will take so much of it as is required to make up his old holding: but if the *whole* field or land be carried away, it will belong on restoration to the *ala maliks* as *shamilat*, and the *ala maliks* will have full power to give it to *adna maliks* or not, and for its cultivation those powers and rules will come into force which are laid down for the *shamilat*. It also contained the follwing clause. *Lekin jis malik adna ki zamin amum burd hogi banisbat digar malikan adna uska pahle hak hai ki banjar shamilat se ya zamin baramad shudu se bakdar rakba burd shuda ke usko mile aur aisi zamin ki liye malik adna ko judid jhuri jo ek rupaya fi acre se ziyada na howe deni hogi aur khilaf dastur ala malikan ho aisi zamin ke liya jhuri lene se inkar karne ka ikhtidar na hoga.*

Accretion-*Contd.*

4 Reformation After Diluviation—*Contd.*

Held that the proper interpretation of this clause was that if the *ala maliks* did not require the lands themselves, and it became a question of letting them out then the first persons entitled to admission were the *adna maliks* who had lost a good deal of land (*amum*). Both those who had lost a considerable part (and who might not wish to wait for the chance of a restoration—*mahaz*) would come under this head, and might claim to be accepted in preference to other *adna maliks* or outsiders on payment of the fair customary rent which the *ala maliks* might not refuse to accept on the plea that they could get a higher rent by competition. **Mubaruk Shah v Abdulla. 125 P R 1889.**

Notes:—Ref 33 P R 1903; Dist 97 P R 1902 =121 P L R 1902.

111—Alluvion and diluvion—Title to land acquired by accretion—Land subsequently retransferred by avulsion—Identification of site.

Owing to changes in the course of the river Chenab, certain land, which was identified as having originally belonged to plaintiffs, after being submerged, gradually re-appeared on the Muzaffargarh side as the river receded, but was subsequently bodily transferred to the Mooltan side by the sudden change in the course of the river. While the land was on the Muzaffargarh side, the defendants brought a few detached plots under cultivation, and were still cultivating them at the time of suit. The burden of suing for possession of the said land was in consequence upon plaintiffs. The latter instituted a suit and obtained a decree in the first Court, which was, however, reversed on appeal by the Divisional Judge.

Held, in accordance with the principle laid down in *Lopez' case* (5 B L R 521), that inasmuch as the site of the land in question had been duly identified as plaintiffs' the latter were entitled to succeed, and that the mere facts that they did not follow the land when it went to the Muzaffargarh; side, and that the defendants had brought a few scattered plots thereof under cultivation did not affect plaintiffs rights as owners of the site.

14 All 238 not followed. **Chundar Bhan v Ahmad Yar Khan. 36 P R 1898.**

Notes:—Fol 66 P R 1901=171 P L R 1901 Ref 63 P R 1903=131 P L R 1903.

Accretion-*Contd.*

4 Reformation After Diluviation—*Contd.*

112—Alluvion and diluvion—Rights of *adna maliks* in submerged land—Custom—*Mauza* Muradpur, *tahsil* Alipure, Muzaffargarh District—*Wajib-ul-arz*—Haq Juri.

The plaintiffs who were *adna maliks* in *mauza* Muradpur, *tahsil* Alipur, in the Muzaffargarh District, sued for a declaration of *adna malkiyat* rights in certain land which had been submerged by river action, which, on its re-appearance in accordance with a provision of the *Wajib-ul-arz* had been recorded as the sole property of the defendants. The provision of the *Wajib-ul-arz* was to the effect: "that in this village there are two kinds of property, *ala* and *adna*. If the land belonging to any *adna malik* is washed away, at the time of its being thrown up it becomes the property of *ala malik*. The *adna maliks* retain no right in the land. The *adna maliks* after paying *haq Juri* to the *ala maliks* will be entitled to get possession. Without having *haq Juri* they will have no right. If the *ala maliks* intentionally refuse to take *Juri* the *adna maliks* are not entitled to take possession. The arrangement as to *Juri* is to depend upon the value of the land and the *status* of the *adna malik*. But it shall not be less than Re 1 per *bigha* or more than Rs. 2 per *bigha*. The *adna maliks* shall have the same power whether the whole or a portion of any wells are carried off."

Held, that as the payment of *haq Juri* or an institution fee for the recovery of land cannot be considered opposed to the principles founded on universal law and justice, it was for the *adna malik* to rebut the presumption in favour of the correctness of the entries after record of custom and to prove that they were not bound to pay it.

Held, on the evidence that the plaintiffs have failed to rebut the entry in question or to prove that they were entitled to the land without payment of *haq juri*.

(97 P R 1902), (125 P R 1889), referred to.

Ahmad Shah v Khuda Bakhsh. 33 P R 1903.

113—Alluvion and diluvion—Land submerged—Reappearance—Right of the owner in submerged land on re appearance—Custom—Wajib-ul-arz—Mauza Khanpur, Gujrat.

Accretion-*Contd.*

4 Reformation After Diluviation—*Contd.*

Held, that in cases of alluvion and diluvion, according to the custom prevailing in *mauza* Khanpur, a proprietor loses all his rights on the submersion of his land, as such land on restoration becomes *samilat deh* and not the property of the proprietor to whom it belonged at the time of its submersion. **Sahib Din v Ilam Din. 15 P R 1904.**

114—Condition of land when reformed-Beng. Reg. XI of 1825, s. 4—Right to possession.

The rule, where a question arises as to the right to the possession of land, either gained by gradual accession or reformation, or thrown up in a river or the sea, is that the condition of the land where it was originally gained by alluvion or thrown up and became the subject of property and capable of cultivation or occupation as such, must be looked to. If after, the land comes into existence and is capable of cultivation, it is taken into possession and occupied, the subsequent drying up of the channel between such land and the shore does not affect the occupior's right to possession as against every one except the Government or one who can show a better title. S. 4 Regulation XI of 1825 is not against this view.

Kaliprasad Mazumdar v Collector of Mymen Singh. 6 B L R 261 note; 13 W R 366

115—Beng. Reg. XI of 1825, s. 4, Construction of—"At the disposal of Government."

The words "at the disposal of the Government" in cl. 3 s. 4. Reg. XI of 1825, mean that the property in, and absolute right of disposal of, the land is vested in the Government has merely a right to the revenue. **Khellut Chunder Ghose v Collector of Bhaugulpore. W R 1864, 73.**

115A—Alluvion—Diluvion—Customary due—Ala Malik—Custom—Wajib ul-arz, entry in.

When the entry in the *wajib-ul-arz* was to the effect that if lands are washed away but subsequently re-appear, the original proprietors are entitled to recover the same on payment of certain fixed dues to the *Ala Maliks*;

Held, that the owners could only recover the lands from the *Ala Maliks* on payment of customary dues to them. **Isar Das v Ghulam Haider. 31 P L R 1912**

Accretion-*Contd.*

4 Reformation After Diluviation—*Contd.*

115 B—Chur land—Alluvial formation—Reformation Accretion—Possession, recovery of, suit for—Mesne profits—Adverse possession—Limitation—Onus of proof—Rennell's map, evidentiary value of-Chouhuddibandi paper, admissibility of, Settlement, acceptance of, from Government, effect of—Presumption of possession following title.

In a suit for recovery of possession of certain alluvial or chur lands on the ground that they were reformations on the site on the plaintiffs permanently settled estates, or were accretions to their estates, the plaintiffs ought to establish what lands were included within their estates at the time of the Decennial Settlement made in 1789 upon which the Permanent Settlement of 1793 was based.

The survey, upon which Major Rennell's map published in 1780 was based, was made by Rennell and his co-adjutors during the years 1764 to 1773: the survey was made for the purpose of showing the courses of rivers and the different land routes passing through the country; there is no indication whatever that the survey was made for revenue purposes, and Major Rennell's maps cannot therefore, be accepted as any safe guide, in determining the boundaries of estates.

Major Rennell's maps being based on surveys made from twenty to twenty-five years before the Decennial Settlement, assumption can safely be made that the condition of the locality, at the time of the Decennial Settlement has remained practically unchanged during that period of time, specially when there is, in any part of the country, one of the most erratic rivers, as the Padma, the variable character of the course whereof is well known.

Rennell's map, based as it is on the surveys of 1764-73, even if it accurately located the different mauzas, cannot be safely treated as indicating their existence or actual position at the time of the Decennial Settlement of 1789.

It is impossible to determine with any approach to accuracy, from Rennell's map, the position, boundaries, and size of the mauzas at the time of the Permanent Settlement, and when the plaintiffs seek to make that map the foundation of their claim, they attempt to use it for a purpose for which it was never intended.

Accretion-*Contd.*

4 Reformation After Diluviation—*Contd.*

The mere fact that a particular tract in Rennell's map bears the name of one or more of the mouzas subsequently settled with some persons at the time of the Decennial Settlement, would not, by itself, indicate that the mauzas were in the same place as in Rennell's time much less would it indicate that the mauzas had the same sizes and boundaries. Rennell's map however useful it may be to show the course of the river in 1764-73 and to indicate generally the relative position of parganas, mauzas and towns on both sides of the river at that period cannot, be accepted as a safe guide to determine accurately the position of the river and of the places on both sides thereof in 1789; much less can it be used to determine the exact position or size or boundaries of different mauzas included in any particular estate at the time of either the Decennial or the Permanent Settlement.

Hakikat chouhuddibundi papers are statements of boundaries of land included in certain estates, and were filed apparently under the signature of the then proprietors; they were declarations by the then proprietors of the boundaries and quantity of the land of which they had obtained possession under the Permanent Settlement. The returns also give details of the land claimed as rent-free, of the waste land of the gross assets of the collection charges and of the balance out of which the Government revenue was payable. Those papers are admissible in evidence, but their evidentiary value must depend upon the facts of the particular case.

It cannot be presumed as a matter of law, that the state of things described in the Thak and Survey Maps existed at the time of the Permanent Settlement.

Where as in this case, the changes in the course of the river have been so sudden and so violent almost from year to year, that even if the plaintiffs could establish that any portion of the lands claimed was reformation on the sites of their permanently settled estates, they could not possibly succeed as to the remainder on the ground of accretion thereto, as no question of accretion could possibly arise.

Where, as in this case, the plaintiffs alleged that they were dispossessed on the 4th June, 1850 and the suits were not commenced till the 29th

Accretion–*Contd.*

4 Reformation After Diluviation-*Concld.*

May, 1902 the burden liess upon them to establish that they were in possession between the 29th May 1890 and 4th June, 1890.

Where it is impossible to hold that either party had complete possession over the whole of the disputed land, if the plaintiffs succeeded in establishing their title, the legitimate inference would be, that, in the eye of the law, the possession was with the rightful owners and this would certainly be so in regard to all the lands except such small portions as might have been occupied by the tenants of the defendants.

Where the parties repeatedly accepted settlements from the Government after they had obtained the release of other lands, though their conduct may not amount to estoppel, it furnishes strong evidence on the side of the Secretary of State that their present claim is wholly unfounded

If the Secretary of State asserted title to the chur and held occupation through settlement holders, for the statutory period, Government would acquire a good title by adverse possession.

In order to prove title to lands by adverse possession, the possession must be adequate in continuity, in publicity and in extent, so as to indicate that it is possession adverse to the competitors.

No presumption of possession can be made in favour of the adverse possessor, and his possession must be restricted to the land of which he has actual occupation. (A O D 105 of 1896 (unreported); A O D 52 of 1899 (unreported) A O D 335 of 1901 (unreported); 12 C L J 216 Ref 3 C L J 560; 10 C W 630 expl. 30 Cal 291: 3 C L J 316 followed. 16 Cal 473 Fol. 20 W R 25 (P C) Ref 29 Cal 513 Ref 27 Cal 943 Fol 24 Cal 256; 3 C L J 316; 35 Cal 961 Ref)

Secretary of State for India v Kalika Prosad 15 C L J 281.

(5) PROCEDURE. (116-119)

(1) PROCEDURE WHERE RULES UNDER BENGAL REG XI OF 1825 ARE INAPPLICABLE.

116—Procedure where rules under Beng. Reg. XI of 1825 are inapplicable.

Where the special rules laid down in Regulation XI of 1825 for the adjudication of questions of title to alluvial land are inapplicable, and no special custom exists, the decision of the case ought to proceed on general principles of equity and justice. **Sheogolam Tewaree v Faquera Misser. 3 Agra, 400**

Accretion–*Contd.*

5 Procedure– *Concld.*

(2) CHUR LANDS REFORMATION ON OLD SITE.

117—Chur lands re-formation on old site—Beng reg. XI of 1825 s. 4 cls 3 & 5.

Held that cl 3 s 4 Regulation XI of 1825 is applicable when the chur land is thrown up for the first time, and is not capable of being identified; but where the land thrown up forms a portion of the old mouzah, and can be identified, cl 5, s. 4 of the said enactment would be applicable; and in the absence of any particular local custom the claim in respect of such land must be decided according to the principles of equity.

Todee Singh v Gardner 2 Agra 342.

(3) SUIT OF ALLUVIAL LANDS.

118—Suit for alluvial lands—Beng. Reg. XI of 1825, s. 5, cl. 5.—

In a suit for alluvial lands, if the defendant pleads, and can establish his plea, that the lands in question were gradual accessions to his estate, neither the ground of re-formation on the old site, nor that of prior possession for a short period, can avail the plaintiff. If, however, the plea be found against the defendant, the matter must be disposed of according to cl. 5, s. 5. Regulation XI of 1825. **Govind Nath Sandyal v. Nubocoomar Banerjee, 8 W R 206.**

119—Beng. Reg. XI of 1825, s. 4, cl. 5.—

Where plaintiff alleges that his and the defendant's villages were washed away, and have re-formed on the same site, and no third party claims the new formation as an increment to his estate, the question of title will have to be determined by cl. 5, s 4 of Regulation XI of 1825.

Jannobee Chowdhrain v. Collecter of Mymensingh, 8 W R 287.

Notes:—Ref: 2 Bom 19.

(6) RIGHT OF PURCHASERS TO ACCRETION (120-125).

(1) Reformation since purchase.

120—Re-formation since purchase.—

Accretion-*Contd.*

6 Right of Purchasers to Accretion *Contd,*

The purchaser of an estate found by actual measurement the year before to consist of a certain number of bighas with a specified rental can have no claim to re-formations of land belonging to the mehal as it originally stood.

Jugobundhoo Bose v. Koomoodinee Kant Banerjee Chowdhry, 19 W R 89.

(2) INCREMENTS NOT MENTIONED IN CERTIFICATE OF SALE.

121—Increments not mentioned in certificate of sale —

Where a mehal which has been diminished by diluvion is sold at auction by the Collector, who apprizes the public of the existing area, his specification of such area in no way limits the terms of the certificate of sale, or restricts the right of the purchaser to claim thereafter any accretion to the estate, the increment being always a contingent right which the zamindar has. 21 W R 115. Affirmed on review 22 W R 23.

Idan v. Nund Kishore, 25 W R 390.

Notes:—Dist. 24 W R 91; 2 C L R 39. Ex: 22 W R 52. Ref: 2 Bom 19; 35 Cal 621; 10 C L J 420.

(3) LANDS TAKEN ON SETTLEMENT FROM GOVERNMENT.

122—Lands taken on settlement from Government.—

Parties settling with Government are entitled to all the proprietary rights of the Government, including the re-formed lands, unless they take the estate at a reduced jumma from that fixed at the original settlement, in which case they are in the position of a proprietor who has accepted a remission of revenue in consideration of the loss of area of the land, a situation which disentitles them to the lands re-formed. **Krishto Mohun Bysack v. Collector of Dacca, 24 W R 91.**

Notes:—Ref: 2 C L R 39.

(4) PURCHASE OF LAND FROM GOVERNMENT—RIGHT TO INCREMENT.

123—Purchase of land from Government—Right to increments.—

Accretion-*Contd.*

6 Right of Purchasers to Accretion-*Contd.*

Plaintiff bought a certain chur, situated between two branches of a river, from the Government, the sale notification stating that the chur contained a certain area and was subject to a certain jumma. It appeared that at a former time the chur had been much larger and extended over a site afterwards covered with deep water, but on which, and before the plaintiff's purchase, new land had formed by accretion to the opposite side of the channel. In a suit for possession of the newly-formed land on the ground that it was re-formation on an old site. — *Held*, that what the Government sold and what plaintiff bought was the chur as it existed at the date of the purchase. 28 W R 115, cited and distinguished. **Gholam Ali Chowdhry v. Collector of Backergunge, 2 C L R 39.**

124—Reg. XI of 1825, Ss. 4, 5—Alluvion and diluvion—Accretion — Auction purchaser at a sale for arrears of revenue, right of, to accretion.—

An auction purchaser of an entire estate at a sale for arrears of revenue is entitled to recover all lands included in the taluq at the time of its settlement as well as all lands which had subsequently accereted thereto by alluvion. Where lands had in fact become dry, not naturally by accretion through gradual alluvion but by reason of the diversion of its water through an artificial channel:—*Held*, that the mere fact that an accretion of some lands had commenced before the excavation of the channel would not give the riparian owner a title to the rest of the lands, if it were found that they were not formed by alluvion. The law relating to lands formed by accretion and dereliction of river discussed.

Kanta Proshad Hajari v. Abdul Jamir Sadayar, 8 C W N 676.

(5) PROPERTY NOT ATTACHED BECAUSE SUBMERGED.

125—Submerged land—Accretion.

F owned a share in a village M, which in 1875, was divided into two separate *mahals*, K and U, and Government revenue was separately assessed on each *mahal*. In 1876 K was entirely submerged by the Ganges. On the 20th September, 1877, F's share was sold in execution of a decree, and the auction purchaser was put in possession. In the sale certificate, the village M was named

Accretion—*Concld.*

6 Right of Purchasers to Accretion—*Concld.*

without specific mention of either of the *mahals*, and the Government revenue referred to was the amount assessed on U only. Subsequently the river receded, and part of K was again left dry and it was treated by the revenue authority as having accreted by alluvion to U in the proprietary possession of the auction purchaser. *Held*, that, this view was erroneous inasmuch as before the auction-sale of 20th September, 1877, the two properties were separate, being separately assessed with revenue, and the incidents of the ownership of one could not affect the ownership of the other; and since there was no such rule of law as justifies the proposition that simply because two *mahals* are contiguous and one of them is liable to be submerged, therefore it is nothing more or less than an accretion to the other. *Held*, also that inasmuch as the *mahal* K. being at the time under water, was not attached in execution of the decree against F. and was not advertized for sale, and the revenue assessed thereon was not referred to in the sale proceedings, and the sale certificate contained no reference to it as the property sold, the sale of the 20th September, 1877, did not convey any rights to the auction purchaser in respect of K, Second Appeal No. 16 of 1884 from a decree of F A Bollack, Esq, officiating District Judge of Allahabad, dated the 12th September, 1883, affirming a decree of Pandit Indar Narain Munsif of Allahabad, dated the 16th July 1883) referred to. **Fida Husain v. Kutu Husain, 7 All 38=4 W N 257**

Notes:—Diss: 9 All 136 Dist: 10 Mad 169.

Accrual of cause of action.

See (1) Limitation Act.
(2) Cause of Action.

Accrual of Right

See Right of Suit.

Accrual of Right to sue

See (1) Right of suit
(2) Limitation Act.

Accrual of right to sue on death of widow

See (1) Hindu Law—(Widow).
(2) „ „ —Reversioners
(3) Limitation Act Art 141

Accumulations

(1) Income (1-2).
(2) Right of Hindu Widow (3-6).

See (1) Hindu Law-Alienation-Alienation by widow—Income and Accumulation.
(2) Hindu Law—Joint Family-Nature and interest in, Joint Property Ancestrial Property.
(3) Hindu Law-Widow-Interest in Estate of Husband—By Inheritance.
(4) Hindu Law—Widow—Power of Widow—Power of Disposition or Alienation.
(5) Hindu Law-Will-Construction of Wills.

(1) INCOME.

1—Income—Hindu window—Accumulations are not income, and cannot be dealt with by a Hindu widow as such; they should be treated in same way as the corpus of the estate.
Grose v Amitamayi Dasi. 4 B L R O C 3= 12 W R O C 13.

2—But income and accumulations are not the same thing: therefore, *quære*, whether she can deal with accumulations as she can with income.
Harendranarayan. Kailasnath Ghose v Biswanath Biswas. 4 B L R O C 41.

(2) RIGHT OF HINDU WIDOW.

3—Right of Hindu-widow—Accumulations of income from her husband's estate.—A Hindu widow is entitled to the accumulations of income from her husband's estate. **Pannalal Seal v Bamasundari Dasi 6 B L R 732.**

Notes—Ref 5 Cal 512.

4—Widow purchasing immoveable property with accumulations—Where a widow purchased immoveable property with the profits of her husband's estate, it was held, to form part of her husband's estate, in absence of any proof of any distinct intention on her part to sever such purchases from the estate and appropriate it to herself. **Gonda Kooer v. Kooer Oodey Singh. 14 B L R 159.**

See Chowdhry Bholanath Thakur v, Bhagabati Deyi 7 B L R 93.

In that case it was held that, though a Hindu widow is not competent to alienate property acquired by her out of funds derived from her

Accumulations-*Contd.*

husband, yet where the property was conveyed to her under a deed, to enjoy for her life-time and to incur all necessary expenses, she was entitled to invest sums of money out of the income for the benefit of her daughters in purchasing immoveable property for their maintenance. But this decision was reversed by the privy council on the construction of the deed.

Bhaga Batti Deyi v. Bholanath Thakoor 1 Cal 104.

Notes;—Fol 9 Cal 758. Con: 25 W R 335. Ref: 5 Cal 512, 10 Cal 324 P C.

4 A—Immoveable property purchased with accumulations—Immoveable property purchased by a Hindu widow with the profits of her husband's estate, there being no proof of any distinct intention on her part to server such purchases from the estate and appropriate it to herself, held to form part of her husband's estate. **Gonda Kooer v. Kooer Oodey Singh 14 B L R 159.** See also, **Chowdhry Bholanath Thakoor v Bhagabati Deyi, 7 B L R 93.**

5—Construction—Direction to accumulate, validity of:—It is not incompetent for a Hindu testator to direct accumulations. Principles governing the validity of directions for accumulations examined and explained. 24 Cal 589 on app., 25 Cal 662 and 4 Cal 443 ref. to.

Rajendra Lall Agarwalla v. Rajkoomari. 11 C W N 65=34 Cal 5.

6.—Will—Construction—General charitable intention—Charity not established—Accumulated interest,if part of the residue-Blood relations right of to have the administration of charity —Cypres doctrine.

Where a testator made a bequest in the following words " (1) I give in charity twelve to sixteen thousand rupees, for building a lower roomed house and premises, for the establishment of a charitable dispensary, and fifty thousand rupees for carrying on the said dispensary. (2) The executors shall demarcate one portion of the joint garden—house we have at R, as my separate share, and erect the buildings, thereon, and after purchasing company's papers for fifty thousand rupees, shall, out of the interest thereof continue to carry on the work of the charitable dispensary. On to the said dispensary they shall put up a sign board of stone with my name written on it, and they shall

Accumulations-*Concld.*

likewise have the power of paying over the said amount, and making over the charge of carrying on the work of the said charitable dispensary into the hands of Government," but the dispensary was not established, and interest had accumulated on the fund. *Held*, that cl. (1) indicated a general charitable intention of the testator;

That, applying the Cypres doctrine, the general charitable intention should not fail to be carried out, merely because the executors are all dead and the particular land on which the testator desired the dispensary to be erected is not available for the purpose; that cl. (2) did not show any intention on the part of the testator, that this particular charity is to remain under the administration of any of the testator's relative; that the mere fact that the charity has not been established earlier does not render the interest accrued on the fund, applicable as a portion of the residue of the estate. But it forms part of the capital for the purpose of carrying out the charity.

Advocate-General of Bengal v.Belchambers. 36 Cal 261=1 Ind Cas 944.

Accumulations, period up to which they may be dealt with

See (1) Hindu Law—Alienation-Alienation by widow.

(2) Hindu Law—Will—Construction of wills-Special cases of construction.

Acknowledgment

See Cases under. (1) Mahomedan Law-Acknowledgment.

(2) Stamp Act, 1879 s. 3, cl. 4.

(3) Cases under Stamp Act 1879. sch. 1, Art 1 Act 5 sch II

Acknowledgment of Debt.

See (1) Limitation Act (1908) S. 19.

(2) Limitation Act (1908) Art 64

Acknowledgment of title.

See (1) Limitation Act (1908) S. 19

Acknowledgment-*Concld.*

(2) Contract Act s. 25 (1) and s. 62.

1—Acknowledgment of debt contained in unregistered document—Admissibility of document as evidence of acknowledgment.—When an unregistered document, which is compulsorily registrable, contains an acknowledgment of a debt, it is admissble as evidence to prove such acknowledgment Khushalo v. Behari Lal. 3 All 523.

See—also cases under:—

(1) Registration Act S. 17 and S. 50.

(2) Evidence Act S.92.

(3) Limitation Act S. 19.

Acknowledgment differs from agreement.

See Dekkan Agriculturists Relief Act Sec, 72 (a).

Acknowledgment Effect of on illegitimate children.

See Mahomedan Law acknowledgment.

Acknowledgment of adoption.

See Evidence—Civil cases—Miscellaneous documents acknowledgment.

Acknowledgment of debt after period of limitation has expired.

See Contract Act Sec 25, cl. III.

Acknowledgment of liability.

See Limitation Act Sec 19.

Acknowledgment of mortgage.

See Limitation Act (1908) Art 148, and S. 19.

Acknowledgment of mortgagor's title by one of several mortgagees as agent for the others

See (1) Limitation Act—S. 19.

(2) Limitation Act Art s. 134, 135 and 147.

Acknowledgment of other Rights.

See Limitation Act S 19.

Acknowledgment of son.

See Mahomedan Law Acknowledgment.

Acknowledgment of Tenancy by receipt of Rent

See Landlord and Tenant.

Acquiescence

See also Cases under:—

(1) Estoppel—Estoppel by Conduct.

(2) Jurisdiction—Question of Jurisdiction—Consent of Parties and Waiver of Jurisdiction.

(3) Laches.

(4) Landlord and Tenant-Buildings on land, right to remove, and compensation for, Improvements.

(5) Common Land.

(6) Arbitration (Awards).

(7) Principal and Agent.

(8) Buildings on another's land).

Acquiescence-

(1) Laches (1—2).

(2) Delay. (3)

(3) Delay in bringing suit (4).

(4) Delay in enforcing rights with knowledge (5—8).

(5) Delay in making objection (9-12 and 12A).

(6) Delay in opposing erection of Building (13).

Acquiescence-*Contd.*

(7) Erection of Building without objection. (14-30).

(8) Cultivating land without objection (31-31A).

(9) Cultivation and changing character of Land (32—33A)

(10) Acquiescence in title by conduct (33B).

(11) Conduct defeating title (34-35),

(12) Presumption from allowing grant of certificate unopposed (36 & 36A-36D).

(13) Not objecting to sale (37 and 37A).

(14) Pre-emption (38A—38B)

(15) Account made in course of usual dealing (39-40).

(16) Sending agent to settle rent (41 and 41A)

(17) Receipt of Rent in lieu of grant of Land (42).

(18) Accepting lower rent than that entitled to for long time. (43).

(19) Long possession by tenant without lease (44-44A).

(20) Allowing part owner to work forfiture of tenure as if full owner (45-62).

3 General Cases (63-70).

(1) LEACHES.

1.—Laches—Doctrine of laches and applicability of—Limitation.

The equitable doctrine of laches and acquiescence does not apply to suits for which a period is provided in the Limitation Acts.

Ram Rau v Raja Rau. 2 M H C R 114.
Taruckchander Bhattacharjee v Huro Sunkur Sandyal. 22 W R 267.
Contra **Uda Begam v Imamudin. 1 All, 82.**

Notes:—Ap: 1 All 82. Ref : 2 M H C R 428; 3 Mad 145; 20 Bom 298.

1 A—Redemption—Maxim—Redeem up and foreclose down—Decree nisi—Res judicata—Civ. Pro. Code (Act V of 1908), S 11—Registration Act (XVI of 1908), Ss. 17, 49—Document severable in parts - Some parts not requiring registration— Document can so far be used in evidence—Company—Directors de facto-Notice to strangers—Mortgagee in possession-Agreement empowering him to charge for his personal services-Agreement valid—Clog on the equity of redemption—Once a mortgage always a mortgage—Manager of a Mill—Acqiescence—Elements of—Fraud, what constitutes.

Acquiescence-*Contd.*

1 Laches—*Contd.*

When there is more than one mortgage upon a property, then the rule is, redeem up,and foreclose down, which, in fact, means that the first mortgagee suing for foreclosure must make all subsequent mortgagees parties to the suit and so afford each in turn the chance of redeeming before being foreclosed. The first mortgagee can neither foreclose nor be redeemed by the original mortgagor without taking into account intermediate encumbrances. If the intermediate encumbrancers, who are parties to the suit, do not choose to exercise their rights to redeem, each in turn would be foreclosed before the first mortgagee could come into touch with the mortgagor.

A decree *nisi* in itself from its nature is provisional and requires the party seeking to have it enforced to move it absolute. Whether the decree be procured by the mortgagor or the mortgagee, it is in the option of either party to enforce it and have it converted into a decree absolute but until one or the other party does so, it never can be a final decision or constitute *res judicata* .

Where a decree is couched in general terms and a question of *res judicata* arises upon it, the Court may look at all the intrinsic evidence before it and the materials of the case as a whole, even going so far as statements in the depositions of witnesses.

Where a document, which as a whole requires registration but is not registered, contains separable parts which do not require registration, those parts may be admitted in evidence to prove transactions which *ex hypothesi* do not affect immoveable property of the value of Rs. 100 or upwards.

An agreement whereby the mortgagee in possession agrees with his mortgagor to carry on the management of a mill (the property mortgaged) and to finance it in consideration of his getting a fixed remuneration, is not compulsorily registrable.

As between a Company and persons having no notice to the contrary, directors *de facto* are as good as directors *de jure*.

Acquiescence-*Contd.*

1 Laches—*Contd.*

Outsiders dealing with a Company are bound to acquaint themselves with its external position, which can usually be gathered from the papers of their constitution, the Memorandum of Association and the Articles of Association, but are not bound to inquire into and satisfy themselves upon all the details of the Company's in-door management. This principle requires modification where the persons sought to be affected with notice are themselves within the Company.

An agreement, whereby a mortgagee in possession agrees with his mortgagor to charge for his personal services, is valid, if it does not constitute a clog on the equity of redemption. The maxim "once a mortgage always a mortgage" means that there can be no additional contract so as to preclude the mortgagor from redeeming.

It does not include previous or part agreements independent of the mortgage, unless they are unconscionable or clearly obtained by undue influence or the abuse of fiduciary relations.

The payment of fair remuneration to the manager of a large concern like a spinning and weaving mill, to keep it in a high state of efficiency, is not a clog on the equity of redemption; and in principle it makes no difference whether the manager is the mortgagee in possession or a third party.

The acquiescence which will deprive a man of his legal rights must amount to fraud.

A man is not to be deprived of his legal rights, unless he has acted in such a way as to make it fraudulent for him to set up those rights. The elements or requisites necessary to constitute the fraud are (1) the plaintiff must have made a mistake as to his legal rights; (2) he must have expended some money or must have done some act on the faith of such mistaken belief; (3) the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff; (4) the defendant must know of the plaintiff's mistaken belief on his rights; and (5) the defendant must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. All these elements must exist together.

7 Bom. 467, Commented on 24 Cal. 504, F

Acquiescence-*Contd.*

1 Laches—*Contd.*

(1875) L R 7 H L 869, (1896) 2 Ch. 93 F (1880) 15 Ch. 96, F.

The Hope Mills Limited v Sir Cowasji J Readymoney Bart. 13 Bom L R 162.

1B—Art. 149 — Estoppel — Acquiescence—Proof of—Evidence Act, S. 115—Building upon the land of another—Practice—Allegations, vague and loose—Judge to ascertain real controversy.

Where parties make vague and loose allegations, it is always essential to the correct determination of the suit that the real controversy between them should be ascertained by the Judge by questioning their legal advisers as to what exactly their position is in the matter.

Where both parties to a suit are equally conversant with the true state of facts, the doctrine of estoppel cannot be referred to.

In a suit by the Secretary of State for India in Council brought in 1909 against the defendants to recover possession of a small strip of land which adjoined the latter's property, it appeared that the land was in the defendants' possession and enjoyment for 48 years; that it was not entered in the Government records in any of the land registers; that the defendants built on the land after receiving permission of the Municipality in 1895; that all the Government officers of the place were aware of the fact; that the building, while under construction, was inspected from time to time by Municipal officers; that, in maps prepared by the Municipality and by the Revenue authorities, the land had been shown as defendants'; and that the Commissioner and the Government had decided that they could not eject the defendants. In the title-deed of the defendants, which was dated 1871, the land was stated to be the property of Government, and the statement was repeated in a latter document of 1895. At the trial, the defendants desired to lead evidence on the foregoing points with a view to make out estoppel and acquiescence against Government:—

Held, (1) that, even accepting the case as put by the defendants, it made no case for the admission of evidence. The Secretary of State was in no way concerned with anything which might have been done by the Municipality; and it could not assist the defendants, if, in certain maps of the Revenue authorities, made by those

Acquiescence-*Contd.*

1 Laches-*Contd.*

authorities for their own guidance, the strip of land was inaccurately described.

(2) That the present was a case where the defendants, having been perfectly aware that the land in suit was the property of the Government and that they, the defendants, had no right over it beyond certain easements, encroached upon the land in the hope that their encroachment might escape the notice of the agents of the plaintiff at the place.

(3) That the defendants' title-deeds having brought to their knowledge the title of the Government, the doctrines of estoppel and acquiescence were not applicable, and the suit was governed by sixty years limitation (Limitation Act, 1908, Art. 149). **Ranchod Lal v. Secretary of State, 13 Bom L R 92=9 Ind Cas 765.**

1C—As a bar to suit—Waiver—Laches.

Laches means a neglect to do some thing which by law a man is obliged to do. To bar a remedy, it must amount either to waiver, abandonment, or acquiescence. To raise the presumption of any of these, the evidence of conduct must be plain and unambiguous.

Peer Mahomed v. Mahomed 7 Bom L R 200 =29 Bom 234.

Notes:—9 Bom L R 1117. Foll.

1D—Acquiescence, meaning of —— Whether question of law.—

Acquiescence is quiescence under such circumstances as that assent may be reasonably inferred from it and is no more than an instance of the law of estoppel by words or by conduct; in other words acquiescence does not mean simply an active, intelligent consent, but it may be implied, if a person is content not to oppose irregular acts which he knows are being done—2 Phill 117 L R 3 H L 249, 203, and 2 Ha and Tw, 221 referred to. L R 19 I A 203 Ref. to and followed; 15 Ch D 96 ref. to and doubted. **Ananda Chandra Sen v. Parbati Nath Sen, 4 C L J 199.**

2—Limitation.—The right which a plaintiff has got vested in him is not barred by mere laches or acquiescence short of the Limitation period. *Semble*—The doctrine of Laches or acquiescence is applicable only in those cases in which they can be regarded as positive extinguishment of rights. When they go merely to the remedy it is not within the power of the court to substitute an extinguishing prescription different from that established by the Legislature.

Peddamuthulati v. Timma Reddy, 2 Mad HC R 270.

Notes:—Ap: 1 All 82; 5 Cal 148 P C; Ref: 2 M H C R 383; 12 Cal 389; 4 Mad 1 F B; 18 Mad 73, 21 Mad 42; 27 Bom 515.

Acquiescence-*Concld.*

1 Laches-*Concld.*

(2) DELAY.

3—Delay—Circumstances constituting delay and acquiescence discussed. **Jamnadas Shankarlal v. Atmaram Harjivan. 2 Bom 133.**

Notes:—Fol: 16 Bom 533 Ref: 16 Cal 252; 21 Mad 42; 33 Cal 633; 27 Bom 515.

(3) DELAY IN BRINGING SUIT

4—Delay in bringing suit.—

Long acquiescence held on the facts to bar a suit for possession after assignment.

Jan Koonwar v Ram Ruttun Neoghy. 18 W R 500.

(4) DELAY IN ENFORCING RIGHTS WITH KNOWLEDGE OF THEM.

5—Delay in enforcing rights with knowledge of them.—

Where the plaintiff in 1859 instituted a suit for a share of certain property which he admitted had been for nine years in the defendants' possession, and which the defendants alleged had been sold to them in 1850—*Held*, that the plaintiff's taking no steps during that time to enforce his alleged rights amounted to acquiescence on his part in the sale. **Nilatatchi v. Venkatachala Mudali, 1 M H C 131.**

Notes:—Fol: 5 M H C R 464. Ref: 2 M H C R 428.

6—Presumption from long delay—Estoppel.—In a suit by plaintiffs (who had been in possession of the land in dispute under and ever since the date of a pottah granted to them by the Collector in 1813) to have their title under the pottah declared, the defendants were held, by their long acquiescence in taking no steps within 12 years to have the pottah declared invalid, to have concluded themselves from now saying that it was illegal, and that the Collector had no power to grant it. **Sunt Lall Misser v. Bhurosee Issur, 18 W R 57.**

7—Contract—Undue influence—Acquiescence by conduct—Exchange of land.—

Where the owner of certain land exchanges it

Acquiescence- *Contd.*

4 Delay in enforcing Rights—*Concld*

for certain other land, but takes a lease for one year of the former land and pays the rent thereof, and receives and retains the rents of the land he has acquired by the exchange, he shows so complete an acquiescence in the transaction that he cannot afterwards have it set aside on the ground of undue influence. **Seetharama Raju v. Bayanna Pantulu, 17 Mad 275.**

8—Acquiescence in lease by Executors which they had no power to make—Estoppel — Representation not acted on.—

Where the devisee of an estate for six years after coming of age and succeeding to the estate signed rent bills in respect of land which the executors of his testator had purported to lease for 999 years, and such rent bills contained a representation that the land had been given to the lessees on fazendari tenure.—*Held*, that, in the absence of any evidence that the lessees had been deceived by or had acted upon such representation, the devisee was not estopped from contesting the validity of the lease. A man cannot be precluded from asserting his own rights by acquiescence in acts of other parties inconsistent with them unless (1) he has actual knowledge as distinguished from the means of knowledge of his rights; (2) he has knowledge that the persons acting inconsistently with them are doing so under the mistaken belief that they are exercising rights of their own; (3) he has encouraged the parties so acting to spend money or do other acts either directly or by abstaining from asserting his legal rights. L R 15 Ch D 96, followed.

Jugmohandas Vundrawandas v. Pallonjee Eduljee Mobedina, 22 Bom 1.

Notes:—Ref: 27 Cal 570; 5 C W N 846; 14 M L J 25; 27 Mad 211; 9 Bom L R 404, 27 Bom 515; 13 C W N 931 Fol: 6 C W N 134 Ex: 27 Bom 537.

(5) DELAY IN MAKING OBJECTION

9—Delay in making objection—Presumption of consent.

In a suit to avoid alienations effected by the plaintiff's father at a time when the plaintiff was living in commensality with his father as a member of a joint family, which suit was brought after 12 or 13 years had been allowed to go by without any objection, save the filing of a petition of protest in a Court of Justice, whereof the

Acquiescence-*Contd.*

5 Delay in making Objection—*Contd*

vendees were not made aware,—*Held* that the plaintiff was rightly considered to have consented to the alienations. **Ram Kishore Narain Singh v. Anund Misser 21 W R 12**

Notes:—Ref 12 Cal 389.

10—Knowledge of transaction—Presumption of consent.

Before a man can be held to have given by his conduct an implied assent to a transaction especially one which operates as a conveyance of a valuable estate, it must be shown that he was fully aware of what the transaction was, and what effect it would have upon his interests at the time he so conducted himself as to indicate assent. **Jago Bundhoo Tewaree v Kurum Singh 22 W R 341**

10 A—Arbitration award, if binding on a person not party to the reference—Civil Procedure Code (Act XIV of 1882) s. 506—Acquiescence—Conduct of the party.

Mere silence on the part of a person not party to an order of reference to arbitration and his omission to inform the arbritrators that he was not a party to the reference cannot make the award of the arbitrators binding him even though during the arbitration, he produced through a servant a document before the arbitrators in obedience to a summons and declined to produce others. **Beni Madhub Mitter v Preo Nath Mandal. 5 C W N 268=28 Cal 303.**

Notes—Ref: 14 C W N 75; 10 C L J 41.

11—Suit to close a road—Presumption of consent.

The plaintiff not having opposed the making of a road until its completion was held not entitled to sue to have it closed. **Radha Nath Banerjee v Joy Kishen Mookerjee 1 W R 288.**

12—suit to close road—Presumption of consent.

If A construct a road across B's land, B can sue within the ordinary period of limitation, and no consent can be inferred from the fact that B did not sue immediately after the commencement or completion of the road. **Huro Soonduree Debia v Ram Dhun Bhuttacharjee 7 W R 276.**

Notes—Con: 12 W R 519.

Acquiescence-*Contd.*

5 Delay in making Objection—*Concld.*

12 A-Widow—Consent. The consent by a widow to an adoption made by her co-widow, may be intimated by conduct as well as by acts: and acquiescence may under certain cricumstances be taken to be consent.

Mere presence is not necessarily equivalent to consent, for consent in this connection implies an intelligent concurrence on due consideration, and it is for the Court to determine whether the whole circumstances of the case invite the inference that such a consent has been given, bearing in mind that the consent required is a matter, not of form, but of substance. **Bhimappa v. Basawa 7 Bom L R 405=29 Bom 400.**

(6) DELAY IN OPPOSING ERECTION OF BUILDING.

13—Delay in opposing erection of building—Presumption of consent.

In a suit for the demolition of a privy erected on plaintiff's land, it having appeared that plaintiff was aware of the erection of the privy and had allowed it to be completed and to remain standing for at least seven years, his application was refused. **Bromo Moyee Debia Chowdrain v Koomodinee Kant Banerjee. Baroda Kant Banerjee v. Koomo-dinee Kant Banerjee 17 W R 467.**

(7)ERECTION OF BUILDING WITHOUT OBGECTION

14—Erection of building without objection.

Acquiescence must be inferred when a person stands by and allows another to erect a pucca building on his land, and a suit would not lie for the demolition of the building, but only for damages or rent of land. **Hurro Chunder Mookerjee v. Hullodhur Mookerjee W R 1864, 166 Nil Kant Sahoo v. Jugoo Sahoo 20 W R 328.**

14A-By silence-Building on another's land on mistaken knowledge of ownership—Owner's rights.

If a stranger builds upon the land of another, although believing it to be his own, the owner is entitled to recover the land with the buildings on it unless there are special circumstances amounting to a standing by on the part of the real owner such as to induce the belief that he intended to forego his right. **Vinayakrao Ganpatrao v. Vidyasankar Bharati 9 Bom L R 405.**

Acquiescence-*Contd.*

7 Erection of Building without objection-*Contd*

15—Building by trespasser on land.

When a trespasser tortiously enters upon the land of another and builds a house thereon, the party injured is entitled to recover possession of the land by destroying the house if there is no proof of acquiescence on his part in the act of injury done. **Gobind Purmanick v. Gooroo Churn Dutt. 3 W R 71**

Gujadhur Singh v. Nand Ram I Agra 244.

Notes—Ref: 7 W R 150; 6 All 370.

16—Suit for restcration of land to former condition.

The rights of a co-sharer in a joint estate were sold by auction, but it did not appear that a site held by him in the village passed by the sale, and the site remained in the possession of his heirs, who sold it to the defendant, who erected a shop thereon. Twenty years after the auction sale, the plaintiffs, some of the co-sharers in the joint estate, sued for demolition of the house, and the restoration of the site to the village.—*Held* that, under the cricumstances, the claim could not be maintained. **Bahadoor v Shadee Ram 2 Agra, 3.**

17—Right to remove building.

Where H, knowing that B claimed certain land as his own, nevertheless purchased the land from a third person and erected a bungalow upon it which B did not interfere to prevent,—it was *held* that the Euglish rule of equity, which, under such circumstances, would allow B to recover the land with the bungalow upon it, ought not to be applied in India, but that H should be allowed to remove the bungalow he had erected.

Narayan Bin Raghaji v. Bholagir Guru Manjir. Hormasji Sorabji v Bholagir Guru Manjir. Bholagir Guru Manjir v. Hormasji Sorabji 6 B H C 80.

Notes—Dist: 9 Bom L R 1181 : 32 Bom 52. Ref: 20 Bom 1; 298.

17A——Acquiescence—Tenant building on landlord's land—Silence—Estoppel.

An abstinence from interference on the part of the owner of land, upon which another man is building, does not raise an equitable estoppel against him. In order to estop the owner it must be proved that besides his abstinence there was a mistaken belief in the builder that the land was

Acquiescence—*Contd.*

7 Erection of Building without objection.—*Contd.*

his own property. (21 All 496 (P C) Fol:).
Muhammad Umardasaz Khan v Maru. 6 A L J 57.

17B—Defendant building on plaintiff's land —Both under mistaken belief that land belongs to defendant—Suit for recovery of land by plaintiff.

Where the defendant built a wall upon plaintiff's land under the belief that it belonged to himself and the plaintiff being also under the same mistaken belief offered no obstruction and the plaintiff on discovery of the mistake sued for recovery of the land, *held* that, as the plaintiff, the possessor of the legal right was ignorant of his own right it was not fraudulent or inequitable for him to set up his legal right and that he was therefore entitled to possession and all that defendant could be allowed was time to remove the wall. **Purshotam v Virchand. 91 P J 279.**

18—Building erected on land by purchaser, owner standing by.

Where a purchaser claims to hold land which he has purchased from a third person on the ground that the owner of such land has acquiesced in the sale, the purchaser must show clearly that the real owner was aware of the sale at the time it took place. Where the owner of land was not aware of its being sold by his father to a third person, but having heard of such sale, subsequently stood by and allowed the purchaser to build upon the land,—It was *held* that the owner could not recover the land without compensating the purchaser for the building erected by him upon the land, and three months were allowed to the owner within which to pay such compensation.
Savaklal Karsan Das v Ora Nizmuddin. 8 B H C O C 77.

19—Right of way, interruption of.

A had a right of way over B's land. He allowed B to erect a house on the path-way and enjoy it for seven years. He then brought a suit to have the pathway re-opened by pulling down B's house. *Held*, A must be taken to have acquiesced in the interruption of his right of way, and his claim was one that a Court of equity and good conscience would not enforce. **Beni Madhab Das v Ramjay Rokh. 1 B L R A C 213: 10 W R 316.**

20—When a man builds a house on land sup-

Acquiescence—*Contd.*

7 Erection of Building without objection—*Contd.*

posing it to be his own, or believing that he has a good title, and the real owner, perceiving his mistake, refrains from setting him right, and leaves him to persevere in his error, a Court of Equity will not allow the owner to assert his legal right against the other without at least giving him full compensation. **Rama v Jan Mahomed. 3 B L R A C 18: 11 W R 574.**
Aruna Chellum Chetty v Olagappah Chetty 4 M H C 312.

20A—Building upon land of another—Standing by.

If a stranger builds upon the land of another, although believing it to be his own, the owner is entitled to recover the land with the buildings on it, unless there are special circumstances amounting to a standing by on the part of the real owner such as to induce the belief that he intended to forego his right. **Vinayakrao v Vidyashankar 9 Bom L R 404.**

Notes:—9 Bom L R 1181 Dist. 32 Bom 32.

21—Suit for ejectment—Transferable tenure —Landlord and tenant—Permissive occupation.

B and C and their father held lands for upwards of thirty five years, and built houses on the same. B and C sold their tenures to D and E. A, the zemindar, who had not objected to the building, now sued to eject D and E as trespassers. Evidence was given that the tenures were, by the custom of the country, transferable. *Held*, A could not eject D and E. **Beni Madhab Banerjee v Jai Krishna Mookerjee. 7 B L R 152: 12 W R 495.**

Upholding on appeal, **Kemp J in S C. 11 W R 354.**
See Eshan Chunder Ghose v Hurrish Chunder Banerjee. 10 B L R Ap 5: 18 W R 19.
and Nabu Mondul v Cholim Mullik. 25 Calc 896.

22—Erection of pucca building more than 20 years ago—Presumption as to permanent character of tenancy—Second appeal, power of Court to question inference from fact in—Omission of the Appellate Court to take into consideration circumstances affecting landlord's acquiescence.

A landlord by merely not objecting to his tenant's raising a pucca building does not confer on

Acquiescence—*Contd.*

7 Erection of Building without objection—*Contd.*

the tenant a permanent right te remain on the land. But long possession coupled with the acquiescence of the landlord in the raising of pucca buildings and his continuing to receive rent from the raiyat after such buildings have been raised may justify the inference that a tenant has a permanent right. *18 Bom 66*, referred to. But there are circumstances which may go far to weaken the force of that inference, and one of these is the circumstance of the landlord's interest being let out in ijara at the time the building was raised. The absence of objection, on the part of the landlord to the erecting of a permanent building by a tenant during the continuance of an ijara of the landlord's interest should not be construed as amounting to acquiescence such as might be inferred where the landlord is in direct receipt of rent from the tenant. *12 W R 495* distinguished.

Krishna Kishore Neogi v Mahomed Ali. 3 C W N 255.

Notes:—Ref: 6 *C* W N 134; 27 Cal 570; 5 C W N 846.

23—Assignable interest—Sale in execution of decree.

The plaintiff permitted B to erect a thatched dwelling-house with mud walls on a piece of land belonging to the plaintiff, and B dwelt in it for more than forty years. *Held* that B had an assignable interest on the house and land, which could, therefore, be seized and sold in execution of a decree against B, and that the purchaser who had obtained possession could not be dispossessed at the suit of the plaintiff. **Durgaprasad Misser v Brindabun Sookul. 7 B L R 159: 15 W R 274.**

24—Land let for building purposes.

A landlord who allows his lessee to invest capital in erecting buildings on lands let for cultivation, and raises no objection for a considerable number of years, will not be allowed to disturb the holding. The fact of buildings having been permitted without objection to stand on lands for a considerable number of years is *prima facie* proof that the land had been originally leased for building purposes. **Braja Nath Kundu Chowdry v Stewart. 8 B L R Ap 51. 16 W R 216.**

25—Permissive occupancy—Right of possession as against purchaser.

Where the defendant had been in possession of land for more than thirty years, and had without objection built upon the land,—*Held* that he had not by such permissive occupancy acquired a right to retain possession when served with notice to quit by a purchaser of the land.

Addaita Charan Dey v Peter Das. 13 B L R 417 note: 17 W R 383.

26—Permanent tenancy—Lease for a specified purpose—Lessee's erecting pucca buildings not for the specified purpose—Lessor's knowledge of the erection of the buildings—Ejectment, suit for—Acquiescence—Presumption.

The appellant's predecessors let to the defendants' predecessors a piece of land for the construction thereon of salt-petre factory at the annual rent of Rs 28, in the year 1858, under the condition that until the lease was continued to be paid, the lessors would not be competent to dispossess the lessees. It appeared from evidence that salt-petre was manufactured on the land only for four or five years; and that after that time pucca shops had been built by the lessees. The evidence also showed that not only did the original lessor not object to the enclosing of the buildings when they were being erected, and stood by, but that by continuing to receive rents from the lessees, even after the erection of the buildings, and even though the salt-petre factory, for which the land was let, had ceased to exist, he sanctioned the lessees doing so. The lessees therefore, contended that the appellants, the successors of the original lessors, were equitably stopped from now suing for their ejectment:

Held, (1) that in order to raise the equitable estoppel against the lessors, it was incumbent upon the lessees to show that the conduct of the owners, whether consisting in abstinence from interfering, or in active intervention, was sufficient to justify the legal inference that they had, by plain implication contracted that the right of tenancy under which the lessees originally obtained possession of the land, should be changed into a perpetual right of occupation: and that the lessees had failed to discharge themselves of that *onus*.

(2) That the mere erection by the tenant of permanent structures upon the land let to him in the knowledge of and without interference by his lessor, would not suffice to raise the equitable estoppel against the latter.

Acquiescence—*Contd.*

7 Erection of Building without objection—*Contd.*

(3) That the maxim "quic quid incedificatum solo solo cedit" has, in Indian Law, no application to the present case, and the rule established in India is that of section 108 of the Transfer of Property Act.

(4) That acquiescence was not a question of fact, but of legal inference from the facts so found: and upon it the judgment of the appellate Court are not final.

The owner of land cannot sue for ejectment where he sees another person erecting buildings upon it, and knowing that such other person is under the mistaken belief that the land is his own property, purposely abstains from interference, with a view of claiming the building when it is erected. **Beni Ram v Kundan Lal. 1 Bom L R 400=21 All 496=26 I A 58=3 C W N 502=1906 A W N 245.**

Notes—Ref: (1904) W N 70, 28 Cal 738; 27 Cal 570; 5 C W N 846, 858; 23 Bom 789; 28 Bom 440; 6 C W N 134 & 352; 14 M L J 25; (1904) W N 70; 8 C W N 235; 27 Mad 211; 6 Bom L R 440; (1908) W N 282; 6 A L J 57 Fol: 4 C L J 198; 33 Cal 1119=10 C W N 765=3 C L J 616 Dist 32 Cal 648=9 C W N 463 Appr: W N (1907) 231: 29 All 652 Ex: 1 A L J 556.

27—Acquiescing of landlord in the erection of building by a tenant.

If a tenant wants to resist ejectment on the ground that the tenancy was a permanent one and that the landlord stood by and permitted the tenant to erect pucca buildings on the land in the belief of the said tenancy being a permanent one, it is incumbent on him (tenant) to show that he had erected the buildings under an honest belief that he had a permanent right on the land and the landlord aware of the said tenant's honest belief stood by and allowed him to go on with the erection of the building. 21 All 496 L R 2 o I P 58. L R 1 E and I Ap 129. 22 Bom 1 &c L R 8 Chi Din 286. 12 Mad 320 referred to. **Ismail Khan Mahomed v Jaigan Bibi. 27 Cal 570=4 C W N 210.**

Notes—Rel 32 Cal 648=9 C W N 463. Fol 5 C W N 846; 6 C W N 352. Ref 13 C W N 949: 13 C W N 931; 28 Cal 738; 5 C W N 858; 14 M L J 25; 27 Mad 211: 8 C W N 301; 235; 297; 9 C W N 60.

27 A.—Landlord and tenant—Building by tenant—Landlord's acquiescence.

Acquiescence—*Contd.*

7 Erection of Building without objection—*Contd.*

In order to raise an estoppel against the landlord, it must be shown that the landlord had purposely allowed or encouraged the tenant to build, knowing that the tenant was building on the mistaken notion that he had rights beyond those of a mere tenant from year to year. **Ismail Khan Mahomed v L P D Broughton. 5 C W N 846.**

Notes—Ref 6 C W N 352; 9 C W N 60.

27 B—Village homestead land—Rights of land-holder in—Sale by tenant—Acquiescence—Principal and agent.

Per Knox A C J.—A person, agriculturist or agricultural tenant who is allowed by a Zemindar to build a house for his occupation in the abadi obtains, if there is no special contract to the contrary, a mere right to use that house for himself and his family so long as he maintains the house and does not abandon it by leaving the village, he has no interest which he can sell by private sale except his interest in the timber, roofing and wood-work of the house (1881) 1 A W N 114 F B and 20 All 248 referred to.

The property of or rights in the property of an absentee cannot be given away by an agent looking on and allowing a tenant to spend money. Unless it can be brought home to a principal that he knew that persons dealing with his agent so dealt in consequence of their believing that all statements made by him had been warranted by the principal and knowing this, the latter allowed the persons so dealing to expend money in the belief that the agent had an authority which, in fact he had not, those persons can enforce no equity against the principal. L R 1 E and I A 129 followed.

Per Aikman J. Where the defendant at great expense reconstructed the house he had bought, believing that he had a right to do so, and the plaintiff or his agent must have known that the defendant was spending money in this belief and yet allowed him to do so, the plaintiff could not, years after the house was finished, sue for possession of the house or its removal. The dictum in 30 All 241, declaring a custom permitting tenants to transfer houses on village homestead land to be bad, is obiter and has been dissented from by more than one Judge of the High Court. **Rajnarain Mitter v Budh Sen. 1 A L J 673=27 All 338=(1904) A W N 241.**

Acquiescence-*Contd.*

7 Erection of Building without objection—*Contd.*

28—Laches—Erection of buildings.

The defendant took possession of, and erected buildings on, land of the plaintiff to which they knew they had no claim without obtaining the the plaintiff's consent. The plaintiff did not use to eject them for one or two years, knowing that the defendants were building on the land. The delay was under the circumstances, held not to be fatal to the suit. **Uda Begum v Imamuddin. 1 All 82**

Notes—Fol 9 All 661. Dist 9 All 434, 16 All 328. Ref; 33 Cal 1119=10 C W N 765= 3 C L J 616; 14 All 362; 27 Bom 515; 532; (1908) W N 282; 6 A LJ 57; 4 C L J 198.

29—Standing by and seeing building erected—Right to removal.

In a case in which plaintiffs sought to recover possession of some land on which defendants had constructed a pucca house and in which defendants pleaded that they had purchased a building right from a third party with whom plaintiffs had settled the land, and that plaintiffs had seen them building the house in question without offering any objections,—*Held* that, having stood by and allowed defendants to build the house, plaintiffs could not sue to have the house removed.

Lala Gopee Chand v Lialkut Hossein. 25 W R 211.

Notes—Ap: 25 Cal 896 F B, Dist; 3 C L R 194. Diss. 17 M L J 409. Ref: 18 Bom 66; 27 Bom 515; 10 Bom L R R 1146; 33 Bom 610.

29A.—Absence of protest.

The plaintiffs sued to remove a building erected by the defendant, as being an obstruction to their right to use a courtyard adjoining their residences. It appeared that the site of the building did not belong to either party but that all the residents of the *mohalla* had from time immemorial exercised a right of way over it to and from their houses. *Held* that their was no principle of acquiescence involved in the case, inasmuch as there was no evidence that the plaintiffs had given their actual consent to the building, and that the only evidence of their acquiescence could be that they did not immediately protest.

Fatehyab Khan v Muhammad Yusuf 9 All 434=7 W N 82.

29B.—By a co-widow, to an adoption.

Acquiescence-*Contd.*

7 Erection of Building without objection—*Concld.*

The consent by a widow to an adoption made by her co-widow, may be intimated by conduct as well as by acts: and acquiescence may, under certain circumstances, be taken to be consent.

Bhimappa v Basawa 7 Bom L R 405= 28 Bom 400.

30.—by a mortgagor-Building upon mortgaged land by mortgagee.

If the mortgagee has erected a building on the property, he cannot claim a right to remove the building, before he is made to hand over the possession of the property to the reversioner.

Vijbhukandas v Dayaram 9 Bom L R 1181 =32 Bom 32.

(8) CULTIVATING LAND WITHOUT OBJECTION.

31.—Cultivating land without objection—Acquiescence——Owner standing by and seeing person without title cultivate land—Fraud and deceit.

In order to prevent the owner of land who is charged with standing by and allowing another person, who belives he has a good title thereto, to enter on the land and spend money in improving it, from recovering possession thereof, fraud and deceit on the part of the owner must be clearly proved 7 Vesey, 251. and 3 B L R A C 18: 11 W R 574, explained. **Langlois v Rattray 3 C L R 1.**

31A.—Cultivating on another's land—Owner not objecting—Compensation.

A man planting and cultivating on the land of another, without any objection on the part of the owner, is entitled to compensation.

Rumjan v Gool Mahomed Buksh 61 P R 1866.

(9) CULTIVATION & CHANGING CHARACTER OF LAND.

32.—Land Lord and Tenant-Forfeiture-Eviction—Altering character of land—Imporper use of land by tenant--Injunction—Specific Relief Act, I of 1877, section 56.

A tenant has no right to alter the character of the land which he holds in such a way as to permanently injure the interest of the landlord, but there is no authority for saying that where he has been guilty of a breach of duty in the use of the land as by making a tank on it, building on it or otherwise changing its character the tenancy is necessarily liable for forfeiture.

Acquiescence-*Contd.*

9 Cultivation & Changing Character of Land - *Concld.*

Quære—Whether having regard to section 56 of the Specific Relief Act an injunction will lie to restrain a tenant from permanently altering the character of lands, *held*, by him. But where landlord stood by and allowed the tenant to do the prohibited act the court refused to grant a mandatory injunction. **Noyna Misser v Rupikun 9 Cal 609=12 C L R 300.**

33.—Land was demised on kanam wet for cultivation. A variety of inprovements was made on the land by the desmise, so as to change the character of the holding. These improvements it was held, were in keeping with the purpose for which the land was demised.

A finding was entered that the landlord had been present seeing with his eyes open that the nature of the holding was being changed, which conduct of his caused a belief that he approved of the various changes that were being made. *Held*, on this finding on second appeal that the demisee was entitled to compensation for his improvements on redemption of the kanam. L R I E and I Ap 129 followed See (12 Mad 323 note) where however it was held that the landlord had not approved of some of the improvements & consequently compensation was not allowed for them though the tenant was permitted to remove those improvements for which compensation was refused. **Kunhammed v Narayan Mussad 12 Mad 320.**

Notes:—Dist: 22 Mad 39. Ref: 27 Cal 570; 20 Bom 1; 8 C W N 235.

(10) ACQUIESCENCE IN TITLE BY CONDUCT.

33A.—Acquiescence in title, by conduct. In a suit to recover possession of property it was held, on the evidence that the plaintiffs had acquiesced defendant's title by their conduct. **Jeebun Mundal v Nadyar Chand Roy 25 W R 461.**

33B.—In matters of alienations under customary law subsequent silence sometimes amounts to conduct precluding a suit to set aside the alienation but where the collaterals not only delayed to attack the alienation but were also concerned either in purchasing from the alienor to the exclusion of the collaterals, or cultivating under or exchanging with the defendants alienees the disputed lands, *held*, that they had acquiesced in the alienation and were estopped from bringing the suit. **Amir v Mussammat Zebo 42 P R 1902**

Acquiescence-*Contd.*

(11) CONDUCT DEFEATING TITLE.

34.—Acquisence in defendant's title by conduct—A suit to recover possession of property was filed in which it was held on evidence that the plaintiffs have by there conduct acquiesced in the title of the defendant. 25 W R 461.

Acquiescence by conduct-Evidence of Ratification. A suit was filed by a plaintiff, a member of undivided Hindu family to recover possession of property which his uncle the first defendant had transferred to the second defendant without any right. The second defendant denying a title to the plaintiff alleged a sale to him by the first defendant & subsequent sale by him to the third defendant. The munsif decreed for the plaintiff. An appeal was preferred to the principal Sudder Amin who held that the plaintiff had by his knowledge acquiesced in defendant's title & so reversed the decree of the munsif.-*Held* that such a knowledge cannot be considered sufficient to make the plaintiff party to the sale by the first defendant. The decree of the Principal Sudder Amin was reversed & the right of the plaintiff to sue in ejectment is not barred He who seeks to displace one, who is prima facie a legal owner, by showing that he has acquiesced by conduct & by such similar facts strong enough to show him to be not a formal party to the suit must prove his case, for he is one who seeks to bar the legal owner. **Rajan v Basuva Chetti 2 M H C 428.**

35.—Ratification—Transfer of Property—The sons, daughters and widow of a deceased Mahomedan proprietor were parties to a solehnama executed in 1847. It transferred the shares of two minor daughters in the estate having been executed by their mother on their behaf, In deciding the question whether the solehnama should be set aside at the instance of the two daughters on the ground of its having been beyond their mother's power to bind them and of the instruments having been prejudicial to their interests, the evidence showed that it had been acted on and followed by possession, and the daughters had, after attaining full age, allowed a lengthened period of twenty years to elapse without taking proceedings to dispute it:—*Held*, that if the mother had exceeded her powers in executing the solehnama on their behalf and if they might at one time have had it set aside, their long acquiescence was sufficient to show the ratification of the transaction

Acquiescence-*Contd*

11 Conduct Defeating Title—*Concld*,

and so the solehnama was upheld.

Mahomad Abdul Kadir v Amtal Karim 16 Cal 161: L R 15 I A 220

(12) PRESUMPTION FROM ALLOWING GRANT OF CERTIFICATE UNOPPOSED.

36—Presumption from allowing grant of certificate unopposed.

In a rival claim between two Hindu widows of a deceased husband the plaintiff sued as mother and guardian of her infant son to establish his right as son and heir of his father. One defence among others was that the son was not legitimate, and could not inherit. His legitimacy was established, but the incapacity to inherit was sought to be proved by the plaintiff's virtual acknowledgment of the defendant's title as heiress on the grant of the defendant unopposed by the plaintiff of a certificate of heirship. *Held* that it was not the practice of the Courts in India or of the Privy Council to press against either an infant or a Hindu female a presumption by acquiescence in a rival claim from the mere non-contestation for a limited time of an adverse title.

Ramamani Ammal v Kulanthi. 17 W R 1=14 Moore's I All 346

36A—The village of Malpura of two *pattis*, one of Jats the other of Brahmins. In 1837, the proprietors of both *pattis* were unable to pay the revenue demand, and the whole village. the plaintiffs alleged, was farmed. the Jats' *patti* to S. R for thirty years, and the Brahmins' *patti* to another persons. The defendant alleged that the village was not farmed but that the proprietors, whom plaintiff now represented in 1837 relinquished their proprietary as well as *malguzari* rights,and in support of this allegation produced a document which they contended was an *istifanamah* or deed of relinquishment. In 1852, C B. purchased at a sale in execution of a decree the rights of S. R in the Jats' *patti*; and was recorded as proprietor : in 1858 C B sold his interest in the *patti* to Sita Ram. who effected *dakhil kharij*. Plaintiff now claimed on the ground that the 30 years' lease to S R had expired: defendant claiming through Sita Ram resited the claim of the plaintiffs on the grounds (1) that there was no farm , but a relinquishment by the proprietors of all their rights : (2) that plaintiffs had allowed their full rights to be transferred (firstly to C. B. secondly to Sita Ram) without

Acquiescence-*Contd.*

12 Presumption from Allowing Grant of Certificate unopposed—*Contd.*

asserting an adverse title,and were thus barred by acquiescence : and (3) that more than 12 years' possession as proprietors by those through whom defendant claimed,also barred the plaintiff's suit. The Lower Courts found a fact that there was farm-lease to S R only and no relinquishment of proprietary rights . and decreed plaintiff's claim. On defendant's special appeal to the Chief Court, it was *held* that as plaintiffs had no right of suit to recover possession until 1867 (the year the farm-lease expired), their suit was not barred , that as to their lying by in 1852 and 1858 when the transfers were effected , this was only some evidence that they had no claim and had actually relinquished their rights : and moreover their position in the village as cultivators did not entitle them to take part in its affairs, and they were not shown to have had express notice of the transfers.—(P R 10 of 1874).

If the owner of property stands by and sees his property sold, without any objection on his part, to a *bona fide* purchaser, he cannot afterwards dispute the sale and the property passes to the purchaser. **Jowala Singh v Jewand Singh P R 87 of 1875.**

36B—By a Pardanashin lady.

It is not the practice of the Courts in India to press a presumption by acquiescence against a female, Hindu or Mahomedan, in a rival claim, from the mere non-contestation for a limited time of an adverse title. **Ebrahim v Foolbai 4 Bom L R 180=26 Bom 577.**

Notes.—19 M L J 747 Ref. 6 Bom L R 983 35 Cal 1 P C; 29 Bom 468.

36C—Decree—Execution—Interest——Payment of interest—Admissions—Contract Act (IX of 1872) Secs. 65, 73.

Where in an application to execute a decree which provides for no interest, the decree-holder puts in a prayer as to the award of interest and the judgment-debtor accepting his liability to pay the decretal debt as well as interest obtains from time to time adjournments from the Court to enable him to pay the amount, he (the judgment debtor) cannot at a later stage of the proceedings dispute the item of interest and is bound to pay interest from the date on which he admitted his liability to pay interest. **Narayan v Raoji 6 Bom L R 417=28 Bom 393.**

Acquiescence-*Contd.*

12 Presmuption from Allowing Grant of certificate unopposed—*Concld.*

36D—The presumption not raised against infant or female.

It is not the practice of the Courts in India or of the Privy Council to Press either against an infant or a Hindu or Mahomedan female a presumption by acquiescence in a rival claim from the mere non-contestation for a limited time of an adverse title. This principle holds good as to waiver or abadonment. Mere laches unless it amounts to one of these three is not sufficient to disentitle a person to equitable relief. Where there is a vested right or interest in any party he cannot waive or abandon that right except by acts which are equivalent to an agreement or license.

Kazi Mahamad v Narotam 9 Bom L R 1117.

(13) NOT OBJECTING TO SALE.

37—Not objecting to sale—Suit to recover property sold—Presumption of consent.

Where R K, acting ostensibly as recognized agent and manager of the family, sold part of the family property to the ancestors of the defendant's and the plaintiff, who was then of age, did not object to the sale, but afterwards sued to set aside the sale as to his share on the ground that the property had been purchased by R K with the joint funds while the plaintiff was a minor, and that it was sold by him without authority the first Court gave him a decree for a one-fourth share of the property. R K appealed, but the other defendants did not appeal. The Judge, assuming the lower Court's finding to be correct. *held* that, as the plaintiff, who was of age at the time, did not object the sale, he could not recover possession of property sold by R K as the recognized agent and manager. *Held* that R K could not found any right upon the presumption of plaintiff's consent, however such presumption might have availed the other defendants, purchasers from R K, who had not appealed.

Gopal Chunder Lahoory v Roy Kishore Lahoory. 15 W R 467.

37A—Suit for possession on ground that a certain sale was invalid as against plaintiff—Plea by defendants that plaintiff acquiesced in sale—"Acquiescence"—Estoppel.

Plaintiff sued for possession of certain land and houses which had been sold in 1876 by their near collateral one K., a childless proprietor, in favor of defendant. The defendant pleaded, and

Acquiescence-*Contd.*

13 Not objecting to sale—*Concld*

the lower Court found, acquiescence in the sale on the part of plaintiffs disentitling them to set aside the alienation, and dismissed the suit. It was proved that plaintiffs, whether or not they knew of the alienation at time it was effected, had knowledge of it in 1878, when they gave evidence on behalf of defendants in a case in which he sued a certain tenant of his for damages for cutting a tree; that they made no mention of their rights though present on each occasion when the defendant twice applied in 1880 and 1886 for partition on the strength of his deed of purchase; that they also raised no objection to his acquiring the rights of certain hereditary tenants, and that, finally many years after the sale they took up some land from the defendant for the purpose of cultivation and tilled it almost up to the date of suit. In the last case it appeared that plaintiff, subsequently to partition proceedings, exchanged certain land allotted to them for others which had fallen to the share of defendant, and executed certain documents, in one of which they expressly stated that they accepted the purchase by defendant in 1875, and waived all rights to object thereto. On behalf of plaintiff it was contended that inasmuch as all the above specified acts took place *after* the sale, plaintiffs were not thereby estopped from attacking the said transfer as they had not by any such act misled the defendant or induced him to enter into the sale transaction.

Held, that plaintiffs were precluded by their acquiescence and express words from making the present claim, and that their suit had been rightly dismissed.

Nihala v Bikham. 81 P R 1898.

(14) PRE-EMPTION.

38—The mortgagee under a deed of conditional sale executed in 1878, took foreclosure proceedings under Regulation XVII of 1806, and the year of grace having expired, a foreclosure proceeding was recorded on the 18th September, 1882, declaring the mortgage to have been foreclosed. In August, 1885, the mortgagee instituted a suit for possession of the mortgaged property. On the 19th September, 1885, the suit was compromised, the mortgagee accepting a part of the mortgaged property, and relinquishing the remainder. A decree was passed in the terms of the compromise. Subsequently, a suit for pre-emption was brought against the mortgagor and mortgagee to enforce pre-emption in respect of the alienat-

Acquiescence—*Contd.*

14 Pre-emption—*Contd.*

ion. The plaintiff claimed to pre-empt the whole of the property to which the deed of 1878 related, including the portion relinquished by the conditional vendee under the compromise and decree of the 19th September, 1885. *Held* that although upon the expiration of the year of grace the ownership of the mortgaged property vested in the conditional vendee even though he might not have obtained a decree establishing or declaring his right, and the right of pre emption accrued on the date when the conditional sale thus became absolute, yet foreclosure proceedings under the Regulation, being of a purely ministerial character, were not conclusive or even *prima facie* evidence in a subsequent litigation against the conditional vendor that a valid foreclosure had been duly effected; that strict observance of the requirements of the Regulation were conditions precedent to the right of foreclosure; and that, in the present case, as the plaintiff had not asserted or attempted to prove that all those requirements had been fulfilled so as to result in an actual foreclosure and consequent accrual of pre-emption at the end of the year of grace, no foreclosure was shown to have taken place prior to the compromise of the 19th September, 1885, and the plaintiff's right of pre-emption accrued on and must be referred to that date, and consequently extended only to the property to which the compromise related, and the price payable by the plaintiff was the amount specified in the compromise. (4 B L. R. A. C. 219): (S. D A. N. W. P. 1864, Vol. I. P. 624) and 6 All. 314) distinguished. 5 I. A. 18; 11 I. A. 186; 8 All. 388) and (Weekly Notes 1887 p. 233) referred to. Acquiescence in a mortgage by conditional sale does not involve relinquishment of the right of pre-emption upon the conditional sale eventually becoming absolute. **Ajaib Nath** v. **Mathura Prasad.** **11 All 164. 9 W. N. 48.**

Notes—Ap: 14 All 405 F B.

38A—Suit for pre-emption—Foreclosure of mortgage—Omission of mortgagee to take preliminary proceedings under Section 8 of Regulation XVII of 1806—Acquiescence by mortgagor in such omission—Right of mortgagee who had obtained decree for foreclosure to plead that such decree was illegal and gave rise to no right of preemption.—In a suit for pre-emption arising out of the foreclosure of a mortgage by way of conditional sale it was urged (*inter alia*) on behalf of the mortgagee defendant, that the plaintiff could not claim pre-emption because the proceedings taken to foreclose the mortgage by the said defendant were not in accordance with the requirements of Regulation XVII of 1806, the result of which would be that, as between the mortgagor and mortgagee, the land in dispute must still be deemed to be held in mortgage and liable to redemption at the hands of the mortgagor, with respect to which therefore no suit for pre-emption could be maintained at the present time. It appeared that the mortgagee, instead of taking the preliminary proceedings contemplated by Section 8 of Regulation XVII, of 1806, brought a regular suit for proprietary possession of the mortgaged land, and obtained a decree conditional on the mortgagor's failure to pay by a specified date the amount due on the mortgage-bond. The mortgagor not having paid the sum decreed against him with the stipulated period, the mortgagee applied for execution and was formally placed in proprietary possession of the mortgaged property. No appeal was preferred by the mortgagor either against the above decree, or against the order in execution placing the decree—holder in possession of the land, and the mortgagee was shown to have continued in possession ever since.

Held, that the mortgagee was estopped from raising the contention noted above in the present case: that the mortgagor's conduct, both in not appealing from the decree for foreclosure, and in allowing execution to take place under it and also in not appealing from the decree of the lower Court in the present suit giving plaintiff a decree for pre-emption, was sufficient to indicate that he had acquiesced in the sale being made absolute: and this being so it did not lie in the mouth of the appealing defendant, the mortgagee, to repudiate a title which had been adjudicated in his favour at his own instance, in order to deprive the plaintiff of his right of pre-emption, which arose in consequence of that title being made absolute. (P R 76 of 1877), referred to.

Jowahir Mal v. **Kalandar Khan** **P R 5 of 1882.**

38B—Usufructuary Mortgage — Mortgagee not in possession of a portion of the mortgaged property—Acquiescence mortgagee in part performance—Stipulation for interest—Redemption

Acquiescence-*Contd.*

14 Pre-emption—*Concld.*

without payment of interest. Where the mortgagors covenanted that " we shall pay the whole mortgage-debt in a lump on Baisakh sudi 18th of any year and we shall pay the money out of our own pocket and if there is any defect in the mortgaged property or in the mortgagee's possession thereof, then we the executants, will pay the principal with interest at 2 per-cent, per mensem,and besides this damages and penalties," and possession was not obtained by the mortgagee of a protion of the mortgaged property for a certain period and in the subsequent suit for redemption the mortgagee claimed interest for the period during which he had been out of possession, held that by reason of his acquiesence the mortgagee was not entitled to claim interest in respect of that period during which he had not obtained possession of a portion of the mortgaged property. **Jhunku Singh v. Chatkan Singh. (1909) 6 A L J 247=31 All 325.**

38 *C*—Effect of mortgagor's acquiescence or silence. A mortgagee by erroneously representing himself as owner of the mortgaged premises cannot make his possession adverse to the true owners 21 Cal 37; 30 Cal 463; 17 All 522, Fol. 23 Mad 372. Fol 22 Bom 624 Appl: 32 Cal 296 Fol. **Jhabba Lal v. Chhajju Mal 4 A L J 787=A W N (1908) 1= 3 M L T 132**

(15) ACCOUNT MADE IN COURSE OF USUAL DEALING.

39—Account made in course of usual dealing —The defendant in a suit for balance of payments made by plaintiff on his behalf *held* not entitled to refuse to be bound by an account made up in accordance with the course of dealing which had practically been assented to by him and had been followed between the parties for many years. **Thakoor Pershad Singh v. Mohesh Lall 24 W R 390.**

Notes:—Ref: 7 Bom 414.

40—Acquiescence—Civil Pro. Code (Act XIV of 1882), S. 443. Suit by guardian ad litem against a major defendant? Subsequent objection at the time of execution for having impleaded wrongly. The manager of a Hindu family consisting of himself and two minor brothers mortgaged the ancestral property to discharge a debt properly incurred by him in the capacity of a manager.—A suit was brought by the mortgagee upon the mortgage bringing three brothers on record as defendants the two younger of whom were sued by the mortgagor as their guardians ad litem the plaintiff got the decree and sold the land in execution. The two younger brothers filed a suit to set aside the decree and sale alleging that they were of age at the time of the suit & hence they had been wrongly impleaded. It was found that the elder brother was in fact a major at the date of the previous suit, but before the sale he knew of the suit and execution proceedings and purposely allowed the elder brother to conduct the defence and execution proceedings on his behalf. Held, that the decree in the former suit was binding on both the plaintiffs. **Rama Charai v, Durai Sami Pillai 21 Mad 167.**

Acquiescence-*Contd.*

(15) Account made in course of usual Dealing—*Concld.*

(16) SENDING AGENT TO SETTLE RENT.

41—Sending agent to settle rent—Acquiescence in rate.—The sending of an agent by a tenant to settle with the landlord as to the rent is not a virtual acquiescence in the rate of rent demanded. **Stalkart v. Lalla Bhurrut Lall W R 1864. Act X, 115**

41*A*—S. 42—Registration-Amicable arrangement after—Tenants if bound. The land Registration Act requires the registration by the various proprietors of their shares in the estate only and does not contemplate a registration of shares in separate mouzahs in the estate. Sec. 42 of the Act therefore has no application to the case of a co-share who by an amicable arrangement with the other co-sharers has been placed in possession of a larger than his registered share in some mouzahs and of a less share or no share in others when the total interest which he holds in all the mouzahs represents his registered interest in the whole estate. *Quere*—Whether the tenants would be bound without their consent by such an arrangement: *Held*, where the tenants had acquiesced in the arrangement and paid rents in accordance therewith for several years prior to the period for which the rents in suit were claimed That they could not rely on sec. 78 of the Act to dispute the landlord's right to recover rent in accordance with that arrangement. **Srimutty Poresh Moni Dassya v. Nobo Kishore Lahiri 8 C W N 193.**

Acquiescence-*Contd.*

(17) RECEIPT OF RENT IN LIEU OF GRANT OF LAND.

42—Receipt of rent in lieu of grant of land. In a suit to recover possession of land it appeared that the defendant's father had in 1801 obtained possession on a lease of 280 bighas from the Government of Kulabo, and that the plaintiffs' father had in 1806 obtained a grant of 10 unspecified bighas of the same land, but that he never asked to have them marked out and given to him *in specie*, and that he, and subsequently his sons, the plaintiffs, were content up to the year 1856 to receive from the defendant's family in respect of their grant the rent formerly paid by them to the Government for the same. The District Court reversed the decree of the munsiff, and threw out the claim to recover possession of the land on the ground that the plaintiffs must be taken after such a lapse of time to have acquiesced in the arrangement that a yearly rent was to be received without any particular land being marked out as theirs. *Held*, that it was competent for the Assistant Judge to come to that conclusion under the circumstances and that there was no ground for saying that there was any error of law in his decision, which was accordingly affirmed. **Sule v. Dhundiraj Venayak, 3 B H C A C 55.**

(18) ACCEPTING LOWER RENT THAN THAT ENTITLED TO FOR LONG TIME.

43—Accepting lower rent than that entitled to for long time.—Where a landlord who may originally have had a right to collect a higher rent is for a long period of years content to accept a lower, it would be manifestly unjust to allow him to turn round upon the tenant at any time he pleases and demand the higher rent. **Roocha Ram Misr v. Naga Doss. 2 N W 92.**

(19) LONG POSSESSION BY TENANT WITHOUT LEASE.

44—Long possession by tenant without lease—An under tenant who has dug a tank and been in possession undisturbed by the former proprietor for a long period, such acquiescence being equivalent to a lease, cannot be ejected by the patnidar. **Sreemunt Ram Dey v. Kookoor Chand 15 W R 481.**

Notes—Fol 6 Cal 827; 1 C L J 579.

44A—Ejectment, suit for—Origin and nature of Tenancy not known-Evidence of mode of dealing with long demised of facts and conduct of parties—Permanent tenancy——Presumption of—Alternative plea of acquiescence by conduct on failure of substantive defence as to evidence of permanent tenancy, if permissible-Acquiescence whether a question of fact—Facts justifying inference of permanent tenancy.—The facts of long possession of a tenancy by the tenants and their ancestors and of the landlord having permitted them to build a pucca house which has existed for a considerable time and which was added to by successive tenants and of the tenure having been from time to time transferred by succession and purchase in which the landlord acquiesced or of which he could not have been ignorant are sufficient to warrant the court presuming that the tenancy is of permanent nature. 11 Moo; 1 All 433; 8 Cal 960; 10 C L R 25; 27 Cal 570 ref to. **Caspersz v. Kedar Nath Sarbadikari 5 C W N 858=28 Cal 738.**

Acquiescence-*Contd.*

(19) Long Possession by tenant without lease—*Concld.*

Notes—Dist; 5 C W N 846.

(20) ALLOWING PART OWNER TO WORK FORFEITURE OF TENURE AS IF FULL OWNER.

45—Allowing part owner to work forfeiture of tenure as if full owner—Waiver of forfeiture—Claim of portion of tenure.—If A allows B to deal with an occupancy tenure as full owner, and by an attempted transfer, to work a forfeiture thereof without any objection on his part, A will not be allowed to come in afterwards and claim a part of the forfeited holding on the ground that B was only part owner, and could therefore only work a forfeiture of his own share. **Manirullah v. Ramzan Ali, 1 C L R 293.**

Notes:—Fol: 10 C L R 15. Dist: 14 Cal 751.

46—Omission—Equitable acquiescence.

When a person took a permanent lease of a cultivatory holding direct from the *zamindar* without making any inquiries as to who were the cultivators and on what tenure they held; and where, the permanent lessee having commenced to build, one of the tenants subsequently brought a suit in ejectment against him. *Held*, that the lessee should, by the knowledge that the land was a cultivatory holding, have been put on his guard and have made inquiries as to the exact condition of the title, and not having done so the

Acquiescence-*Contd.*

20 Allowing Part owner to work forfeiture of Tenure as if Full owner—*Contd.*

doctrine of equitable acquiescence could not be applied. **Bisheshar v. Muirhead, 14 All 362=12 W N 36.**

46 *A*—Acquiescence—Zamindar not suing for three years for removal of tree.

The fact that *zamindar*, who was entitled to claim the removal of certain trees planted by a tenant without his consent, omitted for the space of three years from the planting thereof to sue the tenant for their removal amounts to no such estoppel by acquiescence as would prevent the *zamindar* from successfully suing for the removal of such trees at any time before the expiry of the period of limitation applicable to such a suit.

Ahmad Husain Khan v Phopi, 11 W N 186.

46 *B*—Mother's share on partition between her sons—Mitakshara.—

According to the Mitakshara in force in Bengal, the mother, though not entitled to require a partition so long as her sons remain united, is entitled, if a partition takes place between her sons, to receive the share of a son in property which is ancestral, or acquired by the employment of ancestral wealth; but she may acquiesce in the division of property between her sons without claiming any share for herself.

Chowdhry Ganesh Datt v. Musst Jewach Thakoorain, 6 Bom L R 1=14 M L J 8=31 Cal 262=8 C W N 146=31 I A 10 P C.

Notes:—Ref: 32 Mad 191; 19 M L J 94.

See also 9 C W N 270=32 Cal 234.

47.—Beng. Reg. XI of 1825—Chur in navigable river, Right of Government to.

Act IX of 1847 does not alter the state of the law under Regulation XI of 1825, but merely lays down a procedure. There is nothing in Act IX of 1847 to prevent the Government from taking possession of chur, after it has silted up, if the chur be one that the Government would be entitled to under Regulation XI of 1825.

Budrunnissa Chowdhrain v Prosunno Kumar Bose. 6 B L R, F B 255=14 W R, F B 25.

48.—Acquiescence—Acquiescence is quiescence under such circumstances as that assent may be reasonably inferred from it and is no more than an instance of the law of estoppel by words or by conduct; in other words, aquiescence does not mean simply an active, intelligent, consent, but may be implied, if a person is content not to oppose irregular acts which he knows are being done. (1846) 2 Phill. 117, (1868) L R 3 H L 249. (1850) 2 Ha. and Tw. 224, Ref: 19 I A 203=20 Cal 296, Ref and Fol.

Ananda Chandra Sen v Parbati Nath Sen 4 C L J 198.

Notes:—Fol: 11 C L J 189.

49—Possessor with knowledge of defective title—Right to compensation for improvements.

A person in possession of the land of another with knowledge of his defective title, is not entitled to compensation for improvement where such improvements, not being necessarily of any direct advantage to the real owner, were objected to by him at the time when made.

Baba Khem Singh v Dhunna Singh. P R. 7 of 1872

50.—The owner of a plot of land who stands by and does not interfere to prevent others building a house thereon, is estopped from demanding that the house be pulled down. All that he can claim is rent or compensation.

Bheeka Singh v Hurjus P R. 7 of 1866.

51.—Occupation—Tenant.

The defendant had been associated in the occupation and cultivation of certain land with *I*, a tenant with a right of occupancy, and after *I*'s death continued the occupation, and paid rent to the plaintiffs for nine years. *Held*, that this acquiescence in his occupation must be regarded as a recognition by the plaintiffs of his having been associated with *I*.

Chatoor Singh v Must Heeka Kooer. 5 N W 191.

52.—Acquiescence.

Where in answer to a suit for demolition of a building as having been unlawfully erected on land belonging to the plaintiff, acquiescence of the plaintiff is pleaded it is not enough to show that the plaintiff did not interfere with the progress of the building, but it must be shown that the plaintiff knowing the defendant to be under a mistaken belief that the land upon which he was building was his own purposely remained quiet until the building was completed. (21 All 496: 3 C W N 503) (1 E and I A 129) (15 Ch D 96). 22 Bom 1 Referred to. 5 W N 100 Crn: **Chhothu v Inyat ullah. 19 W N 191.**

Acquiescence-*Contd.*

20 Allowing Part owner to work forfeiture of Tenure as if full owner—*Contd.*

53.—Execution of award without judgment and decree.

Although execution proceedings may be irregular in their inception and in improper substitution for a suit, still when the Court had jurisdiction to grant the same relief, and when the regularity had been acquiesced in, it does not vitiate the execution proceedings.

The Collector of Poona v Dipaji 1890 P J 69.

See also cases under.

Arbitration—Awards.

54.—This was a suit for the demolition of indigo vats and other buildings and constructed upon land jointly owned by the plaintiff and the defendant. *Held*, that as the plaintiffs did not immediatly apply for an injunction and allowed the construction of the buildings costing thousands of rupees and as the plaintiffs had not shown that they had sustained any injury (for they were competent to have their share partitioned and the deficiency made up), they were not entitled to any relief. **Girdhari Lal V Velayat Ali. 5 W N 277.**

55.—B., the resident of a certain village, about 12 years before the date of his suit built a temple on A's land in the village. with the permission of his agent, as A himself was in service in a foreign territory and seldom visited the village. Again about 5 years before the suit B built another temple and a tank on a piece of waste land situate in the village of the larger part of which A was the proprietor. The present suit was brought by A for the demolition of the second temple and the tank. *Held*, that as the terms of the power of attorney under which the agent of A had given his consent to the building of the temple and the tank were very general in their nature. as a temple had previously been built and not objected to, as part only of the tank belonged to A and as the appellant A had not acted in good faith his claim should be dismissed. **Imdad Ali Khan v Sobha Ram. 1 W N 97, 7 W N 82= 5 W N 277.**

See Co-shares.

See also cases under

Principal & agent.

Acquiescence-*Contd.*

20 Allowing Part owner to work forfeiture of Tenure as if Full owner—*Contd.*

56—Acquiescence under mistake. From 1830 to 1890 a zemindari had been managed by the Court of Wards. During the whole or a part of his period the Court of Wards worked the forest of the *Maliahs* (certain hill tracts to the north of the zemindari) for the benefit of the zemindari in the mistaken belief that it belonged to the zemindar, and other Government officials acquiesced therein. The Government officials, under the same mistake also, encouraged the expenditure of the zemindari funds upon the making of roads in the Maliahs. But on the first occasion when a claim of ownership was distinctly put forward by the zemindar, it was repudiated by Government. *Held*, that these facts did not estop the Government from claiming ownership of the Maliahs. **Gajapati Rajah of Parlakimedi v The Secretary of State. 1 C L J 460=9 C W N 553= 28 Mad 130=32 I A 53 P C.**

57—Suit for removal of building ~~Erected~~ on plaintiff's land—Acquiescence.

This was a suit to demolish certain buildings erected by the defendants on open land situate within the limits of a village belonging to the plaintiffs. It appears that the principal plaintiff *M A*, in the performance of his office as Municipal Commissioner, had to report on the petition of the defendants for permission to build, and he reported to the Municipality that he had visited the spot and could find no objection to the defendant's application to erect the buildings in question. *Held*, that it was clear from this that the plaintiffs were well aware of what the defendant was doing and they never interfered. Under these circumstances the plaintiffs were not entitled to the relief they claimed. (1 All., p 82) followed. **Munna v Madat Ali 6 W N 123.**

58.—Ejectment—Rent.

A piece of land was given by the plaintiff to defendants more than twelve years before suit, for the purpose of building a house upon it, not as an absolute grant, but with a reservation of plaintiff's proprietary right in the land. The defendants built upon the land, and occupied without paying any rent. Plaintiff sued either to eject the defendants, allowing them to remove the building materials or pay them compensation, or to receive rent for their occupation of the land.

Acquiescence -*Contd.*

20 Allowing Part owner to work forfeiture of Tenure as if Full owner—*Concld.*

Held, that it would not be equitable to allow the plaintiff to eject the defendants, but that the plaintiff was entitled to a fair rent so long as the defendants continued to use and occupy the land. **Moulvi Sadid-ud-din Khan v. Agha Mir. P R 19 of 1875,**

59.-Where the plaintiff, the owner of a fourth share in a piece of building ground, sued to eject the defendants, who had built on the land with the consent of proprietors owing a half share, *held*, that the plaintiff was entitled to possession of her fourth share on her paying compensation to the defendants. **Mussummat Zuhooran v. Bunsee. P R 21 of 1867,**

60.—Acquiescence—Question of fact.

The question of acquiescence such as would bar a claim to relief which would otherwise be good is one of fact. **Lakshmi Dass v. Roop Laul. 17 M L J 19=30 Mad 169.**

61.—Erection of Buildings—Compensation.

Where buildings are erected upon or improvements made to property by the party in possession, *bona fide*, and without notice of any adverse title, compensation is allowed for such buildings and improvements to the party making them as against the rightful owner. If the owner of the land induces the person to build, there may be an equitable transfer of property from the former to the latter. **Kunhyalal v. Kishen Chund. P R 42 of 1866,**

See also cases under:—

Common Land.

62.—When the plaintiff claimed certain land from the defendants who pleaded a gift from the adoptive mother of the plaintiff with the plaintiff's acquiescence, and it was found that in a previous suit against the adoptive mother about the validity of the adoption the plaintiff had omitted to claim possession of the disputed lands, *held* that the mere fact of the lands not being included in the former suit was not sufficient to shew acquiescence. **Rudro arhar. 1893 P J 141.**

2. GENERAL CASES.

63.—C P C S. 17-Jurisdiction-Court-Application-Acquiescence.

A suit was brought in the Sirsi Court against three defendants, of whom one resided within the local limits of the jurisdiction of the Sirsi Court and the other two within that of the Barsi Court. The plaintiff did not obtain the leave of the Sirsi Court under S. 17 of the Civil Procedure Code. The Barsi defendants in their written statement took an objection that there was no jurisdiction; but they made no application under S. 20 of the Code. The case then proceeded to trial and was decided on its merits by the first Court. The lower appellate Court on appeal held that the Sirsi Court had no jurisdiction and it therefore ordered the plaint to be returned to plaintiff for presentation in the proper Court. On second appeal.—

Held, reversing the order of the lower appellate Court, that as no application was made under S. 20 of the Civil Procedure Code, the Barsi defendants must be deemed to have acquiesced in the institution of the suit; and that, therefore, the suit could not be said to have been improperly instituted against those defendants in the Sirsi Court.
Ramappa v. Ganpat. 7 Bom L R 289= 30 Bom 81.

Acquiescence-*Contd.*

(21) General Cases—*Contd.*

64.—Mother's share on partition between her sons—Mitakshara.

According to the mitakshara in force in Bengal, the mother, though not entitled to require a partition so long as her sons remain united, is entitled, if a partition takes place between her sons, to receive the share of a son in property which is ancestral, or acquired by the employment of ancestral wealth; but she may acquiesce in the division of property between her sons without claiming any share for herself.
Chowdhry Ganesh Datt v Mussst. Jewach Thakoorain. 6 Bom L R 1= 31 Cal 262=31 I A 10=8 C W N 146= 14 M L J 8.

65.—Limitation Act (XV of 1177), Arts 118, 144—Suit by reversioner for possession—Defendant in possession in virtue of adoption—Limitation—Custom—Adoption of daughter's son—Special custom—Burden of proof—Evidence—Entry of special custom in the *Rewaj-i-am*, effect of—Acquiescence by sonless brother in his brother's acts, effect of.

A suit for possession by a reversioner against a person, who claims to hold a deceased person's

Acquiescence-*Contd.*

(21) General Cases—*Contd.*

immoveable property in virtue of an adoption by the latter, is governed by Art. 114 and not by Art 118 of the Limitation Act of 1877 or 1908.

86 P R. (F.B.) 1905=30 P. L. R. 1906, is no longer a guide, and Art. 118 does not apply whether the adoption was done with authority but by way of improper exercise of that authority, or the adopter had no inherent power to adopt.

Among Punjabi agriculturists, any one asserting that the adoption of a daughter's son is valid must prove a special custom to that effect.

The entry of a special custom in a *Rawej-i am* is insufficient to establish such a special custom, unless it is supported by instances quoted in itself or by other verified instances cited in Court.

The acquiescence of a sonless brother in his brother's act does not bind the next reversioners by custom.

Among Mussalman Jats of the Delhi District there is no custom which favours the validity of an adoption of a daughter's son. 96 P R 1908= 79 P W R 1908 and 28 All 727=10 C W N 1065 =8 Bom L R 722=16 M L J 440=4 C L J 405= 1 M L T 265=9 O C 377=3 All L J 695, relied upon. 50 P R 1893, Fol.

Nathu v Rahman. 198 P L R 1911.

66—Easement-Light-Substantial interference —Nuisance—Reflected light-Mandatory injunction, refusal of—Delay-Damages The right of the owner of the dominant tenement is a right to the reception of light and air in a literal direction, but, to constitute an actionable obstruction, the same must amount to a nuisance. The question that has to be decided is not how much light is left in spite of the obstruction but whether there has been such a domination of light as to constitute an actionable nuisance. (1900) A. C 179; 2 Q. B. 722 (1900). When it was urged that, although the natural light coming into the dominant tenement has been diminished the reflected light had increased with the result that the rooms were better lighted than before, but it was admitted that if the building was raised, the light coming in the building would be seriously affected. *Held*—that the right of dominant owner (to light) should not be made dependent on his refraining from exercising his undoubted right of raising the height of his building; there was thus a substantial interference with his rights.

Ananthnath Deb v J C Galstaun, 12 C W N 519=35 Cal 661.

67—Custom Guzarat District (Saroki village) —Sale of house by non-proprietary resident Non-assertion of discretionary right, necessarily renunciation.—

By the custom of the village of Saroki in the Guzarat District, non-proprietary occupants of houses cannot sell them unless they hold the sites by purchase or gift from the proprietors. A mere non-assertion of a discretionary right in certain instances does not necessarily imply a renunciation of it for all time and in all cases. (25 P R 1875, approved.) (124 P R 1888, 119 P R 1884, 87 P R 1884.)

Alla Ditta v Dina, 125 P R 1879.

68-in burden of proof—Where misplacement of the onus has been acquiesced in by the parties in the court of first instance or in the lower appellate Court, the High Court would be very reluctant to interfere with the result unless there were reasons to suppose that the error may have produced error in the decision of the case on the merits. **Gangadas v Dama 5 Bom L R 177**

69—Acquiescence, what is an. There is a distinction between acquiescence in an act which it is still in progress and mere submission to it when it has been completed. In the first case it may operate as an estoppel if it has induced action infringing a right. In the second case, submission cannot change the past, and the right of action once vested cannot, at all events as a general rule, be divested without an accord and satisfaction, or release under seal. Estoppel by acquiescence has no application to an *ex post facto* submission not amounting to ratification and inducing to action or omission and consequently insufficiently to constitute what in such case would be necessary, accord and satisfaction with full knowledge. Acquiescence after a *fait accompli* if not prolonged beyond the verge of limitation is no bar to a right of suit already accrued. **Fatehsingji v Bamanji 5 Bom L R 274=27 Bom 515.**

Notes—1 C L J 73 Ref: 10 Bom L R 1146, 13 C W N 919, 33 Bom 610; 17 M L J 469 Diss.

Acquiescence-*Concld.*

(21) General Cases—*Concld.*

70—Question of fact—Second appeal—The question of acquiescence is not a question of fact and, in a second appeal, the judgment of the lower appellate Court is not final.(21 All 416, P C R)

Caspersz v Kedar Nath Sarbadhikari 28 Cal 738=5 C W N 838.

Acquiescence in lease granted by executor.

See (1) Estoppel

(2) Landlord & tenant.

Acquiescence of Landlord, effect of.

See Landlord & tenant—buildings on land, right to remove.

Acquiescence of owner.

See (1) Acquiescence.

,, (2) Damages—Measure and assessment of damages—Torts.

Acquired property.

See cases under:—

(1) Hindu Law Joint Family.

(2) Custom (Punjab).

(3) Hindu Law Alienation.

Acquisition.

Acquisition of the right of occupancy.

See cases under right of occupancy.

Acquisition by Government of land subject to a mortgage.

See Land Acquisition Act.

Acquisition of Easement.

See Easement Act 1882 S 47, 15 Expl.

Acquisition of Land.

(1) Order deciding competency of Land Acquisition, Judge to review portions of award-Whether appeal to Privy Council lies. 9 Ind Cas 183.

See cases under Land acquisition Act.

Acquisition of land—Contract for sale of land—Acquisition of land under the Land Acquisition Act—Rights of vendee. See Transfer of Property Act. 15 C W N 420.

Acquisition of Gain.

—Association formed for—

See Company—Formation and Registration.

Act of 1835.

Application of, to Crown.

See (1) English Law.

(2) Madras City Municipal Act S. 341.

Act VII OF 1835.

See Sale for Arrears of Rent—Act VIII of 1835.

Act V of 1836.

See Execution of decree-Striking off Execution Proceedings.

Act X, of 1836 s. 3.

See (1) Damages—Measure of Damages—Breach of Contract.

(2) Limitation Act,(1908).

Act IX of 1837.

See Land Tenure in Bombay.

Act XXVII of 1837

See Salt—Acts and Regulations relating to—Bombay.

Act XI of 1838.

Act XI of 1828 (Remuneration of Amins effecting Partition.)

Notes:—Rep; in pt Act XIV of 1870; Rep. (in Agra) Act XIX of 1863; (in Bengal and Eastern Bengal) Ben. Act VIII of 1876; (in Assam, except the Lushai Hills), Reg. 1 of 1886]

See Contribution, Suit for—Voluntary Payments.

Act-*Contd.*

Act XVI of 1838.

See (1)Jurisdiction of Revenue Court-Bombay Regulations and Acts.
(2) Limitation Act, (1908)
(3) Mamlatdar, Jurisdiction of.

Act XXIII of 1838

See Attachment—Subjects of Attachment—Annuity or Pension.

(Repal of part Of Madras Regulation IV of 1821)

Notes:—[Rep; Act XXIII of 1871.]

Act XXV of 1838.

See (1) Wills' Act, 1838.
(2) Will—Attestation.

Act XXV of 1838 (Wills).

Notes:—[Rep., (except as to wills made before 1st January, 1866), Act VIII of 1868; s. 2 rep. in pt., formal words in ss. 2 to 6, 7 to 29 and 31 rep s. 30, rep, Act XII of 1891; Declared in force throughout b. i., except as regards the scheduled districts. Act XV of 1874, s. 3.]

Act II of 1839.

Act II of 1839:(Fines by Magistrates.)

Notes:—[Rep., Act XVII of 18. 2.]

Act II of 1839.

See Judicial officers, Liability of.

Act XIV of 1839 (Emigration.)

Notes:—Rep., Act XIII of 1864.

Act XX of 1839

See Duties.

Act XXIV of 1839.

See Ganjam and Vizagapatam Agency Courts' Act.

Act XXXII of 1839

See (1) Contribution, Suit for—Interest.
(2) Interest—Cases under Act XXXII of 1839.
(3) Interest Act, 1839.

Act XXXII Of 1839.

*. **Interest Act** (XXXII of 1839)—Interest prior to suit.

Act-*Contd.*

Interest prior to the institution of the suit cannot be given, under Act XXXII of 1839, unless a demand of payment has been made in writing. **Fezali v Mahomed. (7 Bom L R 798.)**

2.—Interest Acts, 1839 and 1835—Written demand—Implied agreement—Damages.

In the absence of agreement or usage giving a right to interest, and of a written demand given notice that interest would be claimed, the creditor is not entitled to interest. In the case of actions for debt in which the requirements of the Act XXXII of 1839 are not satisfied, interest cannot be awarded as damages. 20 Mad 481, 73 P R 1892, 36 P R 1894 Ref.
Bura v Mailia Shah. 19 P L R 1902= 104 P R 1901.

IMPERIAL ACTS—ACT XXXII OF 1839 (INTEREST ACT)

1.—Notice in writing—Printed heading to a bill—Interest.

In a suit for the price of goods sold and delivered, a question arose as to whether interest was payable on the bills presented by the plaintiff and which the defendant had failed to pay on presentation. It appeared that at the head of every bill, it was printed "interest will be charged at 12 per cent. per annum on bills not paid on presentation." *Held* that such a printed heading constituted a notice in writing as laid down in Act XXXII of 1839, and that therfore interest was properly demandable from the defendant.
Fitch and Co v Raynor A W N 1887, 287.

2.—Construction—English cases.

The Interest Act was passed for the purpose of extending to India the provisions of the English Act (3 and 4 Will IV C 42) English decisions may therefore be referred to as a guide to construe the Act. **Ganesh Baksh v Harihar Baksh. 26 All 299=3I I A 116= 8 C W N 521=14 M L J 190= 6 Bom L R 505, P C.**

Notes = 11 C W N 1109 Cited=17 M L J 465=4 A L J 750=31 Bom 566=2 M L T 394=31 Bom 354=Ref, 9 Bom L R 439, 7 O C 193.

Act-*Contd.*

Act IV of 1840.

See (1) Limitation Act (1908) Art 47.
(2) Survey Award.

Act XIV of 1840 (Extending 9 Geo 4 c 14)

Notes.—Rep., Act IX of 1872.

Act XIV OF 1840

See Hindu Law, Contract—Breach of Contract.

Act XV OF 1840

See Agent of Foreign Sovereign.

Act XVII OF 1840

See Sonment in default of fine.

Act XXIII OF 1840

See Attachment—Attachment Judgment.

Act XXIII of 1840

Execution in Presidency towns of Mufassal Process.)

Notes,—Rep Act X of 1882.

Act I of 1841

See Adverse Possession.

Act 1. of 1841— s. 2

See (1) Pre-emption—Right of Pre-emption.
(2) Pre-emption—Subjects of and Transfers giving rise to pre-emption.

Act X of 1841

See (1) Merchant Shipping Act, 1854, ss.24, 26.
(2) Ship, Registration.

Act X of 1841 (Registration of ships.)

Notes.—Rep in Pt Act XVI of 1874 ; Rep in pt Am—Act XI of 1850 ; Act VII of 1891 Am Act V of 1883, s. 33 ; Declared in force throughout B I Except as regards the Scheduled Districts Act XV of 1874 S. 3.

Act XI of 1841 (Military Courts of Request.)

Notes.—Rep., Act VIII of 1887.

Act XIX of 1841 (Succession Property Protection).

Notes.—Rep in Pt Act VIII of 1885 S. 13 : Act XVI of 1874 ; Act XII of 1876 ; Extended to Sindh, Bombay Act XII 1866 , s. 12 Declared in force—Throughout B I except as regards the scheduled District, Act XV of 1874, s. 3 in the Arakan Hill Disctrict (with modifications,and with the exception of ss.16 and 20) Reg IX of 1874, S. 3.

Act-*Contd.*

Act XI of 1841-Military Courts of Request.

See (1) Appeal—Acts—Military Courts of Request Act.
(2) Jurisdiction—Question of Jurisdiction-Generally. **I Agra, 222**
(3) Military Courts of Request.

Act XIX OF 1841

See (1) Certificate of Administration—Certificate under Bombay Regulation VIII of 1827 and Acts XIX and XX of 1841.
(2) Certificate of Administration—Right to sue, or Execute decree, without certificate.

Act XIX of 1841.

Summary Order under—

See Limitation Act, (1908) Art 13.

Act XIX OF 1841, s. 3

See Superintendence of High Court—Civil Procedure Code, s. 115.

Act XIX OF 1841 —Jurisdiction—Hindu Law—Joint family—Practice—*Ex parte* order.

The provisions of Act XIX of 1841 do not apply to the case of a family governed by the Mitakshara Law inasmuch as in the case of the death of a member the property passes not by way of succession but the survivorship. Before it can be held that a Court has jurisdiction under Act XIX of 1841, it must be found that the provisions of law have been strictly complied with. Case in which it was held that Act XIX of 1841 could not be applied under any circumstances.

Musstt Sato Koer v Gopal Sahu 12 C W N 65.

Act XIX of 1841 Ss. 5, 8

See Superintendence of High Court Civil Procedure Code S. 115—

Act XIX of 1841

2—Ss 3, 4, 15— Court giving effect without enquiry to a will the validity of which was disputed—"Legal directions."

Where, on an application being preferred under Act XIX of 1841, the Court, considering

Act-*Contd.*

itself bound by the existence of directions in the will of the deceased proprietor for the possession of the property after his death to give effect to these directions, ordered with reference to Section 15 of the Act that the applicant should be put in possession, but did not consider whether the directions contained in the will, the validity of which was disputed, were legal directions, nor take any evidence except the examination of the applicant and of the parties in possession, who denied the truth of the applicant's allegations, *held*, that the enquiry made was not such as to satisfy Section 3 of the Act, but that the case must be remanded for the Court to determine summarily the right to possession after determining whether the directions contained in the abovementioned will were legal directions, and, if not, whether the applicant was entitled to be put in posseasion on the grounds specified in Section 3, or the opposite party to be restored to possession. **Gorakh Nath v Bishember Nath P R 66 of 1882.**

Act XX of 1841 (Collection of debts on succession.)

Notes.—Rep Act XVII of 1860.

Act XX of 1841

Sse Certificate of Administration—Certiffcate under Bombay Regulation VIII of 1827 and Acts XIX and XX of 1841.

Act XXI of (1841 Local Nuisances)

Notes.—Rep Act XVII of 1862.

Act XXI of 1841

See Right of Suit—Orders, Suits to set aside

Act XXIX of 1841

See Privy Council, Practice of—Dismissal of Appeal for want of Prosecution

Act XXIX of 1841 (Dismissal of suits and Appeals Bengal & Madras.)

Notes;—Rep Act XII of 1873.

Act IV of 1842.

See Madras Boat Rules.

Act XII of 1842

See Military Courts of Request.

Act XVI of 1842

See (1) Statutes, Construction of.
(2) Zamindar, Power of.

Act-*Contd.*

Act III of 1843 (Special Appeals)

Notes.—Rep Act XVI of 1853.

Act III of 1843

See Appeal to Privy Council—Cases in which Appeal lies or not—Appealable Orders

Act V of 1843

See (1) Slavery.

Act V of 1843 (Slavery).

Notes Rep in pt., Act XVI of 1874; Declared in force—Throughout B 1., Except as regards the Scheduled Districts. Act XV of 1874, S. 3; In the Sonthal Parganas, Reg III of 1872, s. 3; as Amended by Reg III of 1899, S. 3, in the Chittagong Hill-Tracts, Reg 1 of 1900, s. 4; in the Arakan Hill District, Reg IX of 1874, s. 3; in Upper Burma (Except The Shan States), act XIII of 1898, S. 4 : in Kachin Hill-tracts, as regards Hill tribes, Reg 1 of 1895, s. 3; in certain tracts in the Chin Hills, Reg V of 1896, s. 3; in British Baluchistan, Reg I of 1890, s. 3.

ACT XI OF 1843

See (1) Contract Act s. 22—Illegal Contracts —Against Public Policy.
(2) Declaratory Decree, Suit for—Miscellaneous Suits.
(3) Hereditary Offices' Act, s. 9.
(4) Hindu Law, Adoption—Requisites for Adoption—Sanction.
(5) Jurisdiction of Civil Court—Offices' Right to.
(6) Service Tenure.

Act XIV of 1843.

see Salt.

Act XIX OF 1843

See Registration Act XIX of 1843.

Act XIX OF 1843.

(Registration of certain deed.)

Notes;—Rep. Act XVI of 1864.

Act V, of 1844 (Private Lotteries).

Notes—[Rep, Act XXVII of 1870.]

Act V of 1844.

See (1) Contract—Wagering Contracts.
(2) Promissory note—Consideration.

Act XIX OF 1844

See (1) Cess.

Act-*Contd.*

(2) Town Duties, Bombay.

Act XX OF 1844.

See Factors Act,

Act 1 of 1845 (Sales of Land for Revenue Arrears).

Notes.—[Rep, (In Bengal and Eastern Bengal), Act XI of 1859; (in Punfab). Act XII of 1873; (in Agra, except certain areas), Act XIX of 1873.]

Act I of 1845-ss 6 and 14

See Sale for Arrears of Revenue-Setting aside Sale—Irregularity.

Act I OF 1845—S. 9

See Sale for arrears of Revenue—Deposit to Stay Sale.

Act I OF 1845—S. 21

See Benami Transaction—Certified Purchasers—Act I of 1845.

Act I OF 1845—S 26.

See (1) Enhancement of Rent-Exemption from Enhancement, ect.—Proof of Uniform payment,

(2) Enhancement of Rent—Liability to Enhancement—Land Occupied by buildings.

(3) Cases under Sale for Arrears of Revenue—Incumbrances—Act I of 1845.

Act I OF 1845—S. 29.

See Limitation Act, (1908) S. 18.

Act XVI of 1845 (Re-admission of Appeals Bengal and Madras.)

Notes—(Rep., Act XII of 1873)

Act XVI OF 1845

See Privy Council, Practice of—Restoration of appeal.

Act XXIX OF 1845—S, 5

See Judge—Appointment of Judge.

Act XXIX of 1845 (Joint Zilla and Sessions Judges).

Notes—Rep, Act X of 1872

Act I of 1846 (Legal Practitioners)

Notes-Rep, in pt. Act XVI of 1874; Act XII of 1876; Rep in Pt and Am, Act XII of 1891 Am Act XX of 1853, S. 4 Rep (locality)

Act-*Contd.*

Act XX of 1865; Act XVIII of 1879, S. 42 (inserted by Act IX of 1884,) S. 9, Rep (in Burma), Act XIII of 1898, S. 18, Declared in force throughout the Presidencies of Madras and Bombay except as regards the Scheduled Districts, Act XV of 1874, ss. 4, 5)

Act I of 1846.

See (1) Barrister

(2) Contract Act, S. 25.

(3) Pleader—Remuneration.

Act IX OF 1846

See Madras Boat Rules.

1—Taxation in probate proceedings.

Pleader's fees in appeals in probate proceedings should according to a long standing practice of the High Court. be assessed at Rs. 30.

Sundrabai v. Collector of Belgaum 10, Bom L R 1197=33 Bom 256.

Act I of 1847 (Boundaries).

Notes—(Rep. in Punjab), Act IV of 1872; (in Ajmere), Reg. III. of 1877; (in Central Provinces),Act XVIII of 1881; (in Agra except certain Areas), Act XIX of 1873.

Act I of 1847

See Jurisdiction of Civil Courts—Revenue Courts—Orders of Revenue Courts

Act VII OF 1847

See Distraint.

Act IX OF 1847 Ss 3 to 6

See Evidence—Civil cases-maps.

ACT IX OF 1847

See Jurisdiction of Civil Courts—Revenue.

1—Beng. Reg. XI of 1825.—Chur in navigable river, Right of Government to.—Act IX of 1847 does not alter the state of the law under Regulation XI of 1825, but merely lays down a procedure. There is nothing in Act IX of 1847 to prevent the Government from taking possession of a chur. after it has silted up, if the chur be one that the Government would be entitled to under Regulation XI of 1825. **Budrunnissa Chowdhrain v. Prosunno Kumar Bose 6 B L. R, F. B, 255, 14 W. R, F. B, 25**

2—Right of suit—Effect of an order for

Act IX of 1847-*Contd.*

additional assessment.—Certain land, which formed part of the plaintiff's zemindari, became, on its re-fromation after submergence by a change in the course of the River Ganges, attached to zemindari of *J.*, and it being found so attached, an additional jumma was, after proceedings taken by the revenue authorities under Act IX of 1847, assessed against J. in respect of it. In a suit in the Civil Court brought by the plaintiff against the Government, J., and L., an ijaradar under J., to recover possession of the land,—*Held*. that the suit was not barred by the proceedings under Act IX of 1847. Section 6 of that Act makes the orders passed under its provisions final only against the zemindar, not against third persons. Nor would section 9 bar the suit; the words of that section do not necessarily extend to forbidding a suit brought to recover property which the Government or its officers may be instrumental in keeping away from the rightful owner. *Held*, on the facts, that the Government had not, by the proceedings under Act IX of 1847. or otherwise, interfered with the plaintiff's rights so as to entitle him to relief against it in the present suit. **Collector Of Moorshedabad v. Roy Dhunput Singh Bahadoor 15 B. L. R., 49; 23 W. R., 38**

3—Settlement by Revenue authorities.

Although a settlement made by the Revenue authorities under Act IX of 1847 is final, the fact of such settlement will not preclude a proprietor from seeking in a Civil Court to establish his right to the lands so settled.

Narain Chunder v. Tayler 4 Cal 103. 3 C L R 151.

Notes:—Appr 22 Cal 244.

4—Rights of third parties.—Act IX of 1847 does not affect any question between the person in possession and any person other than the Government. **Kaliprasad Mazumdar v. Collector of Mymensingh 6 B L R. 261 note: 13 W R 366.**

5—Right of assessment by Government of accreted lands—Beng Reg XI of 1825. Act IX of 1847 refers to resurverys of zamindari lands which the Government as such may cause to be made at certain intervals and to assessment consequent on the changes ascertained by such sureveys, but does not interfere with

Act IX of 1847-*Contd.*

the rights of the Government in its capacity of zamindar to take possession of. and assess all accretions to, its own states under regulation XI of 1825. **ObhoyChurn Chowdhry v. Collector of Dacca 4 W R 59**

6—Land added to revenue-paying estate.—The words "land has been added to any estate paying revenue directly to Government" in Act IX of 1847 S. 6, mean added to the estate as it is depicted on the survey map. **Ram Jewan Singh v. Collector of Shahabad 19 W R 127.**

Dewan Ram Jewan Singh v. Collector of Shahbad. 14 B L R 221 Note 18 W R 64

Notes—Over: 14 Cal 67 F B Fol: 11 Cal 784 Ref 2 Bom 19; 30 Cal 291 P C.

7—Ss. 6, 9—Assessment-Accreted land-When the order of Board of Revenue final under s. 6 of Act IX of 1847.

The effect of the words "whose order thereupon shall be final" in s. 6 of Act IX of 1847 is, that where an assessment approved of by the Board of Revenue has been made under s. 6, such assessment is final and cannot be challenged in a civil suit, but the fact of an assessment having been made is no bar to a suit raising the question whether the Board of Revenue had jurisdiction under s. 6 of the Act to assess. Act IX of 1847 is applicable to land reformed on the site of a permanently settled estate. **Sarat Sundari Debi v The Secretary of State for India in Council 11 Cal 784.**

Notes—Over 14 Cal 67 F B. Ref 30 Cal 291 P. C.

8—Assessing reformed land after diluvion—Act IX of 1847, Ss. 1, 6 7 and 9, effect of—Extent of the jurisdiction of Board of Revenue—Powers of Civil Court—the evidentiary value of Survey maps.

Where on the comparision of a survey and a former thak map, the Board of Revenue assessed certain land as alluvial increment, which the Civil Court, in suit against the Board, found to be a reformation on the original site of a permanently-settled estate, in respect whereof the plaintiff had all along paid revenue without abatement :—*Held*, that the land was not liable to fresh assessment under the provisions of S.6 of Act IX of 1884

Act IX of 1847—*Contd.*

nor was the comparision of the two maps by the Revenue Officer conclusive on the question of addition to the estate, 11 Calc.. 784, partially overruled.—*Held* also (Mitter J., dissenting) that the order of the Board of Revenue; fixing the land with liability to assessment was not final, and could be set aside by the Court as *ultra vires*. 18 W R 64, 19 W. R , 127, overruled. *Held*, by the majority of the Full Bench, that the language of Section 9 did not prohibit such a suit: and unless the meaning were clear, its operation should be limited to suits for damages on account of anything done in good faith; for instance, in a case of ouster under Sectiou 7. 15 B. L. R, 49, approved. *Held*, (Mitter J. dissenting), Sec 1 repealed everything in the Regulations which enacted by what officers and how the question of liability to assessment should be tried, and therefore took away from Collectors and Boards of Revenue the power of any binding decision on the point. *Held*, also (Mitter J., dissenting) that the effect of the words " shall be final in Section 6 was to make the assessment final in every case in which there was jurisdiction to assess, but to leave it open to the Civil Courts to inquire in each case whether there was such jurisdiction, or whether the lands assessed were liable to assessment. Per Mitter J.—S. 1 has not abolished the Medical functions of the Revenue authorities under Regulation II of 1819 ; all that has been abolished by that section are the tribunals constituted by Regulation III of 1828. Per Mitter J.—The proceedings of the Revenue authorities under Sec 6 embrace an inquiry upon two questions viz. the question of liabiity to assessment, and its rate, and under the express wording of the section the finality attaches to the whole order of Sudder Board of Revenue.

Fahamidannissa Begum v Secretary of State for India in Council) 14 Cal 67.

Notes :—Ref 30 Cal 291 P. C. : 2 C. L J 351

9—*Held* by the Privy Council on Appeal.

A review of legislation anterior to Act IX of 1847 shows that whilst it was intended to bring under assessment lands not included in the permanent settlement, whether waste or gained by alluvion or dereliction from sea or rivers, yet all such lands as were included in estates which were permanently settled, were to be strictly excluded from further assessment. Lands included in the permanent settlement having afterwards been covered by water, and having then been formed again on the same site, were held not to be lands " gained " from the river by alluvion or dereliction within the meaning of Regulation II of 1819, that expression being confined to meaning lands gained since the period of settlement. The effect of Act IX of 1847 was merely to change the mode of assessment in the case of land already liable to be assessed under legislation in force when that Act became law. It was not the object of that Act to bring under liability land re-formed on the site of the land previously lost, within the area of a permanently settled estate, the revenue upon which had been paid without abatement since the permanent settlement. Where an order of the Board of Revenue, made under Act IX of 1847, subjected land included in the permanent settlement to assessment :—*Held*, that the District Civil Court had jurisdiction (which therefore might be involved as a matter of right) to entertain a suit brought by the landowner contesting that order, and to declare it unauthorised by law.

Act IX of 1847—*Concld.*

Secretary of State for India v Fahamidannissa Begum. 17 Calc, 590= L R 17 I A 40.

Notes:—Ref : 30 Cal 291 P C.

Act XX of 1847 (copy right)

Notes:—Rep: in Pt. Act XVII of 1862 : Act XIV of 1870 ; Act IX of 1871 ; Act XVI of 1874; Act XII of 1876 ; Act I of 1879 ; Declared in Force—Throughout B. I., Except as regards the Scheduled Districts, Act XV of 1874, S. 3 : In Upper Burma (Except the Shan States). Act XIII of 1898, S. 4.

Act XX Of 1877

See (1) Copyright.
(2) Limitation Act (1908) S. 40.
(3) Small Cause Court, Mofussil-Jurisdiction—Copyright.

Act XIII of 1848.

XIII—

See (1) Survey Award.
(2) Limitation Act (1908) Arts 12, 44.

1—Award-Decision on non-appearance of parties —

Act XIII of 1848 " for the greater security of

Act XIII of 1848-*Contd.*

possessory titles in the Presidency of Bengal, derived from awards made by the revenue authorities under Regulation VII of 1822, Regulation IX of 1825 and Regulation XI of 1833 of the Bengal Code," by s 3, enacted that no suit should be entertained for contesting the justice of any award of the revenue authorities under any of these Regulations made after the passing of the Act after the expiration of three years from the date of the final award. A suit for the amendment of a map was referred by the Deputy Collector to an Ameen for the purpose of a local investigation, and the Ameen returned that, neither of the parties appearing before him, he was unable to make the investigation, whereupon the Deputy Collector struck the case out. *Held* that this was not an award within the meaning of the Act.

Golam Koodsee Chowdhry v Rashu Chunder Ghose **Marsh., 323.**

2—In order to apply the provisions of Act XIII of 1848 in regard to limitation, it was necessary to show that there was an award, i e, an adjudication after a contention between the parties before the survey authorities. **Hurree Mohun Thakoor v Andrews** **W R 1864, 30.**

3—Suit to assess land—Boundary suit.

Act XIII of 1848 did not apply to bar a suit to assess land as rent-paying. A decision in a boundary suit decides only the question of right to possession of the land, irrespective of the right to assess. **Mahomed Ali Khan Chowdhry v Jadub Chunder Chuckerbutty** **W R 1864. 60.**

4-Awards made by Collectors-Beng. Regs VII of 1822 IX of 1825, and IX of 1833.

Act XIII of 1848 was limited to awards made by collectors under Bengal Regulations VII of 1822, IX of 1825 and IX of 1833, which gave to the revenue authorities judicial power to determine questions of possession and other matters with a right of appeal to the regular Courts against their awards. An order of the Collector for the mutation of names in the register is not an award of the nature contemplated by the Regulation XIII of 1848, and an appeal from it was not subject to the limitation of three years prescribed there by. **Jewala Buksh v Dharum Singh** **10 Moore's I A 51**

5—Settlement award—Suit to set aside.

Act XIII of 1848 applied only to suits for contesting the justice of an award as between the contending parties, and not to suits for the purpose of amending a settlement and establishing the rights of persons who were not parties contesting between themselves before the Collector.

Komul Kissen Surkhul v Bisson Nath Chuckeburtty **B L R Sup Vol Ap 8 W R F B 128.**

Pureeag Singh v Shib Ram Chunder Mundul **3 W R 165.**

6-Thakbast award—Beng Reg IX of 1825—Act XIII of 1848—Evidence of possession.

A thakbast award of boundary made in the Lower Provinces may be an award, under Regulation IX of 1825, within the meaning of Act XIII of 1848. It would in any case be material evidence of posesssion. **Prahlad Sen v Rajendra Kishor Singh** **2 B L R P C 111; 12 W R P C 6.**

7—Award—Decision under Batwara Law.

The decision of a Collector under the Batwara Law was not an award within the meaning of Act XIII of 1848. Act XIII of 1848 only applies to awards made by the revenue authorities under Regulations VII of 1822, IX of 1825 and IX of 1833. **Pultoo Roy v Greedharee Singh** **W R F B 12; 1 Ind Jur O S 5.**

S. C. Greedharee Singh v Pultoo Roy **Marsh 37**

8—Order of Collector under Reg VII of 1822.

The order of a Deputy Collector under Regulation VII of 1822 declaring the lands in dispute to be paykan jaghir lands, was an award within the meaning of Act XIII of 1848, and any suit to set it aside had to be brought within three years of the order. **Modhoosoodun Singh v Purtee Bullub Paul** **W R 1864 140.**

9—Order of Collector rejecting claim to alluvial land.

The order of a Collector rejecting a claim to alluvial lands on the ground that a settlement of them had already been concluded, was not an award within the meaning of s 3, Act XIII of 1848. **Shurat Soondery Dabee v The Government** **7 W R 42.**

Notes:—Ref 2 Bom 19.

10—Rejection of claim by survey officer.

The rejection by a survey officer of a claim because it had not been brought forward sooner, was

Act XIII of 1848-*Contd.*

not an award within the scope of the special limitation of Act XIII of 1848.
Shama Soondery Dobee v Prosanno Coomar Tagore **1 W R 114.**

Notes:—Dist 12 W R 242.

11—Award adopting order under Act IV of 1840.

An award of survey authorities adopting an order under was not illegal, and was consequently governed by limitation under Act XIII of 1848.
Ramgutty Nag Chowdhry v Burodachurn Bose **1 W R 120.**

12-Order of Superintendent of Survey striking off appeal.

An order of a Superintendet of Survey striking off an appeal was not an award within the meaning of Act XIII of 1848. **Sham Kant Banerjee v Gopal Lall Tagore** **1 W R 328.**

Ntoes:—(S V M) Fol: 21 Cal 519 Dist: 10 W R 167.

13—Order of commissioner.

Nor was the order of a Commissioner striking an appeal off the file. **Janokee Chowdhranee v Dwarkanath Chowdhry** **1 Hay, 555**
Ram Gopal Roy v Oma Soondry Dasee **2 Hay 41.**

14-Deduction for disability,—No deduction on accunot of minority or other legal disability could be made from the period of limitation prescribed by Act XIII of 1848. **Modhoosoodun Singh v Purtee Bullub Paul** **W R 1864, 140.**
Huro Chunder Chowdhry v Kished Coomar Chowdhry **5 W R 27.**

The limitation for awards made under Bengal Regulations VII of 1822, IX of 1825 and IX of 1833 was afterwards provided for by limitation Act XIV of 1859 s 1 cl 6 and Limitation Act IX of 1871 sch II art 44 and is now contained in art 45 of Sch II of the Limitation Act. 1877.

Act XV of 1848 (Supreme Coward's offic-ieks Trading.)

Notes:—Rep in pt Act XIII of 1876.

Effect of, on Official Assignee's claim for commission qua auctioneer—See ST 11 And 12 Vic C 21 ss 19, 21, 31, 36 Cal 990=4 Ind Cas 697.

Act XVIII OF 1848

See (1) Appeal to Privy Council—Cases in which Appeal Lies or not—Appealable Orders-

(2) Nawab of Surat.

Act XXI OF 1848

See (1) Contract—Contract for Government Securities or shares.

(2) Contract—Wagering Contracts.

(3) Interest—Omission to stipulate for, etc—Contracts.

(4) Principal and Agents—Authority of Agents.

(5) Promissory Note—Consideration.

(6) Tazi Mandi Chittis.

(7) Trover.

Act XXI of 1848 (Wagers).

Notes:—Rep Act IX of of 1872.

Act VI of 1849.

See Cases under Pensions act VI of 1849.

Act VI of 1849 (Pensions).

Notes—Rep, Act XXIII of 1871.

ACT XI OF 1849

See Mandamus.

Act IX of 1850

See (1) Contract Act, s. 27.

(2) Small Cause Court, Presidency Towns.

Act X OF 1850 S. 32.

See Parties—Parties to Suits—Legacy, Surt for.

Act X OF 1850 S. 88.

See Bailment.

Act VIII OF 1850.

See Judicial Officers, Liability of.

Act XVIII OF 1850.

See (1) Cantonments.

(2) Judicial Officers, protection to.

Act XVIII OF 1850 (Judicial officer's Protection).

Notes—[Declared in Force—Throughout B, I; except as regards the Scheduled Districts act XV of 1874, s.3; in the Sonthal Parganas, Reg. III of 1872. S. 3; as amended by reg. III of 1899, s. 3. in the Angul District, Reg. I of 1894. s. 3. in the

Act-*Contd.*

Chittagong hill tracts, reg. I of 1900 S. 4; in the Arakan hill district, Reg. IX of 1874, S. 3; in Upper Burma (except the Shan States), act XIII of 1898, s. 4; in certain tracts in the Chin Hills, Reg. v. of 1896, S. 3. in British Baluchistan Reg. I of 1890 S. 3.]

Act XXI of 1850 (Caste Disabilities Removal).

Notes:—[Declared in Force—Throughout B. 1. except as regards the Scheduled districts, act XV of 1874, s. 3: in the Sonthal parganas, Reg: III of 1872, S. 3 as amended by Reg. III of 1899, S. 3; in the Arakan hill District (with modifications), Reg. IX of 1874, S. 3.]

Act XXI OF 1850.

See (1) Custom (Panjab) Alienation by widw-Sales and Mortgages.

(2) Mahomedan Law, Marriage.

Act XXI OF 1850.

See (1) Hindu Law—Guardian-Right of Guardianship. **1 All.549.**

(2) Hindu Law— Inheritance — Divesting of, Exclusion from, and Forfeiture of, Inheritance.

(3) Hindu Law—Maintenance—Right to Maintenance—Widow.

(4) Cases under Hindu Law—Widow—Disqualification—Unchastity.

Act XXVI of 1850 (Improvements in Towns)

Notes—[Rep. in pt. Act XIV of 1870; rep (in Agra). Act VI of 1868, S. 5, (in Punjab). Act IV of 1873; (in Bomboy), Bom. Act VI of 1873; (in Bengal, Eastern Bengal and Assam). Ben, Act V of 1876; (in Sindh), Bom. Act I of 1879; (Locally in Madras), Mad. act X of 1865]

Act XXVI OF 1850

See Bombay district Municipal act, 1850.

ACT XXXIV. OF 1850

See Beng. Reg. III of 1188.

ACT XLII OF 1850

See Railway Company.

10 B. L. R. 241.

Act VIII of 1851

See Tolls.

Act-*Contd.*

Act XII OF 1851.

See Madras town land Revenue Act.

Act V of 1852 (Marriage by registrars.)

Notes:—Rep. Act XV of 1872.)

Act V of 1852

See Hindu Law, Marriage.

ACT XI OF 1852—

See (1) Bombay Revenue Jurisdiction Act, 1876, S. 4.

(2) Inam Commissioner.

(3) Jurisdiction of Civil Court-Customary Payments.

(4) Jurisdiction of Civil Court—Rent and Revenue suits—Bombay.

OF 1852 Attachment under

See Limitation Act, 1908 art 144—adverse possession.

1—Shet-Sanadi-Rules framed under Bombay Act XI of 1852—The shet-sanadi discharged by Government without any fault on his part—The lands continued to him on payment of full survey assessment The new shet-sanadi remunerated from out of the assessment by Government—The shet—Sanadi lands converted into ryotwarl holding-Resumption of lands by Government.

In 1865 shet Sanadi, on being discharged without fault from his office by Government, was under the rules then in force, allowed to remain in posseasion of the shet—Sanadi lands, but full survey assessment was imposed thereon. The defendant No 2, who was appointed the new shet—Sanadi, was remunerated from the extra assessment levied upon the shet Sanadi lands. In 1905 the Government resumed the lands and handed them over to defendant No 2:-

Held, (1) that the order passed, and the action taken under the rule, by the Government had in the effect of converting the lands from a shet-Sanadi vatan into a ryotwari holding and of investing the holder of the land with the rights of an ordinary occupant, entitled to it so long as he paid the survey assessment;

(2) that the defendand no 2 had held the office of shet—Sanadi independently of the lands in dispute; and all that was done in 1865 was that his remuneration for that service was increased, and the enhanced amount was made payable not from the lands in dispute, but out of the

Act-*Contd.*

assessment payable to Government by the occ upant that was an arrangement between defendant no 2 and Government which could not prejudice the rights of the preceding shet—Sanadi in the absence of any law affecting that right;

(3) that the proceedings adopted by the Collector in 1905 were on the supposition that what was done in 1865 had the effect of continuing the land in dispute as one reserved for shet Sanadi service but that was not its effect, and the proceedings in question were ultra vires of the Collector.

Yellappa Ramappa Kuri v. Marlingappa Chavadappa. 12 Bom. L. R. 577.

Act XXV of 1852 S. 1.

See Limitation Act, (1908) Art. 183.

Act XXV of 1852 S. 2.

See Limitation Act, (1908) Art. 182—Step in aid of execution—Suits and other proceedings by decree-holder.

Act XV of 1852 S. 6

See Privy Council, Practice of—Restoration of Appeal.

Act XVI of 1853.

Notes:—Rep. Act XII of 1873.

Act XIX of 1853 (Recusant Witness).

Notes:—S. 40 Rep, Act X of 1855; Ss. 1 to 18 20 to 25, 27 to 39, 41 to 44, Rep. Act X of 1861; S. 19 Rep. Act I of 1872; S. 26, Rep, in Pt. Act XII of 1891; Rep. (Except in Assam), Act I of 1903.

Act XIX of 1853.

See Summons, Service of.

Act XIX of 1853 S. 28.

See Witness—Civil Cases—Defaulting Witnesses.

Act VI of 1854.

Act VI of 1854 (Supreme Courts, Equity Procedure.)

Notes—(Rep., Act VII of 1868.)

Act IX of 1854 (Civil Appeals,)

Notes—(Rep., Act XII of 1873.)

Act-*Contd.*

Act IX of 1854.

See Sale For Arrears of Revenue—Setting aside Sale—Irregularity.

Act XVII of 1854.

See Post Office Act, 1854.

Act XVIII of 1854.

See Cases under Railway Company.

Act XVIII of 1854 (Railways)

Notes—Rep., Act IV of 1879.

Act II of 1855.

Act II of 1855. (Evidence)

Notes—Rep., Act I of 1872.

See Evidence Act, 1855.

Act VI of 1855 (Execution, Supreme Courts.)

Notes—Rep; Act X of 1877.

Act VI of 1854.

See Mortgage——Redemption——Right of Redemption.

Act VII of 1854.

See (1) Execution of Decree—Effect of Change of Law pending Execution.

(2) Subsistence Money.

Act VIII of 1855 (Administrator-General)

Notes—Ref. Act XXIV of 1867.

Act VIII of 1854.

See Administrator General's Act, 1855.

Act XI of 1855 (Mesne Profits and Improvements.)

Notes—(Rep. in Pt., (Locally), act IV of 1882; declared in force throughout B. I, except as regards the scheduled districts, act XV of 1874, s. 3.)

Act XI of 1854 s. 2.

See Sale in Execution of Decree—Setting aside sale—Rights of Purchasers—Compensation.

Act XII of 1855 (Legal Representatives' suits.)

Notes—(Rep. in Pt, act IX of 1871, declar-

ed in force—throughout British India expect as regards the scheduled districts, Act XV of 1874, s. 3; N the Sonthal Parganas Reg. III of 1872 s. 3; as amended by Reg. III of 1899. s 3; in the Angul District, Reg. I of 1894, s. 3; in Upper Burma (Except the Shan States), Act XIII of 1898, s. 4.)

Act XII of 1857.

See (1)Abatement of Suit—Suits.

(2) Right of Suit—Injuries, Suits by and against representatives of deceased for.

Act XII of 1855.

See Civil Procedure Code, O 22, r 4.

Act XIII of 1855 (Fatal Accidents).

Notes—(Rep. in Pt. Act IX of 1871; declared in force—throughout B. I., except as regards the scheduled districts, act XV of 1874, s. 3, in the Sonthal Parganas, Reg. III of 1872, s. 3, as amended by Reg. III of 1899, s. 3; in the Angul district, Reg. I of 1894, s. 3; in the Arakan hill district, Reg. IX of 1874, s. 3; in Upper Burma (except the Shan States), Act XIII of 1898, s 4)

Act III of 1855.

See (I) **Cause of action.**
(2) Damages.
(3) Tort.
(4) Defamation.
(5) Malicious prosecution.
(6) C P C 0 22.
(7) C P C (1882) 483.

Act XIII of 1855.

See (1) Damages—Measure and assessment of of Damages—Torts.

(2) Negligence.

Act XVIII of 1855 (Pardens and Reprieves)

Notes—Rep. Act XVI of 1874.

Act XXII of 1855 (Ports and Ports dues).

Notes—Rep. Act XVI 1874.

Act XXII of 1855.

See (1) Port of Calcutta.

(2) Shipping Law--Collision.

Act XXVIII of 1855 (Usury Laws Repeal.)

Rep. in Pt. act XIV of 1870; Declared in force throughout B. I., except as regards the scheduled districts, act XV of 1874, s. 3.)

Act XXVIII of 1855 S. 2.

See (1) Interest Miscellaneous cases compound Interest.

(2) Cases under Hindu Law—Usury.

(3) Interst—Omission to stipulate for or stipulated time has expired-Contracts.

Act XXVIII of 1855.

See (1) Interest—Stipulations amounting.

(2) Limitation act, (1908) Art 132

(3) Mahomedan Law—Usury

Act XXXVI of 1855

See Salt

Act XXXVII of 1855

See (1) High Court, jurisdiction of—Calcutta —Civil

(2) Sonthal Pergunnahs Settlement Regulation.

(2) Subordinate Judge, Jurisdiction of

Act IX of 1856.

See Bill of Lading.

Act XII of 1856 S. 3.

See Ministerial Officers.

Act XV of 1856 (Hindu Widows' Remarriage).

See Hindu Widaw Remarriage Act.

Notes:—Declared in force — Throughout B. I., Except as regards the Scheduled Districts, Act XV of 1874, S. 3; in the Sonthal Parganas, Reg. III of 1872, S. 3, as amended by Reg. III of 1899, S. 3; in the Angul District, Reg. I of 1894, S. 3; in the Arakan Hill District, Reg. IX of 1874 S. 3.

Act XV of 1856.

See Hindu Law-Marriage—Validity or otherwise of Marriage.

Act XV of 1856 S. 2.

See Hindu Law—Inheritance— Divesting of, Exclusion from, and Forfeiture of, Inheritance—Marriage.

See Hindu Law — Reversioners — Arrangements between Widow and Reversioners.

Act XV of 1856.

See Custom Punjab—Remarriage or unchastity of Widow.

Act-*Contd.*

Act XV of 1856.

See Hindu Law—Widow—Disqualifications-Re-marriage.

Act XV of Ss. 1856 2. 5.

See (1) Hindu Widow's Remarriage Act.
(2) Hindu Law Disqualifications-Remarriage.

Act XV of 1856 S 3.

See Guardian—Appointment.

Act XV of 1856 S. 5.

See Jurisdiction of Civil Court—Caste.

Act II of 1857.

See Bombay University Act.

Act VI of 1857 (Acquisition of Land for Public purposes.)

Notes.—Rep. Act X of 1870.

Act VI of 1856.

See (1) Arbitration-Arbitration under Special Acts, etc.—Act VI of *1857*.
(2) Land Acquisition Act, 1857.
(3) Mandamus.

Act VII of 1856.

See Collector.

Act XI of 1857 (State offences).

Notes:—Rep. in pt, Act XVII of 1862; Act XII of *1876*; Declared in force—Throughout B I., except as regards the Scheduled Districts, Act XV of *1874*, S. *3*; in the Arakan Hill District, Reg. IX of *1874*, S. *3*; in Upper Burma (except the Shan States), Act XIII of *1898*, S. 4; in Kachin Hill-tracts, as regards Hill-tribes Reg. I of *1895*, S. 3: in certain tracts in the Chin Hills, Reg. V of *1896*, S. 3; in British Baluchistan, Reg. 1 of 1890, S. 3: in the Angul District, Reg. 1 of 1894, S. *3*; in the Chittagong Hill-tracts, Reg. I of 1900 S. 4.

Act XI of 1857.

See (1) Forfeiture of Property.
(2) Hindu Law—Inheritance—Impartible Property.**17th All, 456. L R 22 I A 139.**

Act XIX of 1857 (Joint—Stock Companies).

Notes:—Rep. (except as to Table B), Act X of 1866; Table B is in force so far as it applies to any company existing on 1st May 1882—See Act VI of 1882, S. *2* (c).

Act-*Contd.*

Act XIX of 1857

See Companies' Act, *1857*.

Act XXV of 1857.

See (1) Case under Forfeiture of Property.
(2) Limitation—Statutes of Limitation—Act XXV of *1857*.

Act XXV of 1857 (Forfeiture).

Notes.—Rep. in Pt., Act V of 1869; Act IX of *1871*; and Am , Act XII of 1891; Supplemented, Act IX of 1859; Declared in force — Throughout B. I. Except as regards the Scheduled Districts, Act XV of 1874, S. *3*, in Upper Burma (except the Shan States), Act XIII of 1898, S. 4.

Act XL of 1858 S. 18.

See Contract Act S. 65.

Act XL of 1858 S. 18.

See Cases under Contract Act S. 23

Act III of 1858.

See Beng. Reg. III of 1818.

Act III of 1858 (State Prisoners).

Notes:—Rep. in Pt., Act XIV of 1870; Act XII of 1891; Declared in force—Throughout B I., except as regards the Scheduled Districts, Act XV of 1874, S *3*; in the Sonthal Parganas, Reg. III of 1872, S. *3*, as amended by Reg. III of 1899, S. 3; in the Angul District, Reg. I of 1894, S. 3; in the Chittagong Hill-tracts, Reg. I of 1900, S. 4; in the Arakan Hill District (Ss. 2 and 5), Reg. IX of 1874, S. *3*; in Upper Burma, except the Shan States (S. 5), Act XIII of 1898, S. 4; in British Baluchistan (S. 5), Reg. I of 1890, S. 3.

Act X of 1858.

See forfeiture of Property.

Act X of 1858 (Confiscation, etc. for Rebellion).

Notes:—Rep. Act VIII of 1868.

Act XI of 1858 (Corporal Punishment).

Notes:—Rep. Act VIII of 1868.

Act XXI of 1858 (Native Passenger ships),

Notes:—Rep. Act XII of 1870.

Act XXX of 1858.

See Nawab of Carnatic's Act.

Act XXXI of 1858.

See Settlement—Effect of Settlement.

Act-*Contd.*

Act XXXIV of 1858.

See Lunatic

Act XXXIV of 1858 (Lunacy Supreme Courts)—Lunacy Act (Act XXXIV of 1858)—Lunatic Remuneration to a Committee—Court's jurisdiction to pass the order—Next-of-kin of lunatic not entitled to be heard on the application—Lunatic when same can impeach the order.

The Court has a discretionary power to allow a Committee of a lunatic, appointed under Act XXXIV of 1858, remuneration, but will only allow it under special circumstances. When some relation or friend of the lunatic can be found who is willing to act as Committee, the Court will not as a rule allow remuneration to such a person but when no such person can be found and an official of the Court has to be appointed the court will exercise its discretion and allow remuneration. But in all cases the Court has the jurisdiction.

On an application for remuneration by a Committee of a lunatic, the next-of kin of the lunatic have no right to be heard in their own interests, as they have no vested interest in the estate. But a lunatic, if he becomes of sound mind, has the right to impeach any order which he considers has been made without proper regard to his interest; and he can impeach the order for remuneration even after the Committee has passed his accounts. This right devolves on the lunatic's death upon his heirs. **Mulji Damodar v Bomanji Mancherji.** (10 Bom L R 772.)

Act XXXV of 1858

See (1) Appeal—Acts—Act XXXV of 1858
(2) Hindu Law-Inheritance-Divesting of, Exclusion from, and forfeiture of inheritance—Insanity.
(3) Cases under Lunatic.
(4) Principal and agent—Authority of Agents.

Act XXXV of 1858. S. 11

See Oudh Land Revenue Act Ss 175 and 176

Act XXXV of 1858. S. 23.

See Letters Patent, High Court N W P cl 22.

Act XXXV of 1858.

See (1) Abatement of suit.
(2) Muhammadan Law, Joint family.

Act XXXVI of 1358 (Lunatic Asylums)

Notes:—Rep in Pt., Act XVI of 1874; Rep in Pt and Am., XX of of 1889: Am Act XVIII of 1886; S. 17 B, Am in Bengal, Beng Act 7 of 1909; Declared in force—Throughout B 1 except as regards the Scheduled Districts Act XV of 1874; s. 3; in the Sonthal Parganas, Reg 111 of 1872, S.3 as amended by Reg. 111 of 1899, S. 3; in the Angul District Reg 1 of 1894, s. 3 in the Arakan Hill District Reg. IX of 1874, s. 3 in Upper Burma (except the Shan States) Act XIII of 1898, s. 4; in British Baluchistan, Reg. 1 of 1890 s. 3

1—1858 Act XXXV-Lunatics Estates Act Ss 7 and 10-Lunatic adjudged-Lunatics Act XXXV of 1858, ss. 9, 10, 11—Disqualified proprietor—Revenue-paying land Civil Court Jurisdiction.

The Civil Court has authority under s.10 of the Court of Wards Act (IX B C of 1879) to place a person who has been adjudged a lunatic under the provisions of Act XXXV of 1858 under the provisions of Act XXXV of 1848, under the guardianship of the Court of Wards both as regards his person and property even if it does not consist of revenue paying estate. The word 'land' in s. 10 of the Court of Wards Act (IX of 1879) does not necessarily mean revenue-paying land.

Thakurani Makund Koeri v The Deputy Commissioner of Chota Nagpur. 7 C W N 20 = 29 Cal 638

2—Ss. 7, 9—Management of lunatic's estate—Custody of lunatic's person.

Under s. 9 a District Judge is bound to appoint a manager for the estate of the adjudged lunatic. A lunatic should not be forced to go to a lunatic Asylum if he is taken a proper care of by his relatives, there being no provision in the Lunacy Act authorizing a District Judge to send an adjudged lunatic to the Asylum. **Loga Koer 30 Cal 973**

3—C P C O. 32 r. 15 (1882—s. 403)-Lunatics, suits of—Suit against a lunatic so adjudged—Appointment of guardian *ad litem* for him. As the right of suit against a lunatic is not taken away by any provision of law, the Court should appoint a fit and proper person to be guardian *ad litem*, on its being proved that the defendant was a lunatic. **K adala Reddi v Narisi. 24 Mad 504.**

Notes.—Fol: 33 Cal 1094 = 10 C W N 719 = 4 C L J 306.

Act XL of 1858-*Contd.*

Act XXXVI of 1858 s. 4

See Judicial Officers Libility of.

Act XL of 1858 (Minors)

Notes—Rep Act VIII of 1890.

Act XL of 1858.

See (1) Cases under Appeal—Acts—Act XL of 1858.

(2) Appeal to Privy Council—Cases in which Appeal lies or not—Appealable orders.

(3) Certificate of Administration—Issue of, and right to, Certificate.

(4) Court of Wards.

(5) Cases under Guardian:

(6) Judicial Commissioner, Assam:

(7) Cases under Majority, Age of.

(8) Minor—Liability of, Minor on, and right to enforce contracts.

(9) Limitation Act—(XV of 1877 S. 19)

(10) Minor—Cases under Bombay Minors Act (XX of 1864).

(11) Minor—Custody of Minors.

(12) Cases under Minor—Representation of Minor in suits,

(13) Small Cause Court, Mofussil—Jurisdiction —Act XL of 1858.

—Certificate under

See Evidence Act, 1872 S. 35

1-S. 2—Applicationiof Act-Hindu Law-Power to deal with minor's property without certificate of administration.

S. 2 of Act XL of 1858 does not preclude the natural and legal guardian of a Hindu Minor from dealing with the minor's property by mortgage or otherwise within the limits allowed by the Hindu law, without having acquired a certificate of administration from the Civil Court.

Heit Singh vThakoor Singh. 4 N W 57.

2—Minor—Natural guardian, Sale — by Act XL of 1858, Section 18, et. seq.

Where a plaintiff claimed certain immoveable property as purchaser, under a Kobala, executed by a Hindu widow as guardian of her minor son, *bona fide*, for the benefit of such son, the widow not deriving powers from any appointment or certificate under Act XL of 1858, it was held that the plaintiff's title was good.

All the sections of Act XL of 1858 from the 18th onwards, respecting powers, duties, and responsibilities relate not to guardians generally

Act XL of 1858 *Contd.*

but to persons appointed or to whom certificates have been granted under the provisions of the Act. There being no indication in any part of the Act, of any intention to alter or affect the provisions of Hindu or Mahomedan Law as to guardians who do not avail themselves of the Act, guardians acting without certificates will be regulated by the ordinary Hindu or other law applicable to the case. 2 C L R 249 over-ruled.

Ramchunder Chuckerbutty v. Brojonath Mozumdar, 4 Cal 929=4 C L R 247.

Notes:—Fol: 25 Cal 585 F B; 26 Cal 820 Ref: 12 Bom 686; 15 Bom 259; 19 Bom 309, F B. Dist: 29 Cal 473.

3—Mahomedan Law.—

Act XL of 1858 comprises the cases of all minors not under the Court of Wards and not being European British subjects, and acts irrespective of the Mahomedan law, which can be no guide to the Civil Court in determining whether an applicant should or should not have letters of administration. **Akima Bibee v. Azeem Sarung, 9 W R 334.**

4—Mahomedan Law.—

Act XL of 1858 authorizes a Court to select a guardian irrespective of the law of the parties (*e. g.*, Mahomedan Law), but does not prevent the selection of a guardian indicated by such law if he be a fit person. **Mohunnuddy Begum v. Oomdutoonissa, 13 W R 454.**

5—Provision made by will for guardianship.—

Where a testator makes due provision for the guardianship of his minor son, Act XL of 1858 does not contemplate the interference of the Court in its summary jurisdiction.

Anund Coomar Gangooly v. Rakhal Chunder Roy, 8 W R 278.

6—S. 3-Application for certificate—Form of application.—

An application for a certificate under Act XL of 1858 need not refer to the estate of the deceased, but ought merely to set forth that there is property to which the minor is entitled, and of which the applicant claims the right to have charge. **Koosoom Kaminee Debee v. Chunder Kant Mookerjee, 23 W R 346.**

7—Party having no right to possession.—

A certificate under S. 3 of Act XL of 1858 is purely an authority for the administration of

Act XL of 1858-*Contd.*

property,and ought not to be issued where there is neither present right nor prospective possession.

Nobin Chunder Shaha v. Rajnarain Shaha, 9 W R 582.

Notes:—Fol: 3 B L R Appx 119.

8—Minor—Act XL of 1858—Appeal from order under Section 18 of Act XL of 1858—Certificate withheld under certain circumstances.

An application for a certificate under Act XL of 1858 ought not to be granted when there is a minor who has almost attained his majority, unless under special circumstances, as where it is shown that there is some absolute necessity for the certificate being granted.

Under Section 18 of Act XL of 1858, an appeal is allowed to any person injured by an order under the Act. **Muhamdee v. Nazirun, 6 Calc 19=6 C L R 210.**

Notes.—Dist 9 C W N 584.

9—Minority—Plea of Minority-Act XLV of 1858—Certificate of guardianship — Act IX of 1875, Section 3.

In September 1877 the father of the defendant, who was a minor, applied for a certificate of administration to his property under Section 3 of the Minors Act, XL of 1858. On the 10th December 1870 the following order was made by the Court; "Certificate of administration under Act XL of 1858 is hereby granted", but until the 10th December 1881 when a certificate of that date was issued, no certificate was applied for. Between the date of the order and the issue of the certificate the defendant had attained the age of 18 years and had executed the promissory note on which he was now sued.

Held, that the delay in obtaining the Certificate having been caused by the parties and not by the Court, the certificate must be taken to have been intended to operate from the day of its date, by which time the defendant had obtained his majority, and that accordingly the plea of minority was bad. **Stephen v. Stephen, 8 Calc 714=10 C L R 533.**

Affirmed on appeal. **9 Cal 901= 13 C L R 430.**

Notes:—Diss: 14 Cal 55, Fol: 12 Cal 542; 13 Cal 219; Ref: 13 Bom 285.

Act XL of 1858-*Contd.*

10—Minority—Act XL of 1858—Certificate of Guardianship—Act IX of 1875, Section 3.

An order having been made appointing a guardian of a minor under Section 3 of Act XL of 1858, no certificate of guardianship was taken out,but the guardian appointed acted as guardian.

Held, that under section 3 of Act IX of 1875 the minor did not attain his majority until the age of 21 years. Per Curiam:—It is the making of the order under Act XL of 1858, and not the subsequent taking out of the certificate, by which a guardian is appointed of the person and property of a minor within the meaning of Section 3 of Act IX of 1875. 10 C L R 533.

Chuna Mull Johary v. Brojonath Roy Chowdhry, 8 Cal 967=11 C L R 315.

11—The time from which the authority of th e guardian begins—Court Fees Act S. 6 (VII of 1870)—Sec. 6 of the Court Fees Act, which says that a certificate under Act XL of 1858 (among other documents) "Shall not be filed, exhibited, or recorded in any Court of Justice or received or furnished by any public officer", unless a certain fee be paid, means that such certificate cannot exist until the person who has been permitted by the Court to obtain it deposits the requisite amount of stamp duty. Apart from this Section, however, the preparation of such a certificate after the order granting it is not a purely ministerial act, it must then be applied for by the grantee and it is from the date of its being actually taken out, and not from the date of the order of granting it, that a guardian of the person and property of a minor is to be considered as appointed under Act XL of 1858. Where, therefore, I applied for such a certificate, and an order was made that the "application be allowed and in a suit on certain bonds, in which suit the minor in respect of whose person and property the petition for a certificate was made, was a defendant, was represented by J,who had not taken out an actual certificate.—*Held*, in a suit by the minor to set aside the decree as not binding on him, that without the certificate J had no authority to represent the minor, and the latter, not having been properly represented in the suit was entitled to have the decree set aside. 8 Calc. 714 and on appeal, 9 Calc.,901: followed. 8 Calc., 967, discented from. 12 Cal 542.

Act XL of 1858-*Contd.*

The above decision was reversed and it was held by the Privy Council, that, when a Court to which an application is made under Section 3 of Act XL of 1858 for a certificate has adjudged the applicant entitled to have one, he then substantially obtains it, although it may not be drawn up or issued at the time. Obtaining such an order, he has substantially complied with the terms of the Act, in the same way as when a plaintiff having judgment that he shall have a decree in his suit, it may be said that he has obtained his decree. Therefore, when a minor had been represented in a suit by a person who had obtained an order for a certificate under S 3, but had not had it issued to him, the absence of a certificate was held to be not an ir-regularity as entitled the minor, on coming of age, to have the proceedings set aside on the ground that he had not been properly represented.

Mugniram Marwari v Gurshai Nand. Liakut Hossein v Gurshahai Nand. 17 Calc 347=16 I A 195.

Notes:—Appl: 23 All 459. Dist; 21 Bom 400. Fol. 8 Bom L R 897. Ref: Rat Un Cr 803; 15 Bom 505; 19 Bom 571; 26 Bom 109; 4 C L J 112; 3 Bom L R 565: 31 Bom 80; 13 C W N 643; 36 Cal 768.

12—Guardian-Minority-Administration Certificate.—

Whenever an application is made to appoint a guardian under Act XL of 1858, and an order is passed appointing a person a minor's guardian, the minor becomes a ward of Court and the period of his minority extends to 21 years though no certificate has been taken out by the person so appointed a guardian. 8 Cal 714 and on appeal. 9 Cal 901 disented from; 8 Cal 967 followed.

Grish Chunder Chowdhry v Abdul Selam. 14 Cal 55.

Notes:—Ref: 13 Bom 285.

13—Appointment of guardian without proof of certificate being taken out-Presumption as to regularity of proceedings—Evidence Act (I of 1872) s 114, illus (3)—

In a suit by a puisne mortgagee against the prior as well as the subsequent mortgagees and the mortgagor's representative it was found that the prior mortgages were executed when the mortgagor was over 18, but under 21. A guardian of his person had been appointed under Act XL of 1858, but there was no evidence as to whether a certificate of administration had also been granted under that Act. The prior mortgagees thereupon contended that under Act XL of 1858 a guardian of the person could not be appointed unless a certificate of administration was also granted, and there being no evidence of the latter being granted, this appointment of a guardian of the person alone was *ultra vires*. *Held* that, assuming (but without deciding the point) that, under Act XL of 1858 a guardian of the person could not be appointed unless a certificate of adminstration was also granted, an independent appointment of a guardian of the person may be made, and there being no evidence to show that such a certificate of administration was not granted, the Court must presume the regularity of the order under illus. (e) to s 114, evidence Act.

Raj Coomaree Dassee v Preo Madhub Nundy 1 C W N 453.

Notes:—Ref: 1 C L J 337: 4 A L J 273 F B; W N (1907) 97, 29 All 385 F B; 32 Cal 891.

14—Effect of guardianship certificate ordered but not issued-Limitation-A guardianship certificate under S 3 of Act XL of 1858 takes effect from the date of issue and not from date of the order which directs that it should issue. 12 Cal 542 followed **Nowbat Roy v Lala Kedar Nath 13 Calc 219.**

Notes:—Ref: 13 Bom 285.

15—Right to sue without certificate—Acts of guardians without certificates.

Act XL of 1858 declares that a person shall not be competent to institute a suit in Court in respect of property of which he claims the charge until he shall have obtained a certificate; but not that every act of a guardian who has not such a certificate shall be null for the want of one.

Shooghury Koer v Boshisht Narain Singh 8 W R 331.

Notes:—Ref: 8 B H C R 31.

16—Right to sue without certifiate.-Manager without certificate.—

A manager has no authority to deal with the claims or debts and liabilities attaching to the estate of a minor without having taken out a certifi-

Act XL of 1858-*Contd.*

cate under Act XL of 1858. **Tusneef Hossein** *v* **Sookhoo** 14 W R 453.

Sobha Kooeeree v Hurdey Narain Mohajun 25 W R 97.

16A—Guardian without certificate—Validity of acts.

Without a certificate under Act XL of 1858, a Court may refuse to hear even a natural guardian as of right. When the Court, in the exercise of the discretion vested in it, does hear him, the absence of the certificate will not vitiate the proceedings. The private acts of a natural guardian without a certificate under Act XL of 1858 are not vitiated by law. **Lalla Bhoodmul v Lalla Gowree Sunkur** 4 W R 71.

Notes:—Ref: 6 W R 30.

17—Permission to sue by guardian.

A party who sues as guardian of a minor may, for good and sufficient reasons, be allowed to sue without a certificate obtained under Act XL of 1858. *Held* that this permission may be given by the Court in which a suit by the guardian may be brought. **Taramonee Chowdhrani v Rajbibee Chowdhrani** 2 Hay 575.

18—Proof of permission to sue-The proper manner of giving permission to sue on behalf of a minor is by an order recorded in the order sheet, still there is nothing in the nature of the sanction provided by s 3 of Act XL of 1858 which bars the ordinary rule of evidence that sanction may be proved by express words or by implication.

Bhaba Pershad Khan v The Secretary of State for India 14 Calc 159.

Notes:—Fol; 9 All 508.

19—(Act XL of 1858) *Held* that the absence of a certificate of guardianship was not a fatal matter and that the very fact of the Court allowing a suit to proceed must be taken to imply that the necessary permission was given; moreover even if no such permission was given the irregularity was such as was covered by s 578 of the Code of Civil Procedure, that is to say, it did not affect the merits of the case or the jurisdiction of the Court. **Parmeshar Das** 9 All 508; 7, W N 189.

Notes:—Ref: 20 All 370.

20-Father.—A father cannot sue on behalf of his minor son without having obtained the certificate prescribed by Act XL of 1858, and any

Act XL of 1858-*Contd.*

decision passed in the case would be irregular, as being passed in the absence of the party *prima facie* principally interested. **Shiam Soonder v. Narain Das** 2 Agra, 343.

Madho Rao Apa v, Thakoor Pershad 3 Agra 127.

21—Grandmother.-A grandmother is not competent to represent her minor grandson without having obtained the certificate prescribed by S. 3 Act, XL of 1858. **Rutnee v. Roghobere Dyal** 2 Agra, 278

22-Mother.—A mother may be allowed, under S.3, Act XL of 1858, to sue as guardian of her minor son without having taken out a certificate. **Munra Jhunna Koonwar v. Laljee Roy** 1 W R 121.

Oodoy Chand Jha v. Dhunmonee Debia 3 W R 183.

Ramdhun Doss v. Ram Rutton Dutt 10 W R 425.

23-Ground for dismissal of suit.-When a Court of first instance allows a mother to institute a suit on behalf of her minor son, the Judge on appeal has no reason to dismiss the suit on the technical grounds that no certificate had been granted to her under s. 3 Act XL of 1858. **Goonomonee Debia v. Ram Komul Sandle.** 17 W R 144.

See Ankhil Chundee v. Tripoora Soonduree. 22 W R 525.

24—S. 3, Act XL of 1858, gives discretion to the Court to admit a party to sue without a certificate. **Anund Chunder Ghose v. Komul Narain Ghose** 2 W R 219

Luchmee Koonwar v. Bhugwan Doss 6 W R Mis, 116.

Sheoburrut Singh v. Lalljee Chowdhry 13 W R 202.

Bonomally Kesh v. Hungshessur Roy. 17 W R 492.

Sobha Kooderee v. Hurdey Narain Mohajun 25 W R 97

Notes:—Ref: 18 All 131.

25—Held, that the plaintiff not being legally or formally appointed manager or guardian of a minor's estate or person, was incompetent to maintain the suit on his (the minor's) behalf,

Act XL of 1858-*Contd.*

especially when the minor's natural father has been appointed as such under Act XL of 1858, and has not been discharged from his office.

Setul Pershad v. **Birj Mohun Dass** 1 Agra, 25.

26—Waiver of objection-Duty of Judge.-That the persons who sue on behalf of minors are their natural guardians is not a sufficient reason for neglecting the directions of law which require that the minors shall be represented by persons who have obtained certificates,or by persons who, when the property is of small value, are specially permitted by the Court to sue or defend the suit on behalf of minors. The fact that the defendant's pleader did not press the objection, does not relieve the Judge from the duty imposed on him of seeing that the minors were properly represented. **Zorawar Singh** v. **Jawahir Singh** 3 Agra, 167.

27-Guardian-*Held* that the institution of a suit by a guardian on behalf of minors, without due authority having been obtained, is illegal.

Dhunraj Kooeree v. **Roodur Pertab Singh**, 3 Agra, 300.
Agra, F B Ed 1874, 155.

28—Son adopted pending suit.-When adoption takes place while a suit is pending on the part of the widow and the adopted son is a minor, it is necessary that he should be substituted for his adoptive mother as the party preferring the appeal, and be duly represented in conformity with the provisons of S. 3 Act XL of 1858.

Collector of Bareilly v. **Nuraen Day** 3 Agra, 349

29--Stranger.-A stranger connot bring an action on behalf of a minor without a certificate under Act XL of 1858. **Goberdhun** v. **Girwar.** 3 Agra, 92.

30—Surbarakar.—A Surbarakar cannot sue on behalf of a minor without permission on the Court or a certificate under Act XL of 1858.

Bodh Singh v. **Lochun Singh.** 3 Agra 220

31—Permission of Court—From the fact that in a former suit the plaintiff's mother was arrayed among the parties as his guardian as well as from the line of defence she then adopted and in the absence of any evidence to the contrary it was presumed that she had the permission of the Court to appear and represent the minor's interest in that suit, and therefore the decision in that suit was held to be binding on the minor in a subsequent suit, where the same question was raised. **Bonomally Kesh** v. **Hungshessur Roy** 17 W R 492.

32-Suit by unauthorized guardian-Where a person representing herself as a guardian neither took out a certificate under Act XL of 1858 nor obtained the permission of the Court under s. 3 of that Act to appear in the suit without a certificate, —*Held*, that the minor was not bound by any act of the alleged guardian, nor was he bound to sue within three years from the order passed by the Court under s. 246, Act VIII of 1859, rejecting her petition of objection to a sale of attched property. **Sreenath Koondoo** v, **Hurree Narain Mududuck** 7 W R 399

Notes:—Dist; 17 W R 492. Ref: 10 W R 8.

33—Beng Reg X of 1793—Suit on behalf of minors.—In a case in which Regulation X of 1793 has no application, the Court may, under S. 3, Act XL of 1858, allow a friend or relative of the minor to institute a suit on behalf, and where the guardian omits to take steps for the protection of the infant, the Court may allow another person to sue for the benefit of the latter.

Modhoo Soodun Singh v. **Prithee Bullub Paul** 16 W R 231

34—Guardian—In a suit brought by his next friend on behalf of a minor, if the next friend has as a matter of fact the permission of the Court to sue, then it is not necessary for him to have a certificate under Act XL of 1858. **Alim Baksh Fakir** v. **Jhalo Bibi** 12 Cal 48

Notes:—Dist: 14 Cal 754.

35—Guardian—Civil Procedure Code (Act XIV of 1882) S. 440—Reading See 440 of the Civil Procedure Code with S. 3 of Act XL of 1858 it seems that the next friend of a minor plaintiff need not compulsorily take a written permission to sue from the Court. **Newaj** v **Maksud Ali** 12 Cal 131.

Notes:—Dist: 14 Cal 754.

36—S. 440 C P C.—Minor Suit by uncertificated guardian—Leave of Court—(Act XL of 1858) The mother of minor, who had not obtained a certificate under Act XL of 1858, insti.

Act XL of 1858-*Contd.*

tuted a suit on behalf of the minor for some property of small value. She did not ask the Court in which she instituted the suit for permission to institute it, as required by S. 3 of that Act, but the Court entertained it, the defendant not raising the objection that it had been instituted without permission, and it was decided on the merits in favour of the minor. *Held*, that under these circumstances, it must be taken, notwithstanding there was no order allowing the matter to sue, that the suit was instituted with the Court's permission. **Kedar Nath and another v Debi Din 4 All 165; 1 W N 173**

Notes:—Ap 11 Cal 509.

37—Revision—Act XL of 1858.]

Under s. 3 of the Bengal Minors (Act XL of 1858) the Civil Courts has no power to refuse to admit a person who has obtained a certificate of administration under the Act, to defend a suit on the minor's behalf, as guardian of such minor. Where a Subordinate Judge had so acted, *held* that the High Court had no power to revise his order under s. 622 of the Code of Civil Procedure.

Baldeo Das v Gobind Shankar. 7 All 914; 5 W N 294.

38—S. 3-Suit by guardian of minor without certificate under Act XL of 1858 or permission of Court—Presumption.

Where the Court of first instance entertained a suit instituted by a minor under the guardianship of her mother, although the latter did not hold a certificate or guardianship, or apply under s. 3 Act XL of 1858 for permission to institute the suit on behalf of her minor son, *held* that, under the circumstances, it was reasonable to hold that the mother was permitted by the Court of first instance to represent and institute the suit on behalf of the minor, and the suit was maintainable. (A W N 1881, 173 and A W N 1881, 175 Fol:)

Chunna v Daodat A W N 1882, 23.

39—S. 3——Institution of suit on behalf of minor without obtaining certificate.

The words "any other sufficient reason" in the section include any reason which shows sufficiently that the object of the Act, namely the care of the property of the minor, will be best subserved by allowing a relative to institute a suit on behalf of the minor without first obtaining a certificate.

Amirali v Wajidi Begam 4 C P L R 75.

Act XL of 1858-*Contd.*

40—Ss. 3 and 28—Guardian and minor—Appointment of guardian *ad litem* while there is a duly constituted guardian to the property.

An order by a Subordinate Judge appointing a guardian *ad litem* to a minor, where the litigation affects the property of the minor and there exists a duly constituted guardian of the property is an applicable order; but a guardian *ad litem*, where the litigation concerns the property of the minor, cannot be appointed so long as there exists a certificated guardian in respect of the property who is capable of acting in that behalf. (Ref: 20 All 162=18 A W N 9). **Har Bilas v Lachman Das A W N 1891, 42.**

41—S. 3—Certificate of guardianship of the property of a minor member of a joint Hindu family.

Age of majority postponed to twenty-one years -*Held*, that though a certificate for the guardianship of the property of a minor member of a joint Hindu family ought not to be granted, yet where such a certificate has in fact been granted, the grant has the effect of postponing the age of majority of the minor until he attains the age of 21 years. (Ref: 22 All 270, F B). **Durga Prasad v Mahabir Parsad. A W N 1899, 199.**

42—S. 3—Minor—Guardian—Grandfather—Claim.

A minor can be represented by his grandfather as his next friend and object to the attachment of his property in execution of a decree against his father. The grandfather is competent to prefer the objection on behalf of his minor grandson without a certificate under Act XL of 1858.

Muhammad Gulkhan v Muhammad Munir. A W N 1883, 168.

43-Minor-Succession Act, Section 261, Act XL of 1858, section 3—Permissson of Court to represent minor. Civil Procedure Code, Act X of 1877, sections 440 and 462.

A applied for revocation of probate, granted to J, who styled himself as "father and guardian of B, minor" but it did not appear that A had obtained a certificate under section 3 of Act XL of 1858, or had the permission of the Court to represent the minor. The petition was dismissed, but on A's death, an appeal was preferred by the minor, through his natural guardian.

Act XL of 1858-*Contd.*

Held, that the appeal could not proceed, inasmuch as the minor was not a party to the proceedings in the Court below.

The permission of the Court to institute proceedings on behalf of a minor, being an act of judicial discretion open to appeal, must be formally recorded. **Mrinamoyi Dabia v Jogodishuri Dabia. 5 Calc 450=5 C L R 361.**

Notes:—Fol: 12 Bom 18. Dist: 11 Cal 509. Ref: 10 Cal 102; 4 All 1.

44—Permission to relative to defend.

The mother of a minor, who did not hold a certificate under Act XL of 1858, was sued on behalf of the minor. She did not obtain permission to defend the suit on behalf of the minor, but the Court allowed her to answer to the suit on behalf of the minor. *Held* that, under these circumstances, it must be inferred that the Court had given her permission to defend the suit, as required by s. 3 of Act XL of 1858, and therefore the decree made against her in the suit as representing the minor was binding on the latter. **Janki v Dhoram Chand. 4 All 177.**

Notes:—Dist: 11 Cal 402. Ref: 9 All 508.

45—Right to represent minor without certificate—Discretion of Court.

A person who does not hold a certificate under Act XL of 1858 is not debarred by s. 3 from representing a minor as plaintiff or defendant in a suit; but the Court has the fullest discretion, when the property is of small value, or for any other sufficient cause, to dispense with the production of a certificate. **Sreemunt Koondoo v Sharoda Soonduree Dossee. Bhujohurree Paramanick v Sharoda Soonduree Dossee. 8 W R 197.**

Notes:—Diss: 15 W R 283. Fol: 10 W R 205 Ex: 3 Cal 371,

46-Suit on behalf of a minor-Subject of small value.

A suit can be prosecuted or defended by a relation on behalf of a minor, without a certificate under Act XL of 1858, when the subject-matter of the suit is of a small value. A suit to recover real and personal property of the value of Rs 7,-260 was allowed to be prosecuted by the brother of a minor, on behalf to himself and his minor brother, under s. 3 Act of 1858. **Nabadwip Chandra Sirkar Hurender Lal Sahoo v Rajender Pertab. Sahee. 1 W R 260.**

Notes:- 4 B L R F B 130 See 13 W R F B 40.

47—S.5—Property in several districts.-"Residence" of minor.

Held by Loch. J., that the word "residence" used in s, 5, Act XL of 1858, is not the place where the minor may be dwelling at or about the time when the application for a cretificate under the Act is made, but the paternal family house or the family residence of the minor in which every member of the family has an interest, and in which they usually reside; Ainslie I., being of opinion that though ordinarily that might be taken to be the meaning of the word; yet circumstances might arise in which it might be taken to mean otherwise. **Mahomed Hossein v Akbur Hossein, 17 W R 275.**

48-s.6-The summary enquiry provided by s.6 of Act XL of 1858 refers to the grant of the certificate to the parties claiming it, but no part of the Act allows third parties to demand an enquiry into matters which have nothing to do with the genuineness of the grant. **Meltoon Bibi v Gibbon. 12 W R 101.**

49—S. 6—Judicial enquiry—(Act XL of 1858). An application being made to the District Judge by a mother for a certificate of guardianship to her minor son which was opposed by a counter application, the Judge called upon the Collector for a report as to the character and qualifications of the lady under S. 8 of act XL of 1858. The report being submitted the Judge decided the question upon that very report without taking any further evidence. *Held* that no judicial enquiry within the meaning of S. 6 of of the said Act had been held. **Rani Kuar v. Babbu Singh. 7 W N 235.**

50—S. 6—Enquiry by Court—Conduct of applicant.

A Civil Court made after passing orders on an application for certificate under Act XL of 1858, pending an enquiry to the Collector as to the alleged fraud of the manager, and the state of the accounts and the assets of the property.

Mohesh Chunder Sein v The Collector of Dinagepore 16 W R 312.

Act XL of 1858-*Contd.*

51—Change of guardian.

One manager cannot shift off the responsibility from himself and resign the appointment, and another one take up the appointment, without the provisions of s. 6, Act XL of 1858 (requiring issuing a notice of such application or the fixing of a day for the hearing of the application) being duly carried out. **Jogodumba Koer. v Mircha Koer. 17 W R 269.**

52—Ss. 6, 9, 12—"Inquire summarily"—Inquiry to be judical—Certificate of administration—Pardahnashin.

The expression "inquire summarily" in s. 6 of the Bengal Minors Act (XL of 1858) does not mean that the Court is to act on mere hearsay or the report of a Tahsildar deputed by the Collector to make inquiry. In dealing with cases under the Act, District Judges should, as far as possible, adopt and follow the rules ordinarily applicable to judicial proceedings, so as to supply a record from which a Court of appeal may be able to ascertain whether an order appealed from has been rightly passed or not. (A W N (1887) 235 Ref.)

Where the only materials to support an order of a District Judge directing the Collector to take charge of the estate of a minor under s. 12 of the Act were to be found in Tahsildar's report, and the order was passed in a opposition to a petition by the mother of the minor, but the petitioner was not afforded an opportunity in the Judge's Court of giving evidence to rebut the allegations made against her, or of cross-examining the Tahsildar on his report.—*Held* that, upon such materials, it could not be said that there was "no near relative willing and fit to be entrusted with the charge of the property of the minor," which under s. 9 must be found before the power to appoint the Collector under s. 12 could arise. *Held*, also, that the mere circumstances that the mother of the minor was a *pardahnahin* lady was not necessarily a disqualification to her having charge of the property of her son. A W N 1881, 27 and A W N 1881, 102 Ref. **Kaitki v The Collector of Budaon. A W N 1889; 170**

52A—**S. 7**—Qualification for guardianship—Right to certificate.

It is not the policy of Act XL of 1858 to prevent parties from performing their natural duties by the younger members of their family who may be deprived of their parents, and it should not be considered as an axiom that an uncle or other near relative will necessarily defraud a minor, and ought therefore to be refused a certificate under that Act.

Mahomed Saleh v Government. W R 1864, Mis 26

Act XL of 1858 *Contd.*

53—S. 7 looks as much to the fitness of the relative as his propinquity; and when two relatives claim the right to administer, the Court is at liberty to disregard the latter qualification and look to the former. **Akima Bibee v Azeem Sarung 9 W R 334.**

Notes.—Fol: 9 W R 548.

54—Ss. 7, 22, 28-Certificate of administration—Accounts—Interloctutory order.

The appellant in this case to whom a certificate of administration in respect of the property of a minor had been granted under s. 7 of Act XL of 1858, was served with a notice to produce accounts. He objected to this notice, and the District Court disallowed the objection, holding that he was bound to produce accounts. On appeal to the High Court against this order, it was *held* that the order was not such as was contemplated by s. 22 of Act XL of 1858, and it being only an interlocutory and not a final order in the case, the present appeal was premature, as the order appealed from was not such as would fall under the purview of s. 28 of the Act. And the appeal was accordingly dismissed. Appl 13 All 214 = 11 A W N 45. **Ali Ahmed Khan A W N 1884, 318.**

55—**Ss. 7, 28**—Guardian appointed by will—Subsequent nomination under Act XL of 1858—Powers of guardian.

A testator's wish in respect of the guardianship of his minor heirs and administration of his estate could only be given effect to by proceedings under Act XL of 1858; and when such proceedings are taken and the person mentioned in the will is appointed as guardian under the Act, the authority under the will merges in that derived under the Act. The guardian cannot hold a position by reason of the will independent of and antagonistic to, that which he holds by virtue of the Act, and when he is deprived of his position as guardian and administrator under Act XL

Act XL of 1858–*Contd.*

of 1858, he cannot fall back on the mere fact of his nomination by the will. **Ram Pragash v Rukmina.** **A W N 1881, 151.**

56–Ss, 7, 21–"Sufficient cause" cause for recalling certificates granted, what does not amount to.

The District Judge granted a certificate to the appellant the paternal uncle of certain minors, on furnishing security, the respondent, the maternal uncle, agreeing to the same. Subsequently on receiving a letter from the Collector of the place where the property of the minors was situated, that the appellant was in debt the Judge recalled the certificate granted to the appellant and granted one to the respondent without holding any inquiry or proceedings, or allowing the appellant an opportunity of making an explanation or showing cause. *Held* that there was no "sufficient cause" within the meaning of s. 21 for recalling the certificate granted to the appellant.

Muhammad Raza v Raza Ali.
A W N 1881. 4.

57—In the grant of a certificate to a guardian under Act XL of 1858, unless under peculiar circumstances, fitness is to be preferred to mere nearness of relationship. **Aman Khan v Hossena Khatoon.** **9 W R 548.**

58—Before appointing a guardian the Judge should satisfy himself of the applicant's fitness for the office. **Ram Dyal Gooya v Amrit Lall Khamaroo.** **9 W R 555**

59—In appointing a manager of a minor's estate a Judge has to consider not only the nearness of kindred, but also the suitableness of the person to be appointed. **Khoodee Monee Dossee Ghossanee v Koylash Chunder Ghose.**
4 W R Mis 22.

60–The mere fact that a near relative who desires to have charge of the property is a *parda-nashin* is not of itself a disqualification such as takes away the right to a certificate under s, 7.
Kuruppool Koer v Collector of Shahabad
20 W R 432.

61—Under section 7, Act XL of 1858, a person claiming a right to have the charge of the property of a minor by virtue of a will is entitled, if the will be a genuine instrument, to a certificate of administration, notwithstanding the existence of a natural guardian of the minor in the person of his mother. **Bhoobun Mohinee Debee v Poornoo Chunder Banerjee.** **17 W R 99.**

Act XL of 1858–*Contd.*

62—ss. 4 and 6—Appointment of guardian.

Under ss. 4, 6, and 7, Act XL of 1858, the Court has power to appoint a guardian other than the father of a minor, for the purpose of instituting suits and protecting the property of the minor. **Etwari v Ram Narayan Ram.**
4 B L R Ap 71 13 W R 230.

63—Certificate of guardianship to Minor.—Procedure.

Where an application was made by a Hindu female for a certificate of administration under Act XL of 1858 in respect of an estate which she alleged to belong to an adopted son.—*Held*, that the Judge ought merely to have enquired whether the boy was a minor, and whether the petitioner being a near relative was a fit person to be entrusted with the charge of the minor's property. **Brohmo Moyee Chowdhrani v Chitturmonee Chowdhrani.** **6 W R 25.**

64—Accounts, filing in Court.—

An administrator holding a certificate under Section 7, Act XL of 1858, is not bound to file in Court periodical accounts of moneys realized and disbursed on account of the miner.

Sonkally Koonwar.
6 W R Mis 53.

Notes—(S V K) Ap 7 W R 522

65—Account of guardianship—Resignation of guardianship—

Under s. 7, Act XL of 1858, a manager appointed to the estate of a minor cannot in any way get rid of or resign that trust without the permission of the Court, and without duly accounting to his successor for all moneys received and disbursed by him. **Kalee Pershad Singh v Poorno Debia.** **15 W R, 398.**

66—S. 9—Procedure where no near relative—Appointment of guardian—Collector—Person with certificate.—

Under Act XL of 1858, s. 9, the Judge has no power to appoint the Collector as manager of the estate of the minor, until he is satisfied that no person has established title to a certificate under a will or deed, and that there is no relative willing and fit to be entrusted with the charge of the property; and both these alternatives must be proved to the Court in the ordinary way by evidence brought before the Court. **Hyder Reza v Collector of Purneah.** **22 W R 490.**

Act XL of 1858-*Contd.*

67—ss. 10, 11, and 12—Procedure where no near relative—The powers given by ss 10, 11, and 12 of Act XL of 1858 only accrue upon the happening of the contingency which is mentioned in s. 9 **Kuruppooll Koer v Collector of Shahabad. 20 W R 432.**

Act XL of 1858 (Minors).

68—s.10—Manager—Duty to keep accounts. A person appointed to administer the estate of a minor under s. 10 of Act XL of 1858 should keep proper accounts and may summarily be ordered under s. 21 to furnish to his successor an account of receipts and disbursements.

Dal Singh v Raja Harbans Singh. 66 P R 1890.

69—ss. 10 and 12—Cancelling the certificate—Grant of another—Where the minor's estate consists in whole or in part of land, or any interest therein, and when such application is made, the court can only proceed to act in accordance with the provision of s. 12 of Act XL of 1858, and has no jurisdiction to grant another certificate to any fit person, such a course being applicable to the property described in sec 10. **Sakhawat Ally v Noorjeeban Begum 10 Calc 429.**

69A.—s. 12—Appointment of Collector-Power to appoint Collector to take charge of minor's estate.—

Under the provisions of ss. 9 and 12 of Act XL of 1858, the minor's estate cannot be made over to the Court of Wards, but the Collector should be directed, under s. 12 of that Act, to take charge of the estate of the minor, and he thereupon becomes invested with authority to appoint a manager of the property and a guardian of the person of the minor. **Sidhoo Lal. 2 N W 398.**

70-Trust created under will for religious and charitable purposes—

Where a trust is created under a will for certain purposes mentioned in the will—*e. g.*, the maintenance of religious worship, charitable institutions, etc ,—the properties belonging to the trust cannot be taken charge of by the Collector under Act XL of 1858. **Rajessurree Dabia v Jogendro Nath Roy 23 W R 278.**

71—Dispute as to guardianship—

Where two persons were fighting to get hold of the property, and the probability was that the minor would suffer if the property lay in the hands of either, the Court could not say that either person was a fit person to be appointed manager and therefore, under s. 12, ordered the property to be made over to the charge of the Collector, with direction to appoint a manager of the property and a guardian of the person of the minor. **Jugodumba Koer v Mircha Koer 17 W R 269.**

72—Joint property—Interest in—Specification of share of minor—Where, on an application for the appointment of a manager to the estate of a deceased Rajah, a Zilla Judge, notwithstanding a contention raised before him as to the extent of the minor's interest in the property, passed an order strictly within the provision of s. 12, Act XL of 1858, his successor was held to have acted without jurisdiction in having, upon a subsequent application, passed an order specifying the shares of the minor and the opposing party. **Collector of Tirhoot v Rajcoomar Deo Nundun Singh 10 W R 218.**

73—Certificate under Act XL 1858 in respect of interest of sons in ancestral property—

Under Hindu law, the interest in ancestral property taken by sons immediately on their birth is an estate and interest in immoveable property in respect of which a certificate of administration under Act XL of 1858 may be granted during the lifetime of their father.

Dheraj Koer v Adjoodhya Bux Singh. 3 N W 91.

Notes:—Ref: 7 N W P 261 F B.

74—Property of minor—Share of minor in joint family property under Mitakshara Law—

Where the joint property of an undivided joint family governed by the Mitakshara law is enjoyed in its entirety by the whole family, and not in shares by the members, one member has not such an interest therein as is capable of being taken charge of and separately managed under the provisions of Act XL of 1858. **Sheo Nundun Singh v Ghunsam Kooeree. 21 W R, 143. Ajhola Kooeree v Digambur Singh 23 W R, 206.**

Notes—Fol. 23 W R 206; 5 Cal 219.dist, 113. C L R 86. Ref. 12 B H C R 281; 19 Bom 309 F B

Act XL of 1858-*Contd.*

75-Partition-B a Hindu governed by Mitakshara school of Hindu Law, died, leaving two minor sons. J and K and also a widow Z and her two minor sons J and K had lost their mother before the death of B. The court of wards, who manage the whole property, withdrew from management on J's attaining majority; and Z applied and obtained a certificate under act XL of 1858 as regards the shares of K and her two minor sons. Afterwards K's share was excluded from the operation of the certificate as he attained majority. T died leaving H his widow and an infant son. H applied for a certificate under Act XL of 1858 with respect to the property of her son and it appeared that K was incapable of managing the property. *Held*, that though the certificate granted to L had been improperly obtained, H was not entitled to one, as. no partition having been effected since B's death, the property still remained the joint family property. **Hoolash Koer v Kasee Proshad 7 Cal 369.**

76-ss. 12, 9 -Appointment of Collector.—Where a certificate under Act XL of 1858, which had been granted to the two widows of a deceased Hindu, was recalled, simply because, inconsequence of their disagreement, joint management had become impossible, and the District Judge, refusing the application of the widow, who was the minor's mother, to be made sole manager, directed the Collector under s. 12 to take charge. *Held* that, in the absence of any ground to remove her summarily, the Court was bound to grant the application of the minor's mother as the nearest relative, and to allow her the management until some cause to remove her was duly made out. **Nistarinee Debee v. Coellctor Of 24 Pergunnahs 23 W. R., 330**

77-Power of Court to limit nature or extent of property--Where a manager is appointed under Act XL of 1858, the Civil court has no authority to restrict or limit, by description or otherwise the nature or extent of the minor's property. **Sheo Prosunno Chobey v Gopal Suru. 15 W R 529.**

78—Minor—Natural Guardian, Sale by Act XL of 1858. Section 18 et Seq.

Where plaintiff claimed certain immoveable property as purchaser under a Kolaba, executed by a Hindoo widow as guardian of her minor son, bona fide, for the benefit of such son, the widow not deriving her power from any appointment or certificate under Act XL of 1858: it was held, that the plaintiff's title was good. All the sections of Act XL of 1858 from the 18th onwards, respecting powers, duties and responsibilities, relate not to guardians generally but to persons appointed or to whom certificates have been granted under the provisions of the Act.

There being no indication in any part of the Act, of any intention to alter or affect the provisions of Hindoo or Mahomedan law as to guardians who do not avail themselves of the Act, guardians acting without certificates will be regulated by the ordinary Hindu or other law applicable to the case. 2 C L R 249, over-ruled.

Ramchauder Chuckerbutty v Brojanath Mozumdar. 4 Cal 929= 4 C L R 247

Notes:—4 Cal 929=4 C L R 247 fol. 25 Cal 585 F B, 26 Cal 820 Ref. 12 Bom 686, 15 Bom 259, 19 Bom 309 F B Dist 29 Cal 473.

79—Power of guardian to sell or mortgage.—Sanction of Court.

Act XL of 1858 does not prevent a guardian, who has obtained a certificate thereunder, from selling or mortgaging property in Calcutta without the sanction of the Court. **Gopalnarain Mozumdar v. Muddomutty Guptee 14 B L R 21.**

Notes—Fol: 20 Bom 155 Ref: 2 Bom 67, 22 Bom I Dist: 27 Bom 515.

80—Mortgage by guardian without sanction of the Court.

Where a guardian had mortgaged certain property of a minor without previously obtaining the sanction of the Court under s. 18 of Act XL of 1858, but it was found that the mortgage transaction was a proper one, and there had since been a decree in a suit in which the minor was properly represented under which the property had been sold, the irregularity as to the mortgage being made without the sanction of the Court was not allowad to prevail. **Alfutunnissa v. Goluck Chunder Sen 15 B L R 353 note**

Notes—Con: 2 Cal 283.

Act XL of 1858-*Contd.*

81—Grounds for recall of certificate.

Where a guardian, appointed under Act XL of 1858, mortgaged certain immoveable property of the minor without obtaining the sanction of the Court under s. 18 of that Act, and it appeared he was related to, and jointly interested with, the minor in the management of the property—*Held*, that it was not a sufficient cause to recall the certificate unless it was made clear that in the mortgage transactions he had acted in bad faith. or had injured, or was likely, or had intended to injure, the interests of the minor. **Busunto Coomar Ghose 15 B L R 351 note Brojendro Narain Roy v. Busunto Coomar Ghose 13 W R 300.**

82—Sale by guardian without sanction of the Court—Invalidity of sale—Refund of purchase-money.

A sale of a minor's immoveable property by a guardian appointed under Act XL of 1858, and who was also the kurta of the joint family of which the minor was a member, is invalid if made without the sanction required by s. 18 of that Act, even though the sale may have been for the benefit of the minor and made in good faith to pay off the debts of the ancestor. Where, however, it was found that the purchaser had acted *bona fide* and had paid a fair price for the property, he was held entitled to a refund of so much of the purchase-money as had been expended for the benefit of the minor **Shurrut Chunder Chattopadaya v. Rajkissen Mookerjee 15 B. L. R., 350**

Notes—Ap: 20 Bom 61; 150; 15 Cal 627. Fol: 4 Cal 33; 9 All 340 Ref: 22 Mad 289; 9 C W N 923; 3 C L J 260; 20 Bom 61

83-Mortgage by Administrator of a minor's property—Purchaser with notice, Title of—Duties of purchase.

A mortgage of the property of a minor made by the administrator appointed under Act XL of 1858 is invalid, unless the sanction of the Court has been previously obtained under s.18 of the Act. Where the administrator was sued, as representing the minor, by the mortgagee, and made no defence to the suit, and the property was sold, under a decree so obtained, to the mortgagee, by whom it was again sold to a third person, who knew that the administrator had executed the mortgage in that capacity,—*Held* that the decree did not protect the mortgagee who purchased at the Court sale, nor her vendee, from suit by the minor for recovery of the property. **Debi Dutt Sahoo v. Subodra Bibee 2 Chelc., 283, 25 W. R. 449**

Act XL of 1858-*Contd.*

Notes—Appr. 2 All 902; 11 C L R 345; 4 Cal 33 Ref: 15 Cal 40; 6 C L J 448.

84—Mortgage by certificate-holder without sanction—Contract Act IX of 1872, s. 23—

A mortgage by a person holding a certificate of administration in respect of the estate of a minor under Act XL of 1858 of immoveable property belonging to the minor without the sanction of the Civil Court previously obtained is void with reference to s. 18 of that Act and s. 23 of the Contract Act, even though the mortgage-money was advanced to liquidate ancestral debts and to save ancestral property from sale in the execution of a decree. **Chimman Singh v Subram Kuar. 2 All 902,**

85—Purchaser from guardian—Per Garth, C. J—

Previously to the passing of Act XL of 1858, where a suit was brought by a minor on coming of age, to recover property sold by his guardian during his minority, it was generally incumbent upon the purchaser to prove that he acted in good faith; that he made proper enquiries as to the necessity for the sale; and had honestly satisfied himself of the existence of that necessity. Now under s.18 of that Act, the Civil Court not only has the power, but is bound to enquire into the circumstances of each case, and to determine whether, as a matter of law and prudence, it is right that any proposed sale or mortgage of the minor's property should take place; and if the Court, upon the materials and information brought before it by the guardian, makes an order for sale, a purchaser under such an order is not bound to make the same enquiry which the Judge has made, and to determine for himself whether the Judge has done his duty properly and came to a right conclusion. Where a plaintiff alleges fraud or illegality as a ground for setting aside a sale made under s. 18, the onus lies upon him to make out a *prima facie* case of fraud or illegality, and to show that the debt, which formed the consideration for the sale in such case, was one for which the minor was not responsible. *Per* Prinsep, *J*—*A* stranger purchasing from a guardian, acting under the authority granted under s. 18 of Act XL of 1858, will be entitled to every protection from the

Act XL of 1858 (Minors,-*Contd.*

Courts, so long as it is not shown that he acted in a fraudulent or collusive manner, knowing that the debts, for the liquidation of which the purchase money would be applied, were not debts lawfully binding on the minor. The burden of proof in such a case would he heavily on the person seeking to set aside the alienation. But where the purchaser is himself the creditor, and therefore has the means of satisfying a Court as to the origin and nature of the debts and how they are binding on the minor, the burden of proof is shifted on the purchaser, when the plaintiff has established a *prima facie* case.

Sikkher Chund v Dulbutty Singh. 5 C L R 374.

Notes—Ap. 14 Mad 26 Fol. 11 Bom 78; 6 Cal 161 Dist. 5 All 76 Ref. 15 Cal 40; 22 Cal 545, 23 Cal 400, 24 Cal 77; 16 Bom 1; 180; 17 Bom 755; 3 Cal 257=9 C W N 636=1 C L J 408.

86 —Mortgage by guardian without sanction of the Court—

A mortgage without the sanction of the Judge by a guardian of a minor appointed under Act XL of 1858, is absolutely void, and a decree obtained upon a mortgage so executed cannot be enforced against the property of the minor.

Buchraj Ram v Ram Kishen Singh. 11 C L R 345.

Lala Hurro Prosad v Basaruth Ali. 25 Calc 909.

87 —*Held*, that a mortgage by a certificated guardian of minor of the minor's property without first obtaining the sanction of the Court under s. 18 of Act XL of 1858 was not absolutely null and void so as to entitle the minor to the property without first making any restitution to the mortgagees for money spent for the benefit of the minor. S 65 of Act IX of 1872 was applicable to such cases. 3 All 852 distinguished; 15 B L R 350. 7 N W 201,6 N W 258.1 All 57 and Weekly Notes, All 1881 P 16 referred to. **Girraj Bukhsh v Kazi Hamid Ali. 9 All 340. 7 W N 62.**

Notes—Fol 18 All 373; 25 All 59. Ref. 15 Cal 40; 23 Mad 229, 28 All 80=3 A L J 807=(1905) W N 174; 2 C L J 300

Act XL of 1858 (Minors)-*Contd.*

88.-Power of certified guardian to grant lease-Effect of unauthorized transfer—A lease granted for a period of 12 years, though renewable at the pergunnah rate and transferable, without the Court's authority by the certified guardian is void *ab initio*, and will therefore not avail the lessee for the period for which such guardian is at liberty to grant the lease, i. e. five years:—*Held*, accordingly, that in the case of ijmali property, the minor is competent to eject the lessee as trespasser in respect of his own share without making his co-sharers parties to the suit, whether such a lease was executed by such guardian seperately or conjointly with the co-sharers of the minor. Quere whether such a lease granted by a certified guardian conjointly with the co-sharers of a minor, and thus creating one and the same tenancy, is not also void as against the co-sharers. *Held*, also, that a transfer made by a person in the capacity of a guardian before the actual issue of the certificate, but after the order for its issue has been made in his favour and after his recognition as a certified guardian, is a transfer made under the provisions of s. 18 of Act XL of 1858. **Harendra Narain Singh Chowdhry v Moran 15 Calc 40.**

Notes—Ref 18 Cal 259; 33 Cal 273=10 C W N 126; 29 Mad 29; 7 C L J 483; 35 Cal 707; 36 Cal 675=9 C L J 523.

89.- Effect of lease granted by a certified guardian for term exceeding five years without the sanction of court, of minor's property—A lease granted by a certificated guardian of a minor's property, for a term of more than five years without the sanction required by s. 18 of Act XL of 1858 is invalid. **Bhupendro Narayan Dutt v Nemyechand Mondul. 15 Calc 627.**

Notes—Ap. 20 Bom 150. Ref. 20 Cal 249.

90—Leave to deal with property—Procedure on application under s 18 of Act XL of 1858—On an application for leave to deal with the property of a minor, the Civil Court is bound to determine the question whether the proposed manner of dealing with it would benefit the minor if sanctioned and the application should contain all the materials which are adequate to enable the Court to decide that question. The decision of Parth C J in 5 Cal 303, Followed,

Girish Chunder Mookhopadhya 6 Calc 161

Act XL of 1858 (Minors)-*Contd.*

91—s. 21-Ss. 7 and 19-Recall of certificate-Power of Court to recall certificate granted under s. 7, Act XL of 1858—

A certificate granted under s. 7, Act XL of 1858, can be recalled summarily under s. 21, Where the application for recall is based on charges of waste and mismanagement, the certificate may be so recalled, if a sufficient case is made out, without any account having previously been taken in a regular suit under s. 19.

Shurwar Hossein Khan B L R 720; 2 Ind Jur N S 200.

Naunee Bibee v Surwar Hossein 7 W R 522

92-Mode of revocation-It is not necessary to institute a regular civil suit in order to obtain the revocation of a certificate of guardianship

Mahomed Nukshund Khan v Afzul Begum. 3 N W 149.

93-An order cannot be made in the Summary Department declaring a sale made by a manager invalid as being not within the scope of s. 18, and granting an injunction to prevent the demolition of a house. That must be done by a regular suit. **Mukrumunnissa v. Abdool Jubbar. 17 W. R, 171.**

94-Bengal Act IX of 1879-Certificate of guardian ship—Application to cancel one and grant another—Where a petition is made under the provision, of s 21 of act X L. of 1858 to have a granted certificate recalled and a fresh one granted to another, the petitioner should set forth in his petition a sufficient cause for such course being taken and court should thereupon proceed to enquire Judicially whether such sufficient cause is established. **Sakhawatally v. Noorjehan Begum 10 Cal 429.**

95-*Ground for recall*—An order for a certificate may be revoked under s. 21 Act XL of 1858 if the Judge sees sufficient cause for its revocation in the conduct of the party in whose favour it was granted. **Tusneef Hossein v. Sookhoo. 14 W. R. 453**

96-S.12.—A Zilla Judge, having ordered the grant of a certificate under Act XL of 1858 to a widow with reference to the property of her deceased husband, afterwards, at the instance of the Collector, and on hearing all the parties claiming or objecting, set aside his order and

Act XL of 1858 (Minors)-*Contd.*

directed the Collecter to take charge of the estate. *Held* that the order, though the Judge professed to make it under s. 12, Act XL of 1858, was really made under s. 21. **Chunder Coomar Roy v. Collector of Jessore. Bussant Coomaree Dossee v. Collector of Jessore. 13 W R 243 =4 B. L. R. App X 84.**

Notes:—Ref: 6 Bom. 304; 34 Cal 216.

97—S. 12—Certificate of guardianship—Purdanashin lady.—

The mere fact that an applicant for the guardianship of a minor was a *purdanashin* lady, is not, in itself, an adequate ground upon which to reject her application, apart from the question of her fitness and capacity to manage the minor's estate. **Lalkuar v. Shib Singh, A. W. N. 1881, 102.**

98—Ground for remarriage of minor.

The marriage of a minor is not sufficient cause within the meaning of s. 21 of Act XL of 1858 for withdrawing a certificate as manager granted under that Act; there must be some neglect in the performance of duty, or some cause of a similar kind rendering it improper to continue the manager in the appointment. **Jugo Duneba Koer v. Mircha Koer. 17 W R.269.**

99-S. 21—Guardian's heirs, if liable to render accounts.—

The provisions of s. 21 Act XL of 1858 are personal to the guardian himself, and refer to cases in which his certificate has been re-called for incompetence, dishonesty or some other good cause, and not where his appointment has lapsed through death. Under the provisions of that section, the District Judge would not be competent to require the heirs of a deceased guardian to render an account of all moneys received and disbursed by him in the capacity of a guardian. **Rameshur Tewary v. Kishun Kumar. A W N (1882) 6;**

Notes:—Ref: 22 All 332.

100—S. 21. —Application by minor on attaining majority to cancel guardian's certificate —Maintainability—

S. 21 of Act XL of 1858 must be construed in a liberal manner and it includes the power of a Court issuing the certificate of guardianship

Act XL of 1858 (Minors)-*Contd.*

to recall the certificate when the Court is satisfied that the person in respect of whom the certificate is issued has already attained majority, and being *sui juris* is entitled to look after his own interests. **Irtaz Ali v. Shaid Ali A. W. N. 1888, 279.**

101——Neglect of duty of estate—Enquiry—Manager appointed—Where a case is started showing that elder sons are neglecting their duty as managers of an estate to the material injury of a minor son, the Judge is bound to institute inquiry. **Anund Coomar Ganoogly v. Rakhal Chunder Roy. 8 W. R. 278.**

102—Mother's right to sue on behalf of minor son—Sale by Hindu mother of portion of minor's estate to satisfy mortgage debt-Validity.

A suit for redemption cannot be brought by the mother of a minor plaintiff, if she does not hold a certificate under Act XL of 1858. Where a mother of a minor makes a sale of a portion of the minor's share to pay off a mortgage-debt, the sale is not invalid, as it is for the minor's benefit. **Bhim Singh v. Luchho. A. W. N. 1882. 70.**

Act XL of 1858 (Minors).

103-Minor widow guardian-Natural father to be preferrd to mother-in-law-Discretion of court:

The mother of a deceased married son is not entitled to be appointed guardian of the minor widow in preference to her natural father. The Act leaves it to the discretion of the court to appoint a fit person from among the minor's relatives when nobody has been appointed by will or deed. **Musammat Nihal Dae Deoki v. Nundun 25 P. R. 1881.**

104—Certificate to mother of infant son—

The High Court granted a certificate to the mother of a minor son, setting aside the order of the District judge refusing to grant the certificate to her on the ground that she should not be the sole administratrix, and held that the Act provided safeguards for the proper administration of the estate. **Imtiz v. Beguam. A W N 1881, 14.**

105-Certificate of administration to minor's estate.

Where the District judge refused to grant a certificate to the grandmother of the minor to administer to his estate. on the ground that it would be usless and inexpedient to appoint her, without making any

Act XL of 1858 (Minors)-*Contd.*

inquiry into the fitness of the applicant, *held* that the reason for refusing the application was not sufficient or satisfactory, and her application had not been sufficiently investigated. *Held* also that. if the Judge. upon full consideration, considered the appellant unfit, he should record his reasons for so thinking. **Ati Kuar v. The Collector of Gorakpur. A W N 1881, 16.**

106-Certificate of administration-Woman.-

The certificate of administration to a minor's estate should not be refused merely because the applicant is a woman. Nor is it a sufficient reason to refuse the grant of a certificate that the estate is likely to be better managed by the Collector. It is not the intention of the law that no certificate should be granted to a woman and that the administration of the estate of minors should ordinarily be made over to the Collector. **Deo Kuar, A W N 1881, 27.**

107-Property of minor--Two managers.--

Though there may be one guardian for a minor's property and another for his person, there cannot be appointed two managers for different portions of his estate. **Mussammat Bal Kuor v. Ganpat, 181 P R 1888.**

108—Failure to produce accounts.

An applicant for a certificate under Act XL of 1858 having alleged that the appointed guardians had neglected their charge in various ways, the Judge called upon the guardians to produce their accounts, and on their failing to do so took away their certificate,and gave it to the applicant. *Held* that the Judge would have been justified by s 21 in cancelling the guardians' certificate, if sufficient cause were shown; but he had no authority to do what he did, accounts which a Judge can call for under that section being those which a discharged guardian is to furnish to his successor in office, and the only way in which a guardian retaining office can be made to furnish such accounts is by a regular suit brought by a relative or friend of the minor. **Ram Dyal Gooye v Amrit Lall Khamaroo 9 W R 555.**

109—Waste by Hindu widow.

Acts of waste on the part of the widow in regard to her husband's property, if proved, would be a ground for withdrawing a certificate granted to her under Act XI of 1858. **Bhagwanee Koonwar v Parbutty Koonwar 2 W R Mis 13.**

Act XL of 1858 (Minors)-*Contd.*

Notes:—Dist: 11 B H C R 15. Ap: 15 Cal 488 F B. Ref: 20 Cal 418.

110—Interference of Court with guardians of minors—

A person apprehending danger to the health or life of minor should ask the Court's interference under s. 21 Act XL of 1858. **Luckhee Narain Aung Bheem v Sooruj Monee Pat Mohadaye 2 W R Mis 6.**

111—Mismanagement—Procedure

A certificate having been granted to A under Act XL of 1858 in 1872 on the death of the father of a minor, in 1882 the mother of the minor applied that the certificate should be recalled on the ground of mismanagement, and that another should be granted to herself. The District Judge assuming that the minor was a member of a joint family, held that the original certificate ought never to have been granted, recalled the certificate, and dismissed the application. *Held* that A, having obtained the certificate, brought himself within the jurisdiction of the Court under Act XL of 1858, and that the Court ought to have considered the charges against him.

Deorani Koer v Parusman Narain. 12 C L R 546.

112-Selling the minor's property, or allowing portions of it to be unnecessarily sold, justifies the recall of a certificate of guardianship.

Goonoomonee Dossee v Bhabosoonduree Dossee 18 W R 258.

113—Removal of guardian—Immorality of guardian.

Where charges of immorality were brought against the holder of a certificate under Act XL of 1858, it was held to be the duty of the Judge to enquire into the truth of the charges and the fitness of the certificate-holder. **Mohunuddy Begum v Oomdutoonissa. 13 W R 454.**

114—Summary procedure.

Act XL of 1858 does not empower a Judge to remove summarily a guardian not appointed by the Court but under a will of the minor's grandfather. **Lakhi Priya Dasi v Nabin Chundra Nag. 3 B L R A C 37: 11 W R 370.**

115—Ground for removal,

A certificate of guardianship was cancelled under s. 21, Act XL of 1858, in a case where the guardian, without any sufficient cause of justification and without legal advice, withdrew an appeal made to set aside a sale of the estate of the minors, and at the same time dealt with the auction-purchaser and obtained a putnee of a portion of that very property in the name of his own wife.

Pitamber Dey Mozoomdar v Ishan Chunder Dutt Biswas. 18 W R 169.

116—Ground for removal.

An application for the removal of guardians or parties appointed to take charge of the estate of a minor under Act XL of 1858, s. 7. must be supported by proof of malversation or misconduct such as would afford sufficient ground for removal. **Rajessuree Debia v Jogendro Nauth. Roy. 23 W R 278.**

117-Removal of manager of estate.-Grounds for removal.

A manager of the estate of a minor appointed by will is liable to removal only upon proof of actual malversation, or that by reason of mental incapacity, conviction of felony, or by some other incapacitating cause, he has become incapable of managing the property, but not merely on the ground that another person would manage the property better. He is, it seems, subject to removal upon summary application under Act XL of 1858, s. 21; but if the ground upon which his removal is applied for involves an investigation of accounts such investigation must be made in a regular suit under s. 19, previous to such summary application under s. 21.

Mudhoosoodun Singh v Collector of Mindapore. Marsh; 244=2 Hay 113.

Notes.—Appl: 4 W R Mis 3. Ref: 7 W R 522; 23 W R 278.

118-Ss. 22, 23-Delay in submitting accounts.

It is doubtful whether the provisions of s. 22, Act XL of 1858 are applicable in proceedings under s. 23 of the Act, where a guardian appointed under the Act resigned his appointment producing his accounts, but was ordered to produce the accounts in a certain form, without fixing the time within which they were to be submitted, and the guardian produced the same after some delay but before any fresh guardian was appointed, *held* that, under the circumstances of the case, the Court was not justified in fining the guardian for the delay without calling upon him

Act XL of 1858 (Minors)-*Contd.*

to explain it and without finding that the delay was wilful. **Umrao Singh v Newa, A W N 1881, 24**

119-s. 16—Power of Judge to order accounts from Guardian—Discharged guardian.

A Judge has no power under s 16 or s. 21, Act XL of 1858, to order a discharged guardian of a minor to file his account. S. 21 refers to the procedure as between discharged guardians and their successors, and not to a case where the contest is between the owner of the estate and a discharged guardian. **Doolun Singh v Torul Narain Singh. 4 W R Mis. 3**

120—S. 16—Omission of certificated guardian to submit accounts—Revocation of certificate.

When a guardian does not comply with the requirements of s. 16 of Act XL of 1858, the High Court will not generally interfere with the District Judge's order revoking the certificate. The District Judge should then proceed, however, under s. 16, and make proper arrangements for the management of the property. **Brij Mohan Lal v Ganga Dhar. A W N 1881, 44.**

121—Ss. 16, 21, 22—Minor-Certificate of Administration—Revocation—Duty of Court:

S. 16 of Act XL of 1858, second paragraph, no doubt, requires that an administrator should "within six months from the date of the certificate, deliver in Court an inventory, etc." but it does not declare that, upon his failure to do so, his certificate shall be "*ipso facto*" void, nor does it fetter the discretion of the Judge, who has power under s. 21 to recall any certificate granted under the Act or under S. 22 to impose penalties for non-delivery of accounts or property. A Judge is not competent to revoke the certificate granted without affording the administiator an opportunity of being heard.
Ghulam Chishti Khan A W N (1883) 206

122— Procedure—Objections to certificate.

A certificate under Act XL of 1858 having been granted to a party as guardian of an adopted minor, it was objected that the minor's adoption had not been legal. *Held* that, as there was no doubt of the fact of adoption, whether the adoption should on enquiry prove legal or not, the certificate was rightly given, and as the objector did not claim to be appointed guardian, he had no *locus standi* to object to the appointmct of another person **Kisto Kishore Roy v Issur Chunder Roy 15 W R 166,**

Act XL of 1858 (Minors)-*Contd.*

123-Party asserting rights adversely to minor -Discretion of Court where a will is propounded.

Where an application is made for a certificate. under Act XL of 1858, a party asserting certain rights adversely to the minor cannot be admitted as a party to the record, but must seek his remedy in a regular suit. Where the will propounded by an applicant is a genuine document, the certificate prayed for must be granted, notwithstanding the existence of any "natural guardian," no discretion being left to the Court in such a case. **Purma Soonduree Dossee v Tara Soonduree Dossee. 9 W R 343.**

124-Security-bond, Order to furnish Power of District Judge—Assignment of bonds—Succession Act, s. 257—*Quare.*

Whether the Judge of a District Court is competent to call upon a person to whom he grants a certificate under Act XL of 1858 to furnish security; and whether he has done so and security-bonds have been given to him, he can assign them in the manner provided in s. 257 of the Succession Act, 1865. **Amar Nath v Thakur Das. 5 All 248=3 W N 12.**

125—Application for certificate Limitation.

The lapse of six years was held to be no sufficient ground for a Judge's refusal to enquire into the merits of an application for a certificate under Act XL of 1858, that law providing no limitation as to the time within which such applications are to be made. **Puroma Soonduree Dossee v Tara Soonduree Dossee. 9 W R 343.**

126 —S, 28 and s. 6—Right of appeal—Creditor—Enquiry.

Only persons who claim a right to have charge of property in trust for a minor under a will or deed have a right to make applications under Act XL of 1858, and they alone have a right of appeal under s. 28. A mere creditor has no *locus standi* in the proceedings before the Judge, and no right to have his objections gone into. **Meltoon Bibee v Gibbon. 12 W R 101.**

127—s. 29, Jurisdiction—"Civil Court."

The Court of the Judicial Commissioner of Assam is the Civil Court contemplated by s. 29.

Act XL of 1858 (Minors) *Concld.*

Act XL of 1858. **Kaleeka Pershad Bkutta Charjee v. Dhukhina Kali Dabee. W R 1864 Mis 34.**

128—Court of District Judge.

The Civil Court to which the charge of minors and their property is entrusted by Act XL of 1858 is the Court of the Judge of the district.

Mohamuddee Begum v Oomdutoonissa 15 W R 271.

129—S.27—Guardian and minor—Application for certificate of guardianship—Act IX of 1861—Duty of Court:

Where two petitions, one under Act XL of 1858 and the other under Act IX of 1861 for certificates of guardianship of a minor girl were presented to the District Court and both were dismissed on the ground that under s. 27 of Act XL of 1858, no male could be appointed as guardian of a female minor; *held*, on appeal by both parties, that the lower Court ought not to have dismissed both the applications and that it was the duty of the Court upon the facts contained in the applications to provide for the minor's guardianship and custody. **Har Sukhmal v Chanderman. A W N 1888, 124.**

130—Estate in territories of Maharajah of Benares.

An application for a certificate under Act XL of 1858 regarding estates situate in the territories of the Maharaja of Benares should be made in the Court of the Judge of Benares. **Kudum Kooner v Budla Singh, 1 N W Ed 1873, 163.**

Act I of 1859.

Act I of 1859 (Merchantshipping).

Notes.—Rep in Pt Act XV of 1863; Act XIV of 1870; Act XVI of 1874: Act IV of 1875; Act XII of 1876. Am, Act XIII of 1876; ss. 9, 10; Act V of 1883, ss. 34 to 37, Act VI of 1891, ss. 1 to 5. Act XII of 1891 ss. 23, 24-A Am, Act VI of 1906; Declared in force throughout B.I., Except as regards the Scheduled Districts, Act XV of 1874, s. 3.

Act—I of 1859—

See Merchant Seaman's Act.

Act III of 1859 (Cantonment Joint Magistrates.)

Notes:—Rep, Act VIII of 1887.

Act VIII of 1859 (Civil Procedure Code 1859)

See Cases under (1) Civil Procedure Code, (1908) & (1882)

Act—*Contd.*

(2) Arbitration.

ACT IX OF 1859 (Forfeiture).

Notes:—[Rep in Pt, Act VIII of 1868; Act XII of 1891, ss. 16 to 18 and 20; Declared in force—Throughout B. I, except as regards the Scheduled Districts, Act XV of 1874, s. 3; in British Baluchistan (except the last para of s. 18) Reg I of 1890, s. 3 in Upper Burma (except the Shanstates) Act XIII of 1898, s, 4.

ACT IX OF 1859.

See Act of State.

Act IX of 1859—Decree under.

See Government Officers, Acts of.

ACT IX OF 1859 s. 20.

See Limitation—Statutes of Limitation IX—of 1859.

ACT X OF 1859.

See (1) Arbitration under special Act.
(2) Bengal Rent Act, 1869.
(3) Chaukidari chakran lands.
(4) Execution of Decree—Decrees under Rent Law.
(5) Limitation Act, XIV of 1859-Application of.
(6) Review—Orders subject to Review.
(7) Withdrawal from Suit.

ACT X OF 1859, Decision under—

See (1) Cases under Res-Judicata—Competent Court—Revenue Court.
(2) Res Judicata-Estoppel by judgment—Decrees in Rent Suits.

ACT X OF 1859.

1—Object of Act X of 1859—Rights existing prior to Act

The object of Act X of 1859 was to re enact the provisions of existing laws relative to the rights of raiyats, and not in any way to destroy those rights. If, therefore, the plaintiff had a gorabundee tenure existing before the enactment of Act X (and it had been found that the plaintiff's gorabundee tenure had been recognized in a long series of decisions commencing from the year 1846), the enactment of that Act in nowise deprived him of his rights in that tenure.

Leelanund Singh v Nirput Mahtoon. 17 W R 306.

Act X of 1859-*Concld.*

See also Cases under:—

Right of Occupancy.

2.—Date of passing of Act.

The period of limitation within which a suit might be brought for rent due at the time of the passing of Act X of 1859 must be reckoned from 29th April 1859 (the date of the passing of the Act), and not from 1st August 1859 (the date on which the Act came into operation).

Lachmipat Sing v Mahomed Mooneer. B L R Sup Vol 32; W R F B 32.

3:— Ss. 6, 23 Suit for rent of a fishery or tank—Jurisdiction—Revenue and Civil Courts:—A suit for rent of a fishery or *Julkul* tenure is maintainable in a Revenue Court under Act X of 1859 where a lease transferred to the lessee a right to the tank and not merely an incorpororeal right :-*Held*, on a construction of the lease, specially having regard to the condition that the lessee was to continue liable for the rent even in case of drought and non-rearing of fish, that the lease was intended to be of the entire interest of the lessors in the tank and was something more than a grant of a mere right of fishery. That the suit for rent of such a tank was triable by a Civil Court and not by a Revenue Court under Act X 1859. The provisions of Act X of 1859 do not apply to a tank which does not appertain to an agricultural holding but is used only for the preparation and rearing of fish. **Mahananda Chakravarti v. Mangala Keotani 8 C W N 804=31 Cal 937.**

Act XI of 1859

See Cases under :—

(1) Onus of Proof—Sale for Arrears or Revenue

(2) Public Demands Recovery Act.

(3) Sale for Arrears of Revenue.

Act XI of 1859 Ss. 5, 6, 7

See Sale for arrears of Revenue-setting aside sale Irregularity.

ACT XI OF 1859—S. 9

See Sale for arrears of revenue Deposit to stay sale.

ACT XI of 1859

1-4.—Manager of estate under attachment—sale for arrears of revenue—Portion of estate.—

Act XI of 1859-*Contd.*

Act XI of 1859 is, to a great extent, a remedial Act, passed for the benefit of the subject, and in order to relax the stringency of former Statutes, whereby the Crown was empowered to sell estates for non-payment of revenue. S. 5 of the said Act applies to estates which are under attachment issued under Act VIII of 1859, and which are in the hands of a manager appointed on the application of the judgment-debtor for the purpose of liquidating the debts. Such attachments are not superseded by the appointment of such manager. The words "arrears of estates under attachment" apply to cases where a portion only of an estate is under attachment, as well as to cases in which the whole estate has been attached. **Bunwari Lall Sahu v Mohabir Pershad Singh. 12 B L R 297= 1 I A 89**

Affirming on appeal the decision of the High Court. **Mahabeer Pershad Singh v Collector of Tirhoot 13 W R 423.**

5.—Ss. 5 and 6-Specification of notification of sale—Meaning of Estate.—In a notification under Sec. 6 of Act XI of 1859, it is not necessary to specify the owners of an estate or the owners of shares in the estate. 9 Cal. 591 followed. The only thing necessary under that Section is that the notification should specify the estate or shares in it, which are to be sold, and in selling a share in an entire estate it is not necessary to specify the shares or mouzahs of which that share is composed. The word "estate" as used in that section ordinarily means "Mehal" but the term also applies to a portion of a mehal with regard to which a separate account has been opened but not to an undivided portion of a Mehal with regard to which no separate account is kept. **Ram Narain Koer v Mahabir Pershad Singh 13 Calc 208**

Notes.—Ref: 20 Cal 325; 34 Cal 381; 8 C W N 337; 757. Fol 32 Cal 111=8 C W N 757; 32 Cal 502=9 C W N 348=1 C L J 91; 6 C L J 163 Dist: 32 Cal 542= 9 C W N 487.

ACT XI OF 1859—S 9

See (1) Contract Act, ss. 69 and 70.

(2) Co-Sharers—General Rights in Joint Property.

Act XI of 1859-*Contd.*

ACT XI OF 1859—Ss 10 and 11

See Co sharers—Suits with respect to Joint Property—Possession

ACT XI OF 1859—SS 13 14

See Mortgage—Sale of mortgaged property —Purchasers

ACT XI OF 1859—S 31

See (1) Limitation Act, 1877, S 10
(2) Limitation Act, 1877, Art 120

ACT XI OF 1859—S 33.

See (1) Jurisdiction of Civil Court—Revenue Courts—Orders of Revenue Courts
(2) Limitation Act 1877 Art 95 (1871, Art 9)
(3) Right of suit—Road and other Cesses Sale for arrears of

6—Suit for damages S 33 Act XI of 1859 contemplates an action against the individual wrong doer irrespective of Government and co parceners **Gunga Narain Bose v Cornel** 10 W R 442

7—Receipt of sale proceeds—The receipt by a decree holder of portion of the surplus sale proceeds lying in deposit in a Collector's Court without opposition on the part of the judgement debtor is not such a receipt as is contemplated by s 33 Act XI of 1859 **Mohabeer Pershad Singh v Collector of Tirhoot** 13 W R 423

Notes—Ref 15 W R 137

8—S 34—Public Demands-Recovery Act (Bengal Act VII of 1880) Ss 2 and 20—Limitation S 2 of Bengal Act VII of 1880 does not make the limitation in S 34 of Act XI of 1859 applicable to the execution of a decree which annuls a sale under S 20 of Public Demands Recovery Act **Mahomed Abdud Hye v Gajraj Sahai** 25 Cal 283=2 C W N 89,

Notes—Ref 26 Cal 414 F B

Act XI OF 1859 S 36—

See Cases under Benami Transaction—Certified Purchasers—Act XI of 1859, S 36

ACT XI OF 1859—S 37

See (1) Assam Land and Revenue Regulation S 98

Act XI 1859-*Contd.*

(2) Ghatwali Tenure
(3) Parties—Parties to suit—Purchasers
(4) Cases under Sale for Arrears of Revenue—Incumbrances—Act XI of 1859
(5) Cases under Sale for Arrears of Revenue—Protected Tenures

9—'Settlement'—In Act XI of 1859 Ss 37 the word settlement refers not to the permanent settlement but to the settlement which took place after resumption by Government of the lands previously held as lakhiraj **Raj Chunder Chowdhry v Busheer Mahomed** 24 W R 476

Notes—Ref 10 C W N 503

ACT XI OF 1859—S 37 CL (4)

See sale for arrears of Revenue—Incumbrances Act XI of 1859

ACT XI OF 1859 S 39

See Evidence—Civil Cases Miscellaneous documents Registers

ACT XI OF 1859 S 54

See (1) Abatement of Rent
(2) Sale for arrears of Revenue Purchasers right and liability of

ACT XIII OF 1859 (Workman's Breach of contract)

Notes—Rep in Pt Act XVI of 1874 Application suspended in certain cases Mad Act 1 of 1903 S 2

1—Limitation act 1877 Act Art 120 A right to recover an advance

A right to recover an advance made to a labourer under s 2 of Act XIII of 1859 which is a penal enactment is not barred by the Limitation Act Sch II Art 120 **In re Kittu-** 11 Mad 332

Notes—Not Fol Rat Un Or 874 Ref 16 Bom 368 Dist 28 Mad 37

2 Money advanced on account of work to be performed—Loan on condition that the workman should enter into a contract of service

A workman agreed in writing to work for the proprietors of an estate for four years and one month from 1st March 1899 to 31 March 1903, for an initial advance of one rupee which was not to be repaid till after the expiration of the

Act XIII of 1859 *Concld.*

agreement The same person subsequently obtained an advance of P10 to be reimbursed by a monthly deduction of one rupee from his wages He worked from 1st March 1899 till 18th September 1899 when he ceased to work leaving in all a sum of R5 to be accounted for in the adjustment of the total advance He was subsequently charged and convicted under s 2 of the Criminal Breach of Contract Act XIII of 1859 —*Held* that the initial advance of one rupee was not money advanced on account of work to be performed but rather a loan made without interest on the condition that the workman would enter into a contract of service for the duration of the loan and that the Criminal Breach of Contract Act 1859 was inapplicable to this case that with reference to the ten rupees to be repaid out of wages the Act applied and an order should be made directing the workman to work until the expiration of the term of the contract on account of which this sum had been advanced

Tangi Joghi v Hall. 23 Mad 203

Breaches of Contracts Act 1859

3—Contract of labour fraudulent breach of

Act XIII of 1859 provides an additional not a substitutional remedy for fraudulent breaches of contract, and the right to a civil remedy does not depend on the obtainment of a magistrate's order for repayment of the sum advanced **Jayji v Munji 1874 P J 164**

4—Insolvent Debtors Act—Appeal from order in—12 Vic C 21 —

The court fee payable on an appeal preferred under S 73 of the Indian Insolvent Debtors Act is that which is provided for in Article 18 of the Schedule A to the table of Original side of the Madras High Court dated 5th May 1887

Liladhara Vias v Official Assignee of Madras 24 Mad 160

ACT XIV OF 1859

See (1) Limitation Act 1859

(2) Limitation Acts IX of 1871 and XV of 1877 and IX of 1908

ACT XV OF 1859 (Patents)

Notes —Rep Act V of 1888

ACT XV OF 1859

See Cases under Patent

Act—*Contd.*

ACT XV OF 1859 S 22

See (1) Limitation Act, 1871, Art 11

(2) Transfer of Civil Case—General Cases.

Act VII of 1860.

See Company

ACT VIII OF 1860 (Electric Telegraphs)

Notes —Rep Act I of 1876

ACT X OF 1860 (Custom duties)

Notes —Rep Act VIII of 1868

ACT XXI OF 1860 (Societies Registration)

Notes —Rep in Pt Act XVI of 1874, Declared in force—Throughout B I except as regards the Scheduled Districts, Act XV of 1874, S 3, in Upper Burma (except the Shan States) Act XIII of 1898 S 4

ACT XXI OF 1860 (Societies Registration)

1—S 20—Charitable society—Religious society existing for the management of a public mosque —

A religious purpose may be a charitable purpose and a society for religious purposes will ordinarily be a society for charitable purposes Charitable purposes are not restricted to the giving of alms or other charitable reliefs, but the words have a much wider legal meaning *Held* that the religious society which had, for its object the control and management of and the protection of the property appertaining to, a certain public mosque was a society which might legally be registered under the provisions of the Societies Registration Act 1860 **The Anjuman Islamia of Muttra v Nasir-ud din A W N 1906 59=3 A L J 124=28 All 384**

ACT XXI OF 1860

See Incorporated Society

ACT XXII OF 1860

See Chittagong Hill Tracts Act

(2) Certificate of Administration — Act XXVII of 1860

(3) Letters of Administration

ACT XXVII OF 1860

See Succession Certificate

ACT XXVII OF 1860

See (1) Appeal—Certificate of Administration

Act-*Contd.*

(4) Probate—Power of High Court to grant, and form of.
(5) Representative of deceased person.
(6) Review—Orders subject to Review.
(7) Right of Suit—Contracts and Agreements.
(8) Right of Suit — Orders, Suits to set aside.
(9) Succession Act, S. 341.

ACT XXVIII OF 1860 (Boundary-Marks).

Notes:—Rep. in Madras, Mad. Act IV 1897; (in Coorg), Reg. I of 1899.

ACT XXVIII OF 1860.

See Madras Boundary Marks Act.

ACT XXXII OF 1860.

See (1) Income Tax Act, 1860.
(2) Right of Suit—Income Tax.

ACT XXXII OF 1860 (Income—Tax).

Notes:—Rep. Act VIII of 1868

ACT XXXVI OF 1860.

See Stamp Act XXXVI of 1860.

ACT XXXVI OF 1860 S 13.

See Stamp Act, 1879, S. 34.

ACT XXXVI OF 1860 (Stamps).

Notes:—Rep Act X of 1862

ACT XLII OF 1860.

See Special Appeal—Small Cause Court Suits —General cases

ACT XLIII OF 1860 (Amending Act VIII of 1859).

Notes—Rep Act XXIII of 1861

ACT XLVIII OF 1860 (Police, Presidency Towns amending Act.)

Notes:—Rep. (in Calcutta) Ben. Act IV of 1866; (in Madras), Mad Act VIII of 1867 S. 81; (in Bombay) Bom Act IV of 1902.

ACT LIII OF 1860 S. 2.

See Revival of Suit

Act V of 1861 (Police)

Notes:—Rep. in Pt. Act IX of 1871, Act XVI of 1874; Act X of 1882; Rep. in Pt. in Bengal (Except the Sambalpur District) and Eastern nal, Ben. Ac VII of 1868; Rep. in Pt. Rangoon, Bur. Act IV of 1899, S 2, when notified (and see Ss. 3, 4); Rep in Pt. and Am. in North West Frontier Province, Reg. VII of 1901, Ss. 3, 13; Am , Act III of 1888; Act VIII of 1895: S. 34; am. Act I of 1903; supplemented, Ben. Act VII of 1869; portions extended to Calcutta and Suburbs with Modifications, Ben. Act I of 1898; in the Sonthal Parganas, Reg. III of 1872, S. 3, as amended by Reg. III of 1899, S. 3, in the Angul District, Reg. I of 1894, S. 3; in the Chittagong Hill-tracts Reg. I of 1900, S. 4; in the Arakan Hill District (except S. 11), Reg. IX of 1874, S. 3; in Upper Burma (except the Shan States), Act XIII of 1898, S. 4; in British Baluchistan, Reg. I of 1890, S. 3.

ACT V OF 1861.

See Superintendence of High Court—Charter Act, S. 15.

ACT IX OF 1861.

See (1) Appeal—Acts—Act IX of 1861.
(2) Custody of Children Court Fees Act.
(3) Guardian—Liability of Guardians.
(4) Mahomedan Law—Guardian.
(5) Minor Custody of Minors
(6) Munsif, Jurisdiction of.

ACT IX of 1861 (Minors).

Notes.—Rep. Act VIII of 1890.

ACT X OF 1861 (Repealing Enactments relating to Civil Procedure).

Notes:—Rep. Act XIV of 1870

ACT X OF 1861.

See (1) Oath.
(2) Witness— Civil Cases — Defaulting Witnesses.

ACT XI OF 1861 (Amending Act XIV of 1859).

Notes—Act VIII of 1868.

ACT XI OF 1861.

See Limitation Act, 1859— Operation of Act.

Act XVI of 1861.

See Stage Carriage Act.

Act XXI of 1861 (Income Tax).

Notes:—Rep Act VIII of 1868.

Act-*Contd.*

Act XXIII of 1861 (The Code of Civil Procedure.)

Notes.—Rep Act X of 1877.

ACT XXIII OF 1861.

See (1) Appeal.
(2) Appellate Court, Jurisdiction of.
(3) Execution of decree.
(4) Jurisdiction of Small Cause Court.
(5) Mesne Profits.
(6) Review of Judgment.
(7) Revision in Civil Cases.

ACT XXIII OF 1861.

See Civil Procedure Code 1882 (1877).

ACT XXIII of 1861 S 10.

See Interest—Omission to stipulate for, or stipulated time has expired—Decrees.

ACT XXIII of 1861 S 11.

See C P C S 47 question in execution of decree

ACT XXIII of 1861 S 35.

See Superintendence of High Court.

ACT XXIX OF 1861.

See Articles of war.

ACT XXXI OF 1861.

See Saltpetre.

Act IV of 1862. S 10.

See Bank of Bengal.

ACT VI of 1862 (Annexing schedule to Act IV of 1862).

Notes.—Rep Act XI of 1876.

ACT VIII OF 1862, s. 4.

See Jurisdiction of Civil Court—Foreign and Native Rulers.

ACT X of 1862.

See Stamp Acts.

ACT X of 1862.

See Cases under Stamp Act, X of 1862.

ACT XV OF 1862, S 1.

See Judicial officers, Powers of.

ACT XX OF 1862 (Presidency High Courts)

Notes:—Rep., Act X of 1877.

Act-*Contd.*

Act XIV of 1863.

See Enhancement of rent

Act II of 1863 (Appeals to Queen in Council.)

Notes:—Rep., Act VI of 1874.

ACT II OF 1863 S 1.

See (1) Appeal to Privy Council—Cases in which appeal lies or not—Appealable Order.
(2) Execution of decree.

ACT XIX OF 1863 (Amending Act X of 1859 in the Province of Agra)

Notes—Rep Act XII of 1876; (in the Central Provinces and the Sambalpur District), Act IX of 1883

ACT XIV OF 1863.

See (1) Appeal—Act XIV of 1863.
(2) Collector.
(3) Jurisdiction of Revenue Court N.W.P. Rent and Revenue Cases.
(4) Limitation Act, (1908) S. 14.
(5) Parties—Parties to Suits—Cosharers.
(6) Parties—Parties to Suits—Rent Suits For.
(7) Right of Suit—Revenue. Suit for Arrears of.
(8) Settlement Officer.

ACT XVIII 1863.

See Practice—Civil Cases—Affidavits.

ACT XIX OF 1863 (Partition of Revenue Paying Estats.

Notes:—Rep in Pt Act XIV of 1870, Rep (in Agra Except certain Areas), Act XIX of 1873; (in Oudh), Act XVIII of 1876; (in Ajmere), Reg. III of 1877; (in the Central Provinces and the Sambalpur District) Act XVIII of 1881 S, 136 W (inserted by Act XVI of 1889, S 26).

ACT XIX OF 1863 (Partition of Revenue Paying Estates).

See (1) Jurisdiction of Civil Court—Revenue Courts—Partition.
(2) Jurisdiction of Revenue Court—N W P Rent and Revenue Cases.
(3) Partition—Miscellaneous Cases.

ACT XIX of 1863 S 8

See (1) Appeal—Acts—Act XIX of 1863.
(2) Jurisdiction of Civil Court—Revenue Courts—Orders of Revenue Courts,

Act-*Contd.*

ACT XIX OF 1863, Ss. 8 and 9.

See Res Judicata—Competent Court-Revenue Courts.

ACT XIX OF 1863, S 38.

See Partition—Form of Partition.

ACT XIX OF 1863, S. 47.

See Partition—Right to Partition—General Cases.

ACT XIX OF 1863, S. 53.

See Jurisdiction of Civil Court-Revenue Courts—Partition.

ACT XX OF 1863 (Religious Endowments).

Notes:—Rep in Pt Act VII of 1870; Act XIV of 1870; Act XVI of 1874; S 3 A M; Act XII of 1891. Extended to the Kanara District, Bom Act VII of 1865.

ACT XX OF 1863.

See (1) Appeal—Acts—Act XX of 1863.
(2) Appeal—Decrees.
(3) Arbitration-Arbitration under special Acts—Act XX of 1863.
(4) Endowment.
(5) Hindu Law—Endowment-Succession in Management.
(6) Jurisdiction of Criminal Court-General Jurisdiction.
(7) Mahomedan Law—Endowment.
(8) Right of suit—Charities and Trusts.
(9) Small Cause Court Rangoon.
(10) Right of Suit-Endowments. Suits Relating to.
(11) Superintendence of High Court-Charter Act s 15.
(12) Superintendence of High Court Civil Procedure Code, s 622.
(13) Valuation of Suit—Suits.
(14) Waste lands.

ACT XX OF 1863.

1-Suits for declaration of trusts of a temple.—In bringing a suit under Act XX of 1863 it is not necessary to show that the temple was one which was formerly under control of the Board of Revenue. The Act applies to property in Calcutta.

Ganes Singh v Ramgopal Singh 5 B L R, Ap. 55.

Notes:—Diss: 3 Cal 563. Ap: 18 All 227. Ref: 34 Cal 587.

Act XX of 1863-(Religious Endowments)-*Contd.*

2-Suit to establish right to share in management of temple.—The suits referred to in Act XX of 1863, as needing the authority of the Court for their jurisdiction, are solely suits charging trustees, managers, or committees with misfeasance, malversation of the temple property, or neglect of duty. There is nothing in the Act to oust the jurisdiction of the ordinary Courts over suits to establish a right to share in the management.

Agri Sarma Embrandri v Vistnu Embrandri Janadhana Embrandri v Pala Bul Kasava Embrandri 3 M H C 198.

Notes:—Fol: 4 M H C R 112; 404: 4 Mad 157. Dist: 14 Mad 1. Ref; 2 Mad 58.

3—Religious Endowments Act (XX of 1863)—Temple Committee—Power to dismiss the Moktesar of a temple—Onus of proof.

The Plaintiff, a *Moktesar* of a temple was dismissed by the Temple Committee constituted under the Religious Endowments Act, 1863, and was displaced in his appointment by others. He sued the Committee for a declaration that the plaintiff was entitled to his office of *Moktesar* and the appointment of the new *Moktesars* was illegal.

Held, decreeing the claim, that the powers of appointment and dismissal with which the defendants as a Committee were vested, were exerciseable not in their own interests but in the interests and on behalf on the *Devasthan* whereof they were trustees. They were, therefore, not at liberty to appoint or dismiss arbitrarily, capriciously or for private reasons of their own, but only on grounds justified by the interests of the institution. The appointment of the plaintiff by the Committee, therefore, implied that his tenure of office was to continue so long as its continuance was not inconsistent with the interests of the Devasthan.

Held, also, that the *onus* was on the plaintiff to show that the Committee had not, in dismissing him, acted on *bona fide* belief that the dismissal was necessary in the interests of the *Devasthan*, but had been actuated by some other and improper motive.

Bhavanishankar v Timmanna. 8 Bom L R 407=30 Bom 508.

4—Permanent scheme by the Board of Revenue appointing hereditary trustees in a temple,

Act XX of 1863- Religious Endowments)-*Contd.*

Committee not competent to alter—Whether Committee could appoint temporary additional trustees—Regulation VII of 1817, *vesting* in the Committee of the powers of the Board of Revenue under.

The question in this case was as to the right of a temple-Committee to appoint temporary, additional trustees for a temple, in respect of which a certain number of persons had been invested, originally, by the Board of Revenue with hereditary right to the trusteeship. On objection taken on behalf of the Committee (appellants), that it was not competent to the Board of Revenue to have introduced an hereditary element into the management of the temple, *held*, the case was one, in which it was competent to the Board, under Sec. 13 of Regulation VII of 1817, to make such provision for the trust management or superintendence as might, to them, seem right and fit, with reference to the nature and condition of the temple and that there was no necessary inconsistency between the exercise of such superintendence and the existence of hereditary trustees, whether appointed by the Board or otherwise. (7 M. H. C. 77. F ; 7 M. 499, *Diss:*) Having once made a certain scheme for the management of the temple, it was not open to the Board to revoke it and so it was not competent to the Board itself, much less to the Committee, to arbitrarily put an end to arrangements once permanently made. On the ground that the Committee had thus no power to alter, as they did, the construction of the temple management regularly established by the Board, it was laid down following (17 Mad 212, Fol:), that where there is an hereditary trustee.it is not competent for a Committee to appoint additional trustees and that,to lay dawn that the Committee has an unqualified power to making such temporary appointments, it would give them a power liable to grave abuse (29 M 179, F.)Further, such appointment not only does not necessarily add to the efficiency of the body but it has the effect of modifying the powers and responsibilities of the existing trustees.

K. S. Ganapathy Ayyar v. Sri Yedavyasa Alasinga Bhutter. 1 M L T 127= 16 M L J 435=29 Mad 534.

5—Temple Committee,duties of—Appointment of manager——Business done by circulation—Validity.

Act XX of 1863-'Religious Endowments) *Contd.*

The Committee as a body constituted under statutory authority should, in the absence of the specific provision in the statute, follow as far as practicable in the transaction of its business the usual procedure adopted by public bodies entrusted with duties more or less of a public character. The committee should, therefore, ordinarily transact its more important business (such as the appointment of a trustee) at a meeting held after due notice to the members. But the committee should not be looked on strictly as a corporation so that all the technical rules applicable to such bodies in England should not be applied to it. The transaction of such more important business otherwise than at a meeting is, therefore, not void and is capable of being adopted and approved of by other members who may not at first have agreed to it. *Semble* :—The exercise of minute control by the committee over the details of the manager's action in administering the trust is hardly consistent with the respective responsibilities imposed on the trustee and the committee by Act XX of 1863. *Prima facie* it is the duty of a paid trustee to keep the accounts of the trust, or at least to supervise the keeping of accounts. Where, on papers being under circulation, three members of the committee gave their votes to the defendant for his appointment as manager and two others did not then assent but subsequently accepted his appointment :—*Held*, that the defendant was validily appointed. (23 Mad 483 Dist 12 Mad 366 Ref). **Subba Naidu v Gopalasawmy Naidu. 15 M L J 185.**

6—Trustee of temple—Position– Act XX of 1863—Devastanam Committee.

The Devastanam Committee of a temple, appointed under Act XX of 1863, exercise the same powers of supervision that were formerly exercised by the Board of Revenue under Reg. VII of 1817; but the property of the temple is not vested in them, nor do they represent the property. The person who represents the property is the trustee or manager, who is indeed appointed, and may no doubt be removed, by the Committee for sufficient cause. But the trustee or manager is not in the position of a clerk or servant removable at the pleasure of the Committee. He holds his office permanently though subject to removal for misconduct. The deity is regarded as the owner of the temple property, and the trustee or mana-

Act XX of 1863-(Religious Endowments)-*Contd.*

ger appointed by the Committee is the agent of the deity subject to the Committee's control.

Muthuswami v Queen-Empress. 6 M L J 14.

7—Religious Endowments Act——Temple Committee—Suit by majority of members—Maintainability.

There is no provision in the Act for a majority of the members of a temple Committee suing on behalf of the whole of the members thereof. **Bangaru Aiyar v. Siva Subrahmania Pillai. 10 M L J 397.**

8—Removal and appointment of trustee by Committee—Order by some members of Committee in violation of rules relating thereto—Right of other members to sue for declaration of its invalidity. — A majority of the members of a taluk Committee dismissed the trustee of a temple and appointed another in his place. The order was passed without convening a meeting therefor and against the opinions of the other members of the Committee. The majority of members communicated their order to the authorities with a view to placing the new trustee in the room of the old one and did other acts calculated to interfere with the management of the latter. The other members of the committee thereupon sued for a declaration that the order was illegal and invalid. *Held* that, as under Act XX of 1863, the superintendence of the temple was vested in the committee, each member thereof was bound to take part in discharging the duty of the Committee, part of which consisted in seeing that the institution was under the management of a proper trustee. The plaintiffs were entitled to maintain the suit inasmuch as they were virtually excluded from the deliberations of the Committee.

Lakshminarayana Aiyar v. Thandavaraya Pillai. 10 M L J 100.

9—Power of Government to remove trustees—Power of Committees to dismiss trustees for misconduct.

Where an institution falling under s. 3 of the Act is handed over by the Government to a committee appointed under the Act, the Government has not the power to remove the trustee thereof. This is a power belonging to the Committee. The Committee may remove a trustee for proved misconduct. In this case, the Government had resumed an *inam* land granted for performance of services and substituted a money payment therefor. The resumption was due to the fact that the services were not properly performed. The Committee dismissed the trustee for this misconduct as well as others. The lower appellate Court held that the resumption, by Government, of the *inam* was itself a sufficient punishment. *Held*, the resumption by Government was in no sense a punishment, the Government not having the power to punish. It was only a precautionary measure to render malversation more difficult and that the Committee had, therefore, a right to remove the trustee from his office. **Mahomed Abdulla Sahib v Ghulam Hussain Sahib 15 M L J 26.**

10-Right of person interested to sue for misfeasance by managers, etc.—Public endowment.

In the case of a public endowment transferred to trustees, managers, or superintendents of such lands under Act XX of 1863, any person or persons interested (and the interest need not be a pecuniary one) in the religious establishment, in its worship or service, or in its trusts, has a right of suit, after leave obtained from a Civil Court against such trustees, etc., for misfeasance, or breach of trust, or neglect of duty. **Kuneez Fatima v. Saheba Jan 8 W R 313.**

11—Suit for removal of mohunt and appointment of another.

A suit for the removal of the present mohunt of a religious endowment and for the appointment of the petitioner in his place is not of such a nature as is contemplated by Act XX of 1863.

Kishore Bon Mohunt v Kalee Churn Giree. 22 W R 364.

12—Suit to compel heir of manager to make good deficiency—Leave of Court.

Act XX of 1863 does not apply to a suit brought by the dharmakarta of a temple and one of its worshippers to compel the defendant, as heir of the late manager, to make good, out of the property inherited by him, the deficiency in the devasthanam funds caused by breach of trust and misappropriation by the late manager. The leave of the Civil Court for the institution of such a suit is not necessary, and the suit is maintainable. The right of instituting such suits is not a

Act XX of 1863-(Religious Endowments)-*Contd.*

privilege accorded by Act XX of 1863, but a pre-existing right. **Jeyangarulavaru v Durma Dossji. 4 M H C 2.**

Notes:—Ref: 2 Mad 58: 21 Mad 406. Fol: 29 Mad 106=15 M L J 475.

13—Suit to eject Dharmakarta or agents from temple—Right of Government to divest itself of power of interfering with appointment—Mad. Reg VII of 1817.

Plaintiffs, members of the committee appointed under Act XX of 1863, sued to eject defendants (the dharmakarta and his agents) from the possession and management of the temple dedicated to Sri Viraragava Swami at Trivellore and to establish their (plaintiffs') right to the possession and control of the said temple. Defendants denied the right of the plaintiffs to exercise any control whatever over the temple. This right depended upon whether, at the period of the passing of Act XX of 1863, the nomination vested in, was exercised by, or was subject to the confirmation of the Government, or any public officer. It was admitted that in 1842 the Board of Revenue did, so far as it could divest itself of all right to interfere with the appointment of a dharmakarta, but it was contended for the plaintiffs that it was not in the power of the Board of Revenue so to divest itself of the duties imposed upon it by Regulation VII of 1817. *Held*, that, assuming the Board of Revenue to have had such a right, there was nothing in Regulation VII of 1817 to prevent them from renouncing that right if they chose. **Venkatesa Nayadu v Shagatopa Shri Shagatopa Swami. 7 M H C 77.**

Notes.—Fol: 29 Mad 534=16 M L J 435=1 M L T 127 Dist: 7 Mad 499.

14—Jurisdiction—Clause in deed of endowment excluding jurisdiction.—

The jurisdiction given to Courts by Act XX of 1863 cannot be excluded by any clause in a deed of endowment. **Imdad Hossein v. Mahomed Ali Khan, 23 W R 150=14 C L R 382=2 I A 83.**

Notes:—Ref. 1 Cal 456; 3 Cal 612; 5 Cal 512; 21 Bom 509; 27 Bom 43, Fol: 25 W R 516; 1 Mad 65, Dist: 13 Cal 3; 20 All 96, Con: 23 W R 314.

15—Madras Regulation VII of 1817 S. 13—Discretionary power to be used by the temple

Act XX of 1863-Religious Endowments)-*Contd.*

Committee while appointing new trustees when the power of management is not hereditary. Trusts Act (II of 1882) S 49. Jurisdiction of Civil Court. A temple Committee appointed under Act XX of 1863 has a right to appoint new trustees when there is no hereditary trustee for adding to the existing trustees but this right is discretionary and must be used bona-fide and reasonably according to the principle embodied in S 49 of the Indian Trusts Act. If no proper discretion is used the right may be controlled by a Civil Court of original jurisdiction. **Davud Saiba v. Hussein Saiba, 17 Mad 212.**

Notes:—Fol: 16 M L J 435=1 M L T 127=29 Mad 534.

16- Ss. 13, 14, 18—Whether a trustee can sue a co-trustee for breach of trust without sanction under S. 18—How far action of the majority of trustees binds the minority—Temple Committee powers of control of, over trustees.—

A trustee of a religious endowment, constituted under Act XX of 1863, can sue his co-trustee for a breach of trust, without getting sanction under S. 18 of the Act. Such right of suit is given by the general law, and is independent of the provisions of Act XX of 1863. Though the decision of the majority of the trustees of a public trust binds the minority in matters connected with the management of the trust property, it does not bind them in regard to matters which are *ultra vires* and beyond the proper sphere of the trust. **Samaram Singaracharlar v. Krishnaswami Iyengar, 4 Ind Cas 874=19 M L J 513.**

17—Resolution—Quorum—Unanimity

Held, that the resolution of a temple committee constituted under Act XX of 1863 need not, in order to be valid, be the unanimous resolution of all the members of the committee.

Where three out of seven members attended a meeting convened after due notice to all the members and concurred in dismissing the plaintiff from temple trusteeship:

Held, that a resolution passed by a majority of the members present at a *meeting* was valid and binding; that even if it was not law, yet in this particular case three formed the quorum under the resolution passed by the committee on the 19th of March 1878, and subsequently uniformly acted on, and that, therefore, the resolu-

Act XX of 1863-(Religious Endowments)-*Contd.*

tion passed by three members was not invalid in law. **Anantanarayana Iyer v. Kuttalam Pillai, 22 Mad 481=9 M L J 203.**

18--S 3--Power of committee appointed under the Act.—

A committee, appointed under Act XX of 1863 has power to dismiss the trustees or superintendents of temples described in s. 3 of the Act, without having recourse to a civil suit; but such power can only be exercised on good and sufficient grounds. **Chinna Rangaiyangar v. Subraya Mudali, 3 M H C 334.**

Notes:--Fol: 4 M H C R 112, 404, Ref: 5 M H C R 53; 21 Mad 179, 1 Bom L R 743; 30 Bom 508=8 Bom L R 407.

19--Ss. 3 and 4- Onus of proving that S. 3 applies to a particular temple.--

Plaintiff, a trustee newly appointed by the temple Committee, sued for a declaration that defendant, who has been removed from his office of trustee by the Committee, had no right to the management of the plaint temple, and for a permanent injunction restraining him from interfering with the said management. The defendant admitted in a calendar case, and in a petition to the Devastanam Committee, that the temple was subject to the Committee, though he claimed to be the hereditary *stanik*. *Held*, that the burden of proving that the temple was one, to which S 3 of the Religious Endowments Act applied, lay on the plaintiff, and that the statements of the defendant were not, in the circumstances, sufficient to shift the burden on to the defendant. **Ganapathi Gurukal v. Sivarama Aiyar, 6 M L T 282**

20--Ss. 3 and 14 Form of decree — Court's power to appoint trustee--Trustee's duties—Accounts to be kept and submitted by trustee--Trustee to be a celibate:--

The trustee of a Durga is bound to keep proper accounts. If the Durga falls under S. 3 of Act XX of 1863, he will be bound to submit them to the Committee. If it does not, he is, nevertheless, bound to keep separate and clear accounts of the Durga income and expenditure. Under S. 14 of the Act, the Court may direct the removal of a trustee or a manager. Where a dismissed trustee is in possession of trust properties, he has, on his removal, to be relieved of his possession of the trust properties. It is necessary, therefore, to direct surrender of possession. If there is any person already competent to represent the trust, possession may be delivered to him. If the power of appointment is shown to be vested in any person, such person may be directed to make the appointment, and possession may be delivered to him. If there is no person competent to represent the trust, a receiver may be appointed to take charge of the estate. *Quere*--Whether the Court is competent to appoint a trustee? A married man is unfit to be a *Jamashan* of a Durga. **Miyaji v. Sheik Ahmed, 18 M L J 205=31 Mad 212.**

21—Removal by Committee of Superintendent of Pagoda—Ground for removal.—

Where there were not good and sufficient grounds for the removal from office of the defendants, superintendents of a pagoda, within S. 3 of Act XX of 1863, by the committee appointed under that Act, the High Court confirmed the decree of the Civil Judge dismissing a suit brought by the plaintiffs, who had been appointed by the committee as superintendents in place of the defendants for the recovery of the pagoda, and the property belonging to it **Chinna Rangaiyangar v. Subraya Mudali, 3 M H C 338.**

22—Committee, Suit by, to enforce right of control —

The committee of a district duly appointed under Act XX of 1863 are entitled to maintain a suit in a Civil Court without having obtained the leave of the Court to bring the suit as well when the object of the suit is to establish their right of control under S 3 of the Act as when it is sought to enforce such control against the officers of the temple subordinate to them. **Venkatasa Naidu v. Sadagopasma Iyer, 4 M H C 494.**

23—Ss. 3, 4, 11,12—Suit filed by the members of a temple committee—Burden of Proof—Form of decree.—

A suit was brought by the members of a temple committee who were appointed under Act XX of 1863 against one who claimed to be the hereditary trustee of a Hindu temple for getting possession of temple property, for having it declared that they have a right to receive certain annual dues and for getting permanent injunction against defendant ordering him not to interfere with

Act XX of 1863-(Religious Endowments)-*Contd.*

these dues. *Held*, it was the duty of the plaintiffs to prove that the temple comes in a class mentioned in S. 37 the act. On appearing that the temple was not founded by the defendant's ancestor and Government had appointed him a trustee,and his successors in the office of a trustee were not all of them members of his family:—*Held*, that a decree declaring that the disputed temple comes under Sec. 3 of the act, and as such the plaintiffs should have jurisdiction, should be made in favour of the plaintiffs (2) that the plaintiff's had no right to get the possession of the property or the income of the temple under Secs. 14, 1, 12 of the Act XX of 1863. **Ponduranga v. Nagappa, 12 Mad 366.**

Notes:—Ref: 6 M L J 14; 15 M L J 185= 31 Mad 111.

24—S. 4—Power of committee to call for accounts from trustees of temple.—

A District Committee appointed under Act XX of 1863 has no right to call for accounts from trustees of temples which are within S. 4 of the Act. **Venkatabala Krishna Chettiyar v. Kaliyanaramaiyangar, 5 M H C 48.**

Ramiengar Ramanuga Chariyar v. Guanasambanda Pandarasannada, 5 M H C 58.

Notes:—Dist. 9 C L J 636.

25-Right to restoration of endowment of which plaintiff had been deprived under Mad. Reg. VII of 1817.

The plaintiff, claiming to be the owner of a muth and certain land attached to it under a grant from the Rajah of Tanjore from the possession of which he had been ejected by the Collector of Tanjore in 1856 on charges of breach of trust and other misconduct, sued to recover the possession of the lands and mesne profits. The Civil Judge found that the grant was for the performance of religious ceremonies and pious observances only, and that the plaintiff had led a vicious life and been guilty of malversation in his office, and, being of opinion that the plaintiff had been properly deprived of the lands belonging to the muth under Madras Regulation VII of 1817, dismissed the suit. *Held* that, under s. 4 of Act XX of 1863. the plaintiff became entitled, on the passing of the Act, to the restoration of the endowment. **Jusa Gheri Gosamier v. Collector of Tanjore, 5 M H C 334.**

Notes—Dist; 14 Mad 1. Ref: I Bom L R 743.

26—Right to control affairs of temple-Transfer of property—Form of order—Right of suit.

C. C. 23

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In 1849, the Board of Revenue, acting under Bengal Regulation XIX of 1810, interfered in the management of the affairs of a temple. In a suit relating to the affairs of the temple instituted in 1878, it did not appear whether any transfer of property had been made under s. 4 of Act XX of 1863, but it did appear that, in 1865, the Judge of Patna had appointed a manager of the temple. *Held* that, the right of the Government officers to control the affairs of the temple had been sufficiently proved.

Dhurrum Sing v. Kishen Singh. 9 C L R 410=7 Cal 767.

Notes:—Appl: 18 All 227; 19 All 104. **Ref:** 12 Bom 247; 17 M L J 1; 34 Cal 587; 30 Mad 158.

27-Act XX of 1863—Ss.4, 5-Power of District Courts to appoint trustees—Malabar Devasams.

The vacancy of a trustee cannot be filled up by the District Courts under s 5 of Act XX of 1863 unless the former trustee has got the property actually transferred to him under s. 4.

Ittuni Panikkar v. Irani Nambudripad. 3 Mad 401.

28-Ss. 4, 14, 18—Trustee appointed by temple committee—Grant of sanction to sue for removal of such trustee.

A District Judge has jurisdiction to grant sanction under s. 18 of the Act for the institution of a suit for the removal of a trustee appointed by a temple Committee. **Shunmugam Pillai v. Sankaramurti Mudaliar. 10 M L J 109.**

29-Appointment of trustee to religious institution. District Judge's right. Collector as agent of Court of Wards. On the death of a hereditary trustee of a temple the collector as agent of the Court of Wards who had the management of the deceased's estate during the minority of the deceased's sons made an application for having been appointed as trustee on behalf of the sons.

Held, that the District Judge had Jurisdiction to make an appointment under sec. 5 of Act XX of 1863. **Somasundara Mudaliar v. Vythilinga Mudaliar. 19 Mad 285= 6 M L J 92.**

Notes:—Ref: 26 Mad 89.

30—Ss. 5, 14, 21—Suit to remove Mohant on account of misfeasance-Court's power to appoint receiver when right of succession not in dispute —Power of Appellate Court—Joinder as Res-

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pondents of persons who were not parties in the original suit—Court's inherent power to add parties in suits relating to public trusts. In a suit brought under the Religious Endowments Act, a Civil Court has no power to appoint a receiver or manager of *debutter* properties except under sec. 5 of the same Act. A Civil Court has power under that section to appoint a manager only when there is a dispute as to the right of succession. A person electing to proceed under the Religious Endowments Act can be given only such special relief as that special statute says it may give. If he wishes for any relief beyond that he should proceed under sec. 539 of the Civil Procedure Code.

Gayananda Asram v Kristo Chandra Mukherji. 8 C W N 404.

31-Ss. 5 and 4—District Court if may appoint a trustee pending decision of Civil Court, in all cases.

District Courts have no power, upon a vacancy occurring in the office of the trustee of a religious endowment, to appoint a trustee under s 5 of the Religious Endowments Act, unless the endowed property has been actually transferred to the former trustee under s. 4 of the Act by the Board of Revenue or Government. (3 Mad 401, 8 Cal 32, Rel.; 7 Cal 767, 18 All 227, 19 All 104, Diss.). S. 5 of the Act contemplates the temporary appointment of a manager by the Court, pending the decision by a Civil Court of the title of any other applicant to the office.

Mohunt Sheonandan Gir v Dhupan Upadhya 14 C W N 1104=7 Ind Cas 164.

32—Ss. 5-10—"Civil Court"—*'Persona designata'*—Vacancy in office of manager—Conditions precedent for a Judge to act under S. 5—Civil Procedure Code, S. 622—Revision.

An applicant for appointment as Manager under S. 5 of Act XX of 1863 is "interested" in the temple within the meaning of S. 5 and is competent to ask the High Court to revise the order of the Civil Court. An order made by the Civil Court under the powers conferred by S. 5 is a judicial adjudication in the matter before the Court, and the High Court is competent to revise such an order. 11 Mad 26 considered. The conditions precedent to the exercise of jurisdiction under S 5 are:—(1) The existence of a vacancy. (2) There should have been a transfer to the former trustee. (3) The existence of dispute antecedent to the proceedings in which the order is

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sought to be passed as regards the succession to the office. The dispute referred to in the section includes not only a dispute as to the right to succession but also one as to the person who is to succeed to the office. **Gopala Aiyer v. Arunachallam Chetty. 26 Mad 85.**

33-S. 7—Power of appointment in committee.

The defendant was sued as the trustee of a pagoda to recover a certain sum of money for which he had not accounted. The defendant was dismissed by three members of the district committee, which consisted of six members, the other three members refusing to sign the order of dismissal. The plaintiffs were appointed trustees in place of the defendant by the members who dismissed the defendant.

Held that, the appointment of the plaintiffs was invalid under s. 7. Act XX of 1863, and that they were not entitled to sue the defendant.

Pandurungy Achariyar v Iyathory Mudaly. 4 M H C 443.

34-S.7-Suit by Committee, not by superintendent, for accounts, if maintainable.

The Committee of a *mutt* appointed under s. 7 can maintain a suit for accounts against a *tahsildar*. 5 M H C 48 Dist.

Hari Ballav Bose v. Gopi Nath Rath. 9 C L J 636=2 Ind Cas 625.

35—Ss. 7, 10—Constitution of Committee—Powers of two members of a committee

The effect of ss. 7 and 10 of the Act is that the surviving members must act so that the date of the election shall be fixed not later than three months from the date of the vacancy. If they do not so act, their powers of election are gone, and then unless the Civil Court takes proceedings on the application of somebody and appoints a person, there is no power to fill up the vacancy. In construing the two sections of the Act together, they must be read as imperative or obligatory. The fact that the remaining members of the committee are required to act with promptitude, while it shows that the Legislature was alive to the possibility of inconvenience arising in the interval, also indicates the intention of the Legislature to be that the Committee shall not consist of less than the number originally appointed. (22 Mad 481, Expl & Dist.) **Santhalya v. Marjanna Shetty. 8 M L T 213=7 Ind Cas 754=20 M L J 814.**

36-S. 8-Resignation of member of a committee of a temple.

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A member of a committee of a temple, appointed under s. 8 of Act XX of 1863, can retire from his office of his own will.

Tiruvengada v. Rangayyangar. Gopal Ram v. Rangayyangar. 6 Mad 114.

37—Ss 8, 10—Appointment of member of the Devasthanam Committee—Suit to declare Religion—Sect—Where a Vadagalai was appointed a member of the Devasthanam Committee and the appointment was contested in a regular suit on the ground that the temples of the District were mostly of the Tengalai persuasion: *Held*, that the word "religion" in S. 8 of Act XX of 1863 did not mean "sect," and that the appointment of the member, who was of the same *religion* though not of the same sect as the temple, was legal and valid. **Alwar Aiyangar v. Krishnama Chariar** 9 M L J 173.

38-S. 10—Committee of an endowment-Power of Judge—Appointment when memberships all vacant—The judge may appoint a new committee when all the memberships of the committee are vacant and his powers under s. 10 of Act XX of 1863 are not confined to filling up vacancies in the memberships of committee of a religious endowment. **Mahomed Athor v. Sultan Khan.** 4 C W N 527.

39-S.10—Memberships all vacant—New committee—Judge's power to appoint:

The powers of a Judge under s. 10, Act XX of 1863, are not restricted to filling up vacancies in the memberships of a Committee of a religious endowment, but he may appoint a new Commitee when the memberships of the Committee are all vacant. **Syed Mahomed Athor v Sultan Khan.** 4 C W N 527.

40—S 10—Vacancy in Committee-Committee, default by—Power of Committee to nominate—Appointment by District Judge—Superseding nomination by Committee.

When a vacancy occurs among the members of a Devastanam Committee, the remaining members of the Committee can proceed under S. 10 of Act XX of 1863, to elect a new member to fill the vacancy; but they cannot nominate any for it. An order was made by a District Court under S. 10 of Act XX of 1863, asking the Devastanam Commitee of the District what steps they had taken to fill up a vacancy that had occurred in the Committee and ordering them to fill it up forthwith. The Committee thereupon did not elect but nominated a person for the vacancy. *Held*;—That the District Court had power to supersede such nomination by a nominatian of its own. **Ramanuja Aiyangar v Anantaratnam Aiyar. (1895) 6 M L J 1.**

41—S. 10—Order of District Judge filling vacancy in Committee not appeallable.

No appeal lies to the High Court from an order by a District Judge filling a vacancy in a Committee under s. 10 of Act XX of 1863.

Farid-uddin Ahmad v Muhammad Nasarullah Khan A W N (1889) 7

Notes:—Foll: 11 Mad 26.

42—S. 11 & 12 & S. 3—Manager's right to bring a suit for rent on Muchalkas granted by the committee of Religious Institution.

A committee of religious institution appointed under Act XX of 1863 obtained Muchalkas from the tenant of the land belonging to the institution in its own name & not in the name of its manager. Held that this is an irregularity and a suit brought by the manager on such Muchalkas can lie. **Kalyanaramayyar v Mustak Shah Saheb** 19 Mad 395.

Notes.—Dist: 22 Mad 68 F B.

43—S. 14—Suit for wrongful dismissal from temple by officer.

A suit by an officer of a mosque, temple or religious establishment for wrongful dismissal from his office is not a suit for misfeasance within the meaning of s. 14, Act XX of 1863.

Amin Sahib v Ibram Sahib, 4 M H C 112

Notes.—Ex: 23 Mad 298. Ref: 14 Mad 1.

44-S 14—Breach of trust by the agent of the trustee—Suit against agent, whether maintainable under the Act:

A mere agent of the trustee of a temple cannot be sued for breach of trust or neglect of duty under S. 14 of Act XX of 1863. **Venkatappayya v Venkatapati.** 9 M L J 105.

45—S. 14—Power to appoint a new trustee—Code of Civil Procedure (Act XIV of 1882) s. 539.

S. 14 of the Religious Endowments Act only empowers a Court to direct the specific performance of any act by the trustee, manager or superintendent or to award damages or costs against such trustee, manager or superintendent and to direct their removal. It confers no power on the Court to appoint a new trustee, manager or superintendent, for which the proceedings provided for by s. 539 of the Code of Civil Procedure

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must be resorted to. **Sada Shankar v Hari Shankar. 5 A L J 191=(1908) A W N 101.**

46—S. 14—Suit for removal of manager and for declaration of invalidity of mortgage created by him—Declaration ancillary——Manager's claim to trust property *bona fide*—Liability to dismissal.

Suit for a declaration that a mortgage created by the manager of a *musjid* and *ashurkhana* was invalid, and for the removal of the manager from his office. *Held*, that the mortgage of the endowed property of the *musjid* which was a public mosque, was invalid. The plaintiff's prayer for a declaration being introductory or ancillary to the claim for the removal of the manager, s. 14 of the Religious Endowments Act did not apply. The suit was maintainable. *Held* also that as the defendant dealt with the mosque property in the *bona fide* belief that it was the private property of his family, and apart from this, as there was no evidence of misconduct by the defendant in his capacity as manager, the claim for his removal could not be granted. But in the circumstances of the case, the defendant was ordered to pay the costs of the suit.
Muhammad Jafar v Muhammad Ibrahim. 24 Mad 243

47—S. 14—Suit under—Jurisdiction of Civil Courts—Question of fact—Whether can be taken for the first time in second appeal.

A Civil Court has jurisdiction to try when proceedings are instituted under s. 14, Act XX of 1863. The appellant cannot be allowed to take for the first time in second appeal, a point which was neither raised in the written statement nor in the Courts below. 30 Mad 158; dist. 23 Mad 298;16 M L J 15 Appl. **Venkata Reddiar v Krishna Iyengar. 7 M L T 311= 6 Ind Cas 684.**

48—Ss. 14, 16—Suit for removal of a trustee —Power to refer to arbitration.

In a suit for the removal of a trustee, the Court has jurisdiction to refer to arbitration the question whether the trustee should be removed as prayed for in the plaint. **Nambi Ayyangar v Yagnanarayana Somayajial 12 M L J 431.**

49—Ss. 14, 16—Suit for removal of dharmakarta on ground of misappropriation and mismanagement——Power to frame scheme——Suit under s. 14—Power to refer for decision by arbitrator.

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In a suit brought under s. 14 of the Religious Endowments Act for the removal of a dharmakarta on the ground of misappropriation and mismanagement of the funds of the temple, it is not competent to a District Judge to frame a scheme for the management of temple. Under s. 16 of the Act, it is open to the Judge to refer any mattar in dispute in a suit brought under s.14, for decision by an arbitrator, but it is not open to him to refer the whole suit for decision to an arbitrator. **Veeraraghava Perumalaya v Sitaramayya, 12 M L J 401.**

50.—Ss. 14, 7, 18, 3,—Endowments affected by regulation XIX of 1810, management of—Removal of trustee for misconduct—Act XX of 1863, Ss. 3, 7, 14 and 18. The object of Act XX of 1863 was to relieve the Boards of Revenue and Local Agents from the duties imposed on them by Reg. XIX of 1810, and, in order that any action may be taken under this Act, S. 3 of the Act requires that the Provisions of the Regulations specified in the preamble to that Act should be applicable to the endowment which is the subject of the suit, and that the nomination of trustees, etc., should either be vested in or be exercisable by the Government at the time of the passing of the Act. Where the question was about the management of a certain religious endowment in Cuttack, and it was admitted that in 1864, the Local Government appointed a Committee of three members under S. 7 of the Act, *held* that such appointment was a clear indication of the fact that that endowment was under the management of the Board of Revenue before the passing of the Act of 1863, and that the fact that an endowment had come under the management of the Board of Revenue was sufficient to characterise it as a public endowment and as one falling within the operations of this Act It was also held that all endowments which were effected by Reg. XIX of 1810, whether they come under the Board of Revenue or not, fall within the purview of Act XX of 1863.

For the operation of this Act, it is immaterial whether the office of the trustee or manager is hereditary or not, and, in either case, a trustee or manager, who misconducts himself and acts contrary to the object of the endowment, can be dealt with under the provisions of this Act.

Where the Court finds that a trustee was guilty of misconduct in the management of the endowment, an order by the Court directing him to

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execute a bond with sureties, in order to ensure better management for the future, is legal. (8 W R. 313, Fol; 18 All 227; 5 B L R Hpp. 5): 7 Cal 767, Ref: 26 Mad 166, Fol. 2 Mad 197 Fol. 14 Mad 103. Fol) **Mahomed Athar v. Ramjan Khan. 34 Cal 587.**

51—S 14—Suit of declaration maintainable when ancillary to suit for removal.

In a suit under the Religious Endowments Act, a prayer can be made that the property be declared to be that of the institution and that a mortgage over it be declared not binding on it, if such prayer is ancillary to the claim for the removal of the manager. **Muhammad Jafar v Muhammad Ibrahim, 24 Mad 243.**

52—Ss. 14 and 18—Suit for declaration that plaintiff is to be appointed manager in preference to defendants not maintainable—Misfeasance or breach of trust not alleged—Application for leave to institute suit.

A suit for a declaration that the plaintiff is a more eligible person than the defendants to be appointed manager of a shrine in which no misfeasance or breach of trust or neglect of duty is alleged against the trusrees appointed under the Religious Endowments Act, is not maintainable under s. 14 of that Act. *Held*, also, that a preliminary application to the District Judge for leave to institute the suit was necessary under s. 18 of the Act. **Tajammul Husain v Fazal Rasul 4 A L J 774=A W N 1907, 287.**

53—Ss. 14 and 18-Civ, Pro. Code, s. 539—Removal of manager of a religious institution—Power of Temple Committee—Sanction.-Where there is a duly constituted manager of a religious institution, he cannot be removed from his office except by bringing a Civil suit. And, for such a civil suit, previous sanction is required under ss. 14 and 18 of the act or s. 539. Civ. Pro. Code. It is not open to a self-constituted Committee in the event of a dispute with the manager to take the matter into their own hands, and, if they do so, they run the risk of a successful suit by the ex-manager for re-instatement. **Bansi Dhar v. Chhanga Ram. 7 P. R. 1908=176 P.L.R. 1908 =20 P. W. R. 1908.**

54—Ss. 14 and 18—Sanction, necessity of, for suits under s. 14—C P C. (Act XIV of 1882)—Jurisdiction.

Where from the application under s. 18 of Religious Endowments Act, for sanction to institute a suit, it is clear that the suit is not one against the

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defendants as trustees, managers, or superintendents of a mosque or as members of a committee, as contemplated by s. 14 of the Act. *Held* that the District Judge had no jurisdiction to grant the sanction. **Amin Miran Sahib v. Medan Hussain Sahib. 5 M L T 209,**

55—Ss. 14 and 18—Suit for removal of a trustee—Civ. Pro. Code (Act XIV of 1882), s 539—Suit for appointment of a trustee—Leave of Court—Plaintiffs not trustees cannot claim possession.

A suit for the removal of a trustee of a mosque under the authority of s 14 of the Religious Endowments Act may be instituted with the leave of the Court obtained under s. 18 of the Act. But a suit for the appointment of a new trustee by the Court does not lie without obtaining the requisite leave under s. 539 of the Code of 1882. Where the plaintiffs in a suit for the removal of a trustee are not trustees themselves and therefore, are not entitled to possession of the trust property, they are entitled to sue for removal of the trustee without asking for possession themselves. **Ghulam Ahmed v. Shah Mahomed Usuf, 9 Ind Cas 168=9 M L T 301=21 M L J 450**

56—Ss 14, 18—Breach of trust by managing member of Committee—Appeal.

The managing member of a Committee appointed for the management of a religious endowment under Act XX of 1863 paid out of the trust funds a sum of Rs. 132 for the law expenses of himself and another in certain proceedings which resulted in the election of a certain person in place of a deceased member, being declared invalid and set aside, and for so doing he obtained the sanction of himself, the person whose election was *sub judice*, and another. He also paid out of the trust-funds another sum, part of which was spent in presenting, to the High Court, an appeal, which did not lie, against an order passed under s, 10 of the Act, and, acting as managing member, he passed an order sanctioning such payment. *Held* that these acts were obviously *ultra vires* of the managing member, s. 18 of the Act showing that it was for the Court to decide whether costs or any portion of them, might be paid out of the trust-funds. and that the managing member had committed malfeasance, breach of trust, and neglect of duty. The decision of the Privy Council (referred to in 14 I. A. 160) does not apply to a suit under s. 14 of Act XX of 1863 terminating in

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a decree. **Farid-uddin v. Wilayat Husain A W N 1889.168**

57—Ss. 14, 22—Applicability of Act to Central Provinces——Right of worshipper to sue for breach of trust relating to a temple.

The provisions of the Act, except s. 22, do not apply to the Central Provinces. Thus, though a suit under s. 14 of the Act is not maintainable in the Central Provinces, a worshipper has, apart from the provisions of the Act, a right to sue for a breach of trust relating to the funds or property of a temple. 3 Bom 27; 8 Bom 432 Fol

Jaiwanti Bai v. Nagridass 3 C P L R 11.

58—Ss 14 and 18—Reg. XIX of 1810—Religious endowment—Suit to remove manager.—

Held, that Reg. XIX of 1810 was extended to the Punjab by general rules and orders of Government and that Act XX of 1863 is in force in the Punjab; *held*, also that the Court had power to decree removal of the manager of the temple on the plaintiff's suit filed after sanction was given under s. 18, Act XX of 1863, although the sanction was not applied for by all the plaintiffs. **Gokal Ram v. Kahani Ram 6 P L R 1901.**

59—Right to sue for removal of trustees—religious endowment.

S. 14 of Act XX of 1863 is sufficiently wide in its scope, to empower any person interested in any temple, mosque or religious endowment or in the performance of trusts connected thereto, to file a suit against the trusted manager or superintendent or the member of a committee appointed under the Act, for misconduct, and the said section 14 also empowers the Court to remove any trustee The tomb of a reputed saint became a place of pilgrimage and an endowment was made for the maintenance of the shrine and for the performance of certain religious ceremonies. The proprietors and managers of the institution had it as their practice to divide among themselves the residue of the income, to dispose of their own share in any way by way of sale or mortgage. Held that this was a religious institution within the meaning of Act XX of 1863. The 14th section of the Act empowers the Civil Court to remove trustees for misfeasance etc and it does not recognise any difference in respect of trustees whether hereditary or selected. **Fakurudin Sahib v Ackeni Sahib. 2 Mad 197.**

Notes—Ref: 26 Mad 166: 19 Cal 275; 17 Mad 85. Fol: 34 Cal 587.

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60—Suit to remove trustee of religious endowment though unlawfully appointed.

Act XX of 1863 is applicable to an endowment whereby certain shops have been purchased by subscription and dedicated to the support of the mosque, and is also applicable in respect of a person in possession of the endowed property and professing to act as mutawalli, even though he may not have been lawfully appointed. 7 Cal 767, 18 All 227, ref. to.

Muhammad Sirajul Haq v Imam-ud-din 19 All 104=16 W N 187.

Notes—Dist 9 M L J 105.

61—Act XX of 1863, section 14-Religious endowments—Injunction against Mohunt—C. P. C., Act X of 1877, section 30.

Under s 14 of Act XX of 1863 ands 30 of the C. P. C. Act X of 1877, a suit at the instance of the plaintiffs, as worshippers at a temple, to which the former Act applies, and as representing the persons interested in the management of such temple will lie to restrain the Mohunt from wrongfully parting with the custody of the property of the endowment. **Dhurum Singh v Kishen Singh. 7 Cal 767=9 C L R 410.**

62-Trustee of temple His qualifications-Duty of a Committee—Misfeasance.

It is not enjoined by Act XX of 1863 that a trustee of a temple appointed by the committee should be of a particular sect although it is desirable that the trustee must belong to the sect to which the temple belongs. The appointment of a Sivite as a trustee to a Vishnuvite temple cannot be considered an act of misfeasance, neglect, or breach of trust on the part of the committee within the meaning of section 14 of the Act. **Gandavathara v Devanayaga Mudali. 7 Mad 222**

63-Jurisdiction of Civil Court—Endowment-Religious endowments, Application of Act to.

Act XX of 1863 only applies to certain religious trusts and endowments which had been or might come to be under the management of the Government; and s. 14 of that Act, although in its terms it appears to be more general than the earlier sections, applies in fact only to the same religious endowments to which the rest of the Act applies. 3 Cal 863; 2 C L R 121, cited and followed. (see under Endowment(). **Kali Churn Giri v Gulabi. 2 C L R 128.**

64—Suit to recover land on behalf of temple.

Act XX of 1863-(Religious Endowments)-*Contd.*

The provisions of s. 14 of Act XX of 1863 (Religious Endowments Act) do not oust the jurisdiction of the ordinary Courts except in the cases specified therein. A suit for recovery of immoveable property on behalf of a temple, alleging by way of misfeasance and breach of trust that the defendants (the managers of the temple) had forged documents and usurped temple property, without any prayer for the removal of the managers or for damages, or for a decree for specific performance of any act by the managers. is not a suit for which a special jurisdiction is provided by the Act. **Mahalinga Rau v Vencoba Ghosami. 4 Mad 157.**

Notes:—Dist: 24 Mad 243.

65-S. 41—Trustee-Voluntary contributions—Festivals—The right of the trustee to reject contributions—C P C S. 11.

Where it has been customary for the worshippers to offer, and for the trustee of the temple to receive, voluntary contributions for the due performance of certain ceremonial observances, it is not open to the trustee to reject the offered contributions and refuse to perform the ceremonies at his whim and pleasure.

Per *Subrahmania Aiyar* J-Even though there is no custom, if voluntary contributions are offered for the benefit of the temple and for purposes not inconsistent with the usage of the institution, the trustee is bound to receive them. If he refuses to do so unreasonably or with a wrong motive, the persons interested in the temple may bring a suit to compel the trustee to receive and to apply them for the purposes for which they are offered. **Elayalwar Reddiar v Namberumal Chettiar. 23 Mad 298=10 M L J 86.**

Notes—Ref: 15 M L J 458; 17 M L J 1; 30 Mad 158.

66.—Trustee, manager, or superintendent of mosque—Application of Act.

The words "trustee, manager or suprintendent of a mosque," etc., mentioned in Act XX of 1863 mean the trustee, manager, or superintendent of a mosque, etc, to which the provisions of the Act are applicable, not the trustee, etc., of any mosque. And such persons are those to whom the provisions of Regulation XIX of 1810 were applicable. The mosques etc., to which the provisions of that Regulation were applicable, were mosques for the support of which endowments had been granted in land by the Government of the country or by individuals; and the mosques, etc., to which the provisions of Act XX of 1863 apply are, not any mosques etc., but any mosques for the support of which endowments in land have been made by the Government or private individuals. **Jan Ali v Ram Nath Mundal. 9 C L R 433=8 Cal 32.**

Notes—Diss 7 M L J 281; 7 All 178 F B Disapd. 23 Mad 28. Appl 12 Mad 157. Fol 9 Cal 604. Dist 24 Cal 418. Ref 20 Cal 810 17 Mad 95; 15 Bom 612; 21 Bom 48; 24 Bom 170; 1 Bom L R 649; 2 C L J 46; 460; 33 Cal 905=10 C W N 867.

67-Act XX of 1863 s.14-Muth, management of -Suit against Superintendent of Temple-Endowment, suit in respect of—Committee of management under Act XX of 1863, suit by—Jurisdiction—Sanction of District Judge.

A suit by the members of a committee of management of a temple for an injunction to restrain a superintendent of the temple from exercising any authority over the temple will lie in the Court of the Subordinate Judge without sanction obtained from the District Judge although the temple be an endowment under act XX of 1863.

68-Per curiam:-S. 14 of that act is an enabling section intended to allow suits to be brought by any person interested in an endowment against the members of the committee of management themselves or any of those who are engaged in managing or superintending the affairs of the endowment, but it is not intended to take from the committee the power which would be inherent in them of their own authority to bring a suit in the ordinary Court against the manager in respect of monies misappropriated. **Pudmalav Roy v. Ram Gopal Chatterjee. 9 Cal 133=11 C L R 333.**

69-Suit by a trustee against ex-trustee. S. 14 of Act XX of 1863 does not include a suit to recover property by trustees against ex-trustees who are dismissed from office by temple committee.

Verasami Nayadu v Subha Ram. 6 Mad 54.

Notes:—Ref 22 Mad 481; 11 Mad 274: 22 Mad 225; 31 Cal 519; 8 C W N 500.

70—Hereditary trusteeship—Suspension from trusteeship & right of puja—Maintenance in office on certain conditions.

A suit was brought by certain dikshadars or hereditary trustees of the Chidambaram Temple against others (trustees) praying that the latter should be removed from their office & that a decree for money should be passed against them & then favour, inasmuch as the defendants

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were jointly as custodians of some temple property, guilty of misconduct with respect to it, & had obstructed the repairs of certain shrines. The District Judge passed the money decree asked for & also decreed that some of the defendants should be suspended from their office & from their right of Puja for an undefined period.

Held—that the admission that the trusteeship was hereditary in certain families did not come in the way of the operation of Act XX of 1863, & that the District Judge had jurisdiction under the Act XX of 1863 to deprive the defendants of the right of Puja

Held also that considering the evidence, that the defendants quite deserved the punishment that was inflicted on them. Decreed that the defendants be reinstalled in their office on condition that they file an undertaking with two sureties that they would give back temple property that was missing & then they would abide by the decision of the majority of Dikshadars as to the management of temple affairs &c.

Natesa v Ganapati. 14 Mad 103.

Notes.—*Fol:* 34 Cal 587.

71.—Suit to carry out endowment.

In a suit by the mutwalli of a large Mahomedan establishment acting on behalf of the Mahomedans of the neighbourhood, to secure the performance of trusts of a deed of appropriation by a Mahomedan, the plaintiff was held, with reference to the words o ss 14 and 15, Act XX of 1863, to be a person interested in the preservation of the trust, and a proper person to bring the suit. He was not required under those sections to have any interest in the trust, direct or immediate, or any share in the management of the property. **Doyal Chund Mullick v. Keramut Ali 12 W R 382.**

72-Religious Institution-Applicability of Act XX of 1863—Madras Regulation VII of 1817.

A suit was brought to displace the trustees of a Hindu temple, with the permission of the District Court under Act XX of 1863—It did not appear that the trustees were nominated by or subject to the confirmation of, the Government or any public officer. *Held*, that as long as it is not proved that the institution comes under Madras Regulation VII of 1817, Act XX of 1863 is not applicable. **Muthu v. Gangathara 17 Mad 95.**

Act XX of 1863-(Religious Endowments)-*Contd.*

Notes:—Ref: 18 All 227. Ex: 26 Mad 166.

73-Madras Regulation VII of 1817—Joinder of purchasers in a suit against trustee.

A temple having been endowed with immoveable property after the passing of Madras Regulation VII of 1817 and before the Religious Endowments Act (XX of 1863), and the trustee having without authority sold the same, a suit was instituted under Act XX of 1863 against the trustee and the purchasers of the property, to annul the sales and to declare the right of the temple thereto:—*Held*, (1) that a transferee of trust property under a transacion which amounts to a breach of trust on the part of the trustee of the institution, cannot be proceeded against under the provisions of the Religious Endowments Act, 1863; and (2) that the trustee of a public religious institution can be sued under the provisions of the Religious Endowments Act, 1863, notwithstanding the fact that the institution came into existence after Regulation VII of 1817 was passed. **Sivayya v. Rami Reddi 22 Mad 223.**

Notes—Ref; 24 Mad 243: 26 Mad 166; 31 Mad 212; 18 M L J 205,

74 Endowment for family idol—Suit for the removal of shebaits for their office—Arbitration—Bengal Regulation XIX of 1810—Act XX of 1863 is not applicable to an endowment which is not a public one, but which is made for the benefit of an ancestral famiy idol. Two plaintiffs who were members of a Hindu family, applied for and obtained leave to institute a suit against the defendants (in their presence). The suit was for the removal of the defendants from their office as shebaits of a certain idol, on the ground of their misconduct. The plaint alleged that as all the Hindus had a common right of worshipping the idol, the endowment was a a public one. This statement was contradicted by the defendants. After the framing of the issues, the lower Court by an order under S. 16 of the Act, referred some of them to arbitration. The defendants contended and objected to the reference on the ground that the Act was not applicable as the endowment was not a public one. The arbitrators made an award finding that the endowment was not a public one, the idol being the ancestral family idol of the parties to the suit. Certain definite rules were

Act XX of 1863-(Religious Endowments)-*Contd.*

also laid down in the award by which the Sheva was to be conducted and repairs to the temple made. The Lower Court passed a decree on the award which declared that the idol was the ancestral idol of the parties and directed that the defendants should perform the Sheva in a certain manner and should execute certain repairs to the temple within six months. The decree further declared that on the default of the party to act as directed, any member of the family should be able to bring a suit for the appointment of a manager. The defendant appealed against this decree, and contended that the act did not apply to the case on the finding of facts as to the endowment not being a public one that the compulsory reference to arbitration was alleged and void, and that the decree was unauthorised by the terms of S 14 of the Act. *Held*, that on the facts as found by the arbitrators, Act XX of 1863 was inapplicable to the case and that the compulsory reference to arbitration and the decree made thereon were illegal and void. Held further that the decree itself was bad on the ground that it was not one coming within the scope of S 14 of the Act. **Protap Chandra Misser v Brojonath Misser 19 Cal 275**

Notes—Ref 18 All 227.

75-Suspension and dismissal of trustee of a temple—*Powers of temple committee.*—The plaintiff was appointed to the office of trustee of a Hindu temple under Religious Endowments Act, 1863, s. 3, by the temple committee constituted under that Act. Subsequently the committee, having received certain complaints against him, suspended him from office pending inquiry without calling on him for an explanation. They alleged as the grounds of his suspension that he had caused loss of property and money to the temple, and that he had conducted things in the temple contrary to custom so as to cause a disturbance of the peace. The trustee refused to acquiesce in the order of suspension and to give up certain records, etc, which he was by that order required to deliver, and denied the authority of the committee as asserted by them. Shortly afterwards the committee dismissed him. The plaintiff, denying that his suspension and dismissal were legal, brought two suits against the members of the committee, the first for damages for the suspension, and the second for an injunction to restrain the defendants from interfering with the discharge of his duties as trustee. Both of these suits were dismissed, and the plaintiff preferred appeals to the High Court in the appeal relating to the claim for an injunction, it was found that no misconduct had been proved against the plaintiff previous to the order of suspension *Held* by Shephard and Davies, jj: that a trustee in the position of the plaintiff cannot be dismissed from office except for good cause shown, and that his conduct subsequent to the order of suspension did not amount to such good cause. In the appeal relating to damages:—*Held* by Shephard J. that the order of suspension was illegal, and that, under the circumstances the plaintiff was entitled to substantial damages. *Held* by Davies J (finding that the committee had proceeded in the *bona fide* belief that they were acting for the good of the temple in suspending the plaintiff pending inquiry), that the order of suspension was not illegal, and that the suit was rightly dismissed. Owing to the difference of opinion between the two judges, the last-mentioned appeal was referred to the Chief Justice under Civil Procedure Code, s 575, and was heard by him sitting with the two other Judges:—*Held* by Collins, C. J and Shephard, J. (Davies, J; diss.) that the order of suspension was illegal, and the plaintiff was entitled to substantial damages. *Per* Collins, C. J.—The power of suspension by the committee is, in my judgment, the same as the power of dismissal. The committee, having made due inquiry and having called on the trustee for an explanation, may suspend for good and sufficient cause, but not otherwise. **Seshadri Ayyangar v. Nataraja Ayyar. 21 Mad 179.**

Notes—Ref: 30 Bom 508=8 Bom L R 407; 6 Bom L R 131; 230. Fol: 29 Mad 534=16 M L J 435=1 M L T 127; 9 C W N 32.

75A S. 16—Suit to remove trustee-Reference by Court of entire suit to arbitrator—Legality of reference.

In a suit under s. 14 of the Religious Endowments Act to remove a trustee, the Court referred the whole suit to an arbitrator. The arbitrator prepared a scheme for the management of the temple concerned and the Court accepted that scheme and appointed trustees in accordance with it. *Held* that, under s. 16 of the Religious Endowments Act, it was open to the Judge to refer any matter in difference in the suit for decision by an arbitrator, but it was not open

Act XX of 1863-(Religious Endowments)-*Contd.*

to him to refer the whole suit for decision to an arbitrator as he had done in the case. Obiter: A District Judge has no power to prepare a scheme for the management of a temple under the provisions of the Religious Endowments Act.

Karedla Vizayaraghava Perumalayya Naidu v. Vemavarapu Sitaramayya 26 Mad 361

76-S.18—Leave to sue-Public and private endowments—Reg XIX of 1810-Jurisdiction of Civil Court—Suit to remove mutwalli.

A, a Mahomedan lady, executed a wakfnama purporting to dedicate the whole of her property to an imambara in her house, for the purpose of perpetuating various Shiah ceremonies. By the wakfnama she constituted herself joint-mutwalli with one B, and caused the names of herself and B as mutwallis to be substituted in the Collector register for her own name as owner. On the death of B, A acted as the sole mutwalli. The wakfnama was publicly registered. But though the property was styled "wakf," and A the mutwalli thereof, in all documents connected with the estate, A all along continued to deal with it as absolute proprietress and the dedication though made in 1885, was never under the control of the Board of Revenue or of local agents. In a suit, which the plaintiffs obtained leave to institute under s 18 of Act XX of 1863, to remove A from the mutwalliship, on the ground of misfeasence—*Held*, the wakfnama, did not constitute a public religious establishment within the meaning of Act XX of 1863, and that, therefore, the Judge below had no authority to give the plaintiffs, under S. 18 leave to sue; and that his decision was consequently *ultra vires*. S 18 of Act XX of 1863 applies only to such religious establishments as were under the control or superintendence of the Board of Revenue or of local agents under Regulation XIX of 1810 and were transferred to trustees or managers under s 4 of the Act.

Delroos Banoo Begum v. Ashgar Ally Khan 15 B L R 167 -23 W R 453.

77-S. 18—Jurisdiction of Court to pass orders under the section after making some enquiry and receiving affidavit from manager—Whether the order is open to revision under s 622 (of the Old C P C.)—

A District Judge would not be acting illegally in the exercise of his discretion, if he passes an order under s 18 of Act XX of 1863 after making some enquiry and receiving an affidavit from the manager in reply to the allegations in the petition presented under the section. There is no authority to support the view that she ought to pass an order under this section on a bare persual of the application for leave to sue. An order under s 18 (Act XX of 1863) is not open to revision under s 622 C P C (Old Code). (10 Mad 98 Fol) **Ramanathan Chettiar v Ananthanaryana Iyer 7 M L T 126=5 Ind Cas 291= 33 Mad 412.**

78.-S. 18—Duty of Court dealing with application for leave to institute a suit —Discretion.—

The granting or withholding of leave to sue upon an application made under s 18 of Act XX of 1863 is not a matter simply dependent upon the discretion of the Court. Where therefore a District Judge dismissed an application under s 18 without determining the question which he was bound to determine under that section, but upon grounds entirely irrelevant to the section, it was held that his order was liable to revision under s 622 of the Code of Civil Procedure

Waris Ali v Amiruddin A W N 1895, 200.

79-S 18—Leave to sue granted without notice to defendant—Validity.—

A plaint was presented under s 14 of the Religious Endowments Act charging that in an enquiry held by the Revenue Department it was found that the defendant had misappropriated certain temple funds and praying for the removal of the defendants from the management of those temples. The District Judge granted leave under s 18 of the Act without giving notice of the application to the defendants. *Held* that the words " on the perusal of the application " in s 18 of the Act clearly indicated that the Judge was not bound to do more. If the application satisfied him he was not bound to give notice thereof to the opposite party and hear them. The sanction granted was valid. (10 Mad 232, 9 Mad 319 7 Mad 222, 11 Mad 148 Ref)

Venkatappayya v Venkatapathi 24 Mad 687.

Notes.—Fol: 24 Mad 685.

80-S.18—Suit against manager—Permission to suit.—

Act XX of 1863 is applicable to the Punjab. A suit with regard to the religious endowment may be brought after obtaining permission under S 18. The circumstances that the application asking permission make no mention of the Act and that all the plaintiffs were not applicants for permis-

Act XX of 1863- Religious Endowments)-*Contd.*

sion to sue are not vital defects. (35 P R 1871, 75 P R 1884 Ref).

Gokal Ram v Kahan Ram, 95 P R 1900.

Notes:—Cons. 7 P R 1908

81—S. 18—C P C 1882, ss 402, 407—Grant of permission to institute suit for removal of trustee—Permissibility of applicant to sue in forma pauperis.—

Where a person has obtained permission to institute a suit under s 18 of the Religious Endowments Act for the removal of the trustee of a temple the provisions of Ch. XXVI, C P C 1882, do not prevent him from being allowed to sue as a pauper. **Gurusami Chetty v Krishnasami Naikar 24 Mad 419.**

82—S. 18—Application for sanction to institute suit—Proof of control of Board of Revenue not necessary.—

An applicant for sanction under s 18 of the Religious Endowments Act to institute a suit need not show that the temple referred to in the petition had been under the management of the Board of Revenue or that its Dharmakaitas had been under its management. Such actual control is not a condition necessary to make the Act applicable. (17 Mad 95 Expl)

Saturluri Seetaramanuja Charyulu v Nanduri Seetapati 26 Mad 166,

Notes:—Fol. 34 Cal 587.

83-S.18-Single application against several trustees—Charges not specific—Sanction on a general petition—Material irregularity—Revision, powers of—Civ Pro Code S 622.

When one application is made against several trustees, the application should clearly set forth the charges and the nature of the charges made against each especially as, under s 18, the Judge is to determine merely on a perusal of the verified petition whether there are sufficient *prima facie* grounds against each of the trustees and the Judge would be acting with material irregularity in the exercise of his jurisdiction in according sanction based on a general petition and if such irregularity should materially prejudice the trustees the High Court can exercise its powers of revision under s 622 C P C and can set aside the sanction. **Chinnathambi Sahib alias Saiyid Gulam v Muhinddin Sahib 15 M L J 221.**

84-S. 18—Leave to sue not necessary to sue in High Court for neglect by trustee.

Leave is not required under Sec 18 of Act XX of 1863 to sue a trustee for neglect of duty on the original side of the High Court.

Act XX of 1863-(Religious Endowments)-*Contd.*

Annasami Pillai v Ramakrishna Mudaliar. 11 M L J 1=24 Mad 219.

Notes:—Ref:— 27 Mad 192=13 M L J 341.

85—S.18—Leave to institute suit to remove trustee—Original Civil Jurisdiction of the High Court.

The members of the Tengalai sect of the Hindu community and worshippers of the Sri Parthasaradhi Swami Temple of Triplicane, situated within the local limits of the ordinary original civil civil jurisdiction of the High Court at Madras, brought a suit to remove one of the trustees of the said temple for negligence and breach of trust. *Held*, That no leave under S. 18 of the Religious Endowments Act was necessary for the institution of the suit. 3 Cal 572, followed. **Srinivasa Appanagar v Raghavachariar. 6 M L J 239.**

86-S,18 Grant of leave to sue on application by unverified letter not presented to Court by applicant or pleader—Civil Prodedure Code, Ss. 622, 647—Omission to give notice of application to person intended to be sued.

Application to District Courts under S 18 of Act XX of 1863 for leave to sue should be verified and presented by the applicant or his pleader. A grant of such leave on an unverified application not presented by the applicant or his pleader is a material irregularity within S 622, C P C. Omission to give notice of such application to the person intended to be sued does not *per se* make the leave if given, irregular. **Amdoo Miyan v Muhammad Davud Khan Bahadur 11 M L J 326=24 Mad 684.**

87—S. 18—Leave to bring suit for accounts—Grant of leave—Order, if a decree——Civ. Pro. Code (Act XIV of 1882), s 2—Appeal.

Act XX of 1863 (Religious Endowments Act) makes no provision for appeal, and an order granting leave to bring a suit, for the purpose of having the accounts of a certain religious endowment, not being a "decree" within the meaning of s 2 of the Code of Civil Procedure, no appeal lies against such an order. (18 Cal 382, Ref).

Mozaffer Ali v Mirza Hedayet Hossain 5 C L J 641=34 Cal 584.

88—Right of beneficiaries under deed of endowment.

Act XX of 1863, while it empowers persons to sue whose right to sue. independently of the Act,

Act XX of 1863-(Religious Endowments)-*Contd.*

may be doubtful, does not deprive persons claiming to be beneficiaries under a deed of endowment of the right to sue, which they have independently of the Act. nor does it impose on them the necessity of obtaining the sanction to institute the suit required by s. 18 of the Act. **Kulab Hossein v. Mehrum Beebee 4 N W 155.**

89-Suit to have trusts of endowment carried out.

An appropriator who sues on the ground that the trust created. so far as it related to the appointment of mutwallis. had never been acted upon and that the original rights of the appropriator remain, is at liberty to bring such a suit without leave of the Court under s. 18 of Act XX of 1863. **Hidaitoonnissa v Afzul Hosscin 2 N W 420.**

Act XX of 1863 s. 18—See—s. 18 Superintendence of High Court C P C S 115

90-S.18-Leave to sue-Notice to trustee-Petition Mahazarnama Civil Procedure Code, ss 622 and 647-Material irregularity. Before giving leave to institute a suit under sec 18 of the Religious Endowments Act XX of 1863 it is not necessary that notice should be given to the trustee against whom it is proposed to institute the suit.

Leave to sue cannot be granted without a formal petition properly signed and verified being presented to the Court by the petitioner in person or by pleader and to grant such leave on the mere letter of Mahazarnama signed by a large number of people is irregular; leave so granted will be set aside on revision under section 622 Civil Procedure Code. **Amdoo Miyan v Muhammad Davud Khan Bahadur 11 M L J 326=24 Mad 685**

91—S 18—Where suit sanctioned under S 18, leave to sue in forma pauperis C P C S 407. Where a person got leave under s 18 leave can be given to sue in *forma pauperis* and Chapter XXVI C P C does not preclude him from suing *in forma pauperis*. **GurusamiChetti v Krishnasama Naicker 21 Mad 419.**

92—S 18-Leave to sue-Sanction—Condition precedent. It is not a condition precedent that for the exercise of the jurisdiction to grant sanction under s 18 of Act XX of 1863 that the Board of Revenue should have had management of the temple or that its Dharmakartas should have been under the Board's control. 17 Mad 95 discussed 2 Mad 197; 23 Mad 223 ref to. **Sathulini Seetaramanuja Charyulu v Nanduri Seetapati 26 Mad 166.**

Notes:—Fol 34 Cal 587.

93—S. 18—Sanction to sue—Prescription—Trustee—Power to appoint successor — Acquisition of the right by prescription—Removal of old

Act XX of 1863-(Religious Endowments)-*Contd.*

temple—Funds—Alienation of trustee validity of.

Where the government acquire the land on which a temple stands and award compensation to the trustee, the fact that in building a new temple the trustee largely supplements such funds by contributions which he raises does not make either him or the contributors the founder of the new temple.

Semble:—It may be otherwise if the temple had gone to ruin and a person out of charity erected a new temple even though the materials of the ruined temple had been used in the erection of the new.

Not only the right to be a trustee for life, but the right to be such trustee with power to appoint his own successor, may be acquired by prescription.

Where L. the hereditary trustee of a temple, devised the trusteeship to his sister A, and authorized her to appoint successor to herself and A devised the trusteeship to V with a similar right of appointment and V appointed to defendant as his successor in office.—

Held, that the right of appointing a successor was part of the title acquired by prescription and that the defendant was, therefore, properly appointed trustee.

Held, that leave was not required under S. 18 of Act XX of 1863 to sue a trustee for neglect of duty on the original side of the High Court.

Semble—The alienation of a trust by a trustee by prescription to one in the line of trustees ordained or contemplated by the founder is not, in the absence of any corrupt inducement or prejudice to the interests of the temple, within the prohibition of Rajah Vurmah v. Rani Vurmah 1 L R 1 Mad 235. **Annasami Pillai v. Ramakrishna Mudaliar. 11 M L J 1=24 Mad 219.**

Notes:—Ref: 27 Mad 192; 13 M L J 341.

94-Sanction for suit—Suit brought different in nature from the one sanctioned—Plaint rejected.

A suit was brought under the Religious Endowments Act (Act XX of 1863 s. 14) by two persons being worshippers in a Hindu temple, against persons as managers or trustees of the temple alleging various acts of misfeasance, & praying for their removal from office. No claim was made for damages, though the order sanctioning the suit sanctioned such a claim.

Held that the suit actually instituted was not the one for the institution of which sanction was accorded, the plaint therefore was properly rejected. **Srinivasa v Venkata. 11 Mad 148.**

Notes:—Doub; 22 Mad 223. Ref: 21 Bom 257.

Act XX of 1863 (Religious Endowments)-*Contd.*

95-Order of Civil Court as to title Effect of—Semble—That an order of the Civil Court under s 18 of Act XX of 1863 refusing leave to institute a suit and deciding that the temple was governed by a hereditary dharmakarta and therefore within s 3 of the Act was not conclusive upon the question of title between the parties. **Venkatasa Naikar v Srinivassa Chariyar. Srinivassa Chariyar v Venkatasa Naikar 4 M H C 410.**

96—Costs—Suit for benefit of a trust.

Where a suit under Act XX of 1863 is for the benefit of a trust, and no party to the suit is in fault,—e.g., where the right to the succession is disputed, and it is necessary to secure the property,—the Court may order the costs to be paid out of the estate; but where a person is in fault, no such order ought to be made. **Sookram Doss v Nund Kishore Doss. 22 W R 21.**

97—Affirmed by the Privy Council that the decision of the High Court so far as it held that the endowment created by the document was not of such a public character as would sustain a suit under Act XX of 1863, not dissented from.

Ashgar Ali v. Delroos Banoo Begum 3 Calc., 324.

Notes—Appl: 8 All 267; 14 All 8. Dist: 18 Mad 257; 2 M L J 235. Ref: 19 Cal 275: 3 Mad 215; 12 Mad 380: 3 Bom L R 658; 18 All 227; 2 A L J 436.

Act XXI of 1863.

See Cases under:—

(1) Recorders Act.

(2) Small Cause Courts, Rangoon.

(3) Superintendent of High Court—Charter Act S. 15.

Act XXIII of 1863.

See Cases under:—

Waste Lands.

Act XXIII of 1863 (Waste—Lands Claims)

Notes; Rep in Pt: Act IX of 1871; Declared in force—Throughout B I except as regards the Scheduled Districts Act, XV of 1874, s. 3; in the Arakan Hill District Reg. IX of 1874. s 3.

Act XXIII of 1863 s. 5.

See Valuation of suit—Waste Lands suit for.

Act II of 1864.

See (1) Local Government, Power of.

(2) Transfer of Civil case, Letters Patent, High Courts, cl; 13.

Act-*Contd.*

Act III of 1864 (Foreigners.)

Notes:—[Rep in pt., Act XII of 1876; s. 24 Am, Act XII of 1891; Declared in force—throughout B.I., except as regards the Scheduled Districts Act XV of 1874, s. 3; in the Sonthal Parganas, Reg. III of 1872, s. 3, as amended by Reg. III of 1899, s. 3; in the Angul District, Reg. I of 1894, s. 3; in the Arakan Hill District, Reg. IX of 1874, s. 3; in Upper Burma (except the Shan States), Act XIII of 1898, s. 4; in British Baluchistan, Reg. I of 1890, s. 3.]

Act III of 1864.

See (1) Whipping.

(2) Foreigners.

Act XI of 1864 (Native Law Officers.)

Notes:—[Rep., Act VIII of 1868.

Act XI of 1864.

See (1) Mahomedan Law—Endowment.

(2) Mahomedan Law—Kazi.

Act XIII of 1864.

See Contract—Breach of Contract.

Act XIII of 1864 (Emigration of Native Labourers.)

Notes:—[Rep., Act VII of 1871.]

Act XVI of 1864 (Registration of Assurances).

See Registration Acts.

Act XVI of 1864.

See Registration Acts.

Act XVII of 1864 (Official Trustees)

Notes:—[Rep in Pt., Act XIV of 1870: Act XII of 1876; Act XII of 1891: s. 34 (3) (as to Lower Burma) Rep., Act VI of 1900, s. 48, Am., Act II of 1890, ss. 1 to 7; Act V of 1902.]

Act XVII of 1864.

See Official Trustee's Act.

Act XX of 1864..

See (1) Costs, Bombay Minors' Act.

(2) Guardian-Duties and Powers of Guardians.

(3) Hindu Law —Partition—Right to Account on Partition.

(4) Minor—Cases under Bombay Minors' Act, 1864.

Act XX of 1864 ss. 11 and 15.

See Collector.

Act-*Contd.*

Act XXII of 1864.

See (1) Cantonments.
(2) Excise.

Act XXVI of 1864 (Small Cause Courts presidency-towns.)

See Presidency Small Cause Courts Acts.

Act XXVI of 1864.

See Cases under Small Cause Court, Presidency Towns.

Act XXVI of 1864 s. 9.

See (1)Contract Act, s. 27.
(2) Costs—Small Cause Court Suits.

Act III of 1865 (Carriers)

Notes:—Rep in Pt., Act IX of 1890; Am. Act X of 1899, s.2; Rep. (as to carriers by Rail) Act IV of 1879; Declared in force—throughout B. L., except as regards the Scheduled Districts, Act XV of 1874, s. 3; in the Sonthal Parganas, Reg III of 1872, s. 3. as amended by Reg, III of 1899, s. 3; in the Arakan Hill District (with a modification), Reg. IX of 1874. s. 3; in Upper Burma (except the Shan States), Act XIII of 1898, s. 4.

Act III of 1865.

See (1) Carriers Act.
(2) Carriers.

Act V of 1865.

See Marriage Act (Christian). 1865.

Act VII of 1865 (Government Forests)

Notes:—Rep. Act XII of 1891.

Act VII of 1865.

See Forests Act, 1865.

Act VIII of 1865 (Validating Imprisonment of certain persons)

Notes:—Rep., Act V of 1871.

Act X of 1865.

See Succession Act.

Act XI of 1865.

See (1) Small Cause Court, Mofussil.
(2) Small Cause Court, Rangoon.

Act-*Contd.*

(3) Special or Second Appeal—Small Cause Court Suits.

S. 21—Process for enforcement of decree—Act XI of 1865.

An application by a decree holder for money paid into Court by the judgment-debtor is "a process for enforcement of the decree" within the meaning of s. 21 of Act XI of 1865.
Amolak Ram v The Bombay Baroda and Central India Railway Company.
8 W N 59.

Act XV of 1865.

See (1) High Court, Jurisdiction of—Bombay—Civil.
(2) Parsi Marriage and Divorce.
(3) Cases under Parsis.
(4) Restitution of Conjugal Rights.

Act XV of 1865 (Parsi Marriage & Divorce.)

Notes:—Rep in Pt., Act VII of 1870; Act XIV of 1870; Act XII of 1876; Am., Act VI of 1886, s. 31; Declared in force throughout B.L., except as regards the Scheduled Districts, Act XV of 1874, s. 3.

Act XIX of 1865.

See (1) Judicial Assistants.
(2) Jurisdiction of Settlement Court.
(3) Review of Judgment.

Act XX of 1865.

See (1) Costs—Summary Suit for Possession.
(2) Mooktear.
(3) Pleader.

Act XX of 1865 (Pleaders. Mukhtears and Revenue Agents.)

Notes:—Rep., Act XVIII of 1879.

Act XXI of 1865.

See Cases under Parsis.

Act XXI of 1865 (Parsi Intestate Succession

Notes:—Declared in force—throughout B. L., except as regards the Scheduled Districts, Act XV of 1874, s. 3; in the Arakan Hill District, Reg. IX of 1874, s. 3; in Upper Burma (except the Shan States), Act XIII of 1898 s. 4.

Act XXVII of 1865.

See Review of Judgment.

Act-*Contd.*

Act XXVIII of 1865.

See Insolvency—Cases under Act XXVIII of 1865.

Act IV of 1866

See (1) Appeal.
(2) Arbitration
(3) Small Cause Court.
(4) Review.
(5) Revision.

Act V of 1866 (Policies of Insurance Marine and Fire Assignment)

Notes:—Rep in Pt., Act IX of 1872; Act X of 1877; Act XII of 1879; s. 99; Act XXVI of 1881; Residue Rep., Act II of 1900, s. 5.]

Act X of 1866 (Companies)

Notes:—Rep., Act VI of 1882.

Act X of 1866.

See:—Cases under Company.

Act XII of 1866 (Private Water—Courses)

Notes:—Rep. Act XII of 1876.

Act XIII of 1866.

See Oudh Redemption Act.

Act XIV of 1866 (Post Office)

Notes:—Rep., Act VI of 1898.

Act XX of 1866.

See (1) Registration Act, 1866.
(2) Registration Act, 1877.

Act XXI of 1866.

See (1) Hindu Law.
(2) Native Convert's Marriage Dissolution Act.
(3) Divorce.

Act XXI of 1866 (Native Converts' Marriage Dissolution.)

Notes:—Rep in Pt., Act VII of 1870; Act XVI of 1874; Act XII of 1891; Declared in force throughout B. I., except as regards the Scheduled Districts, Act XV of 1874, s. 3; in the Sonthal Parganas, Reg III of 1872, s. 3, as amended by Reg III of 1899, s. 3; in the Arakan Hill District, Reg, IX of 1874, s. 3.]

Act-*Contd.*

Act XXV of 1866 (Unclaimed Deposit)

Notes:—[Rep in pt., Act XXIV of 1867; Act XVI of 1874; Act XII of 1876; Act XII of 1891; Supplemented, Act V of 1870.]

Act XXVI of 1866

See (1) Oudh Estates Act.
(2) Oudh Sub-Settlement Act.

Act XXVII of 1866 (Trustees).

Notes:—Rep. in Pt. Act XIV of 1870; Act XVI of 1874; (Locally), Act IV of 1882; Am. (In Lower Burma) Act VI of 1900, s. 47; s. 35 Ext. Act III of 1909, s. 119 (From 1st January 1910).

Act XXVIII of 1866 (Trustees' and Mortgagee's Powers).

Notes:—(Rep. in Pt. act XVI of 1874; Act VII of 1882, s. 6; (Locally) Act II of 1882; Am. (in lower Burma), Act VI of 1900, s. 47; declared in force throughout B. I., Except as regards the Scheduled Districts, Act XV of 1874, s. 3.)

Act XXVIII of 1866.

See (1) Trustees and Mortgagees Act, 1866.
(2) Charitable Trusts 33 Bom 509.

Act III of 1867.

See Cases under gambling.

Act X of 1867 s 1.

See Small Cause Court, Mofussil practice and Procedure reference to High Court.

Act X of 1867 (References by Mufussil Small Cause Courts.

Notes—Rep. Act X of 1877.

Act XII of 1867 (Presidency Jails)

Notes—Rep. Act V of 1871.

Act XV of 1867.

See Municipal Committee.

Act XVIII of 1867:

See Jurisdiction of Civil Court—Rent and Revenue Suits, N. W P

Act-*Contd.*

Act XXIV of 1867.

See (1) Administrator General's Act
(2) Illegitimacy.

Act XXIV of 1867 (Administrator General.

Notes—Rep. Act II of 1874.

Act XXV of 1867.

See (1) Defamation.
(2) Cases under Appeal—Acts—Stamp Act, 1867
(3) Cases under Stamp Act, XXVI of 1867.
(4) Valuation of Suit.

Act XXV of 1867 (Press and Registration of Books)

Notes -(Rep in Pt Act XIV of 1870; Rep. in Pt. and Am—Act X of 1890, Act XII of 1891, Local Govt. empowered to annul Declarations made under and s 15 ext, Act VII of 1908 ss 7, 8, Declared in force—Throughout B I, except as regards the Scheduled Districts, Act XV of 1874, s. 3, in the Sonthal Parganas, Reg. III of 1872, s 3, as amended by Reg. III of 1899, s. 3, in Upper Burma (Except the Shan States), Act XIII of 1898, s. 4,

Act XXVI of 1867 (Stamp-duties)

Notes—Rep. Act X of 1877.

Act XXVII of 1867 (Deputy Commissioner)

Notes—Rep—(in Oudh), Act XXXII of 1871; (in Punjab), Act XVII of 1877, (in Central provinces and the Sambalpur district), Act XVI of 1885, (in Jhansi Division), Act XX of 1890, s. 5 (2)).

Act XXIX of 1867.

See Income and License Tax.

Act I of 1868

See (1) Limitation Act (1908) Art 144.
(2) Mortgage
(3) (Punjab) Tenancy Act (XXVIII of 1868).

Act I of 1868

See General Clauses Act (I of 1868).

Act I of 1868

See Notice.

Act-*Contd.*

Act I of 1868 (General Clauses).

Notes—Act X of 1897,

Act VI of 1868 (N W P Municipal Improvement Act).

See N W P and Oudh Municipalities Act, 1883, ss. 69, 71.

Act VII of 1868.

See (1) Appeal
(2) Review of Judgment.

Act VIII of 1868 s 1

See Statutes, Construction of

Act IX of 1868

See Tax.

Act XIII of 1868.

See Right of Suit—King of Oude, suit against.

Act XIV of 1868.

See Prostitutes.

Act XVI, of 1868 s 9

See (1) Appeal Orders.
(2) Ministerial Officers, Appointment of.

Act XVI of 1868 s.12.

See Munsif, Jurisdiction of

Act XVI of 1868 s 18.

See Bengal Civil Courts Act, 1871, s. 22

Act XVI of 1868 s. 19

See Execution of Decree—Transfer of Decree for Execution.

Act XIX of 1868.

See Oude Rent Act

Act XXVIII of 1868.

See (1) Custom (Punjab) Alienation of Occupancy Rights.
(2) Right of occupancy.
(3) Punjab Tenancy Act, 1868.
(4) Punjab Tenancy Act, 1887.

Act XXVIII of 1868.

See Punjab Tenancy Act (XXVIII of 1868.

Act I of 1869.

See Oudh Estates Act

Act IV of 1869

Notes—(Rep in Pt, Act VII of 1870; Act XII of 1879 (in Punjab) Act XVIII of 1884;

Act-*Contd.*

(in the Centeral Provinces and the district of Sambalpur), Act IV of 1901, s. 8; AM., (in Lower Burma), Act XI of 1889, s. 97 (Rep. by Act VI of 1900). and Act VI of 1900, s. 47: declared in force—in the Sonthal Parganas, Reg. III of 1872, s. 3; as amended by Reg III of 1899,s. 3; in the Angul District, Reg, I of 1894, s. 3, in the Arakan Hill District (except so much of sections 47 and and 49 as relates to Stamps), Reg. IX of 1874, s. 3, in Upper Burma (except the Shan States), Act XIII of 1898, s. 4; in British Baluchistan, Reg. I of 1890, s. 3.)

Act IV of 1869.

See Divorce Act.

Act V of 1869 (Articles of war).

Notes—Rep. in Pt. Act I of 1901; Art. 170 (Heading) Am., Act XII of 1891; Rep. in Pt., and AM., Act XII of 1894; art. 4 (2) AM., act I of 1900. art. 4 (1) AM., Act IX of 1901;art 89 A, AM. art 91 Rep in Pt , App III Rep , act XIII of 1904, arts 4, 161 AM. Act V of 1905, declared in force—in the Sonthal Parganas Reg. III of 1872, s 3, as amended by Reg III of 1899 s. 3 in the Angul District, Reg 1 of 1894, s 3; in the Arakan Hill District (except the first three clauses of part 1, para (c)) Reg. IX of 1874 s 3 in Upper Burma (except the Shan States). Act XIII of 1898 s. 4 in British Baluchistan Reg. 1 of 1890 s 3)

Act V of 1869.

See (1) Arrest.

(2) Execution of decree.

Act IX of 1869.

See Estoppel—Statements and Pleadings.

Act XIV of 1869.

See Bombay Civil Courts Act.

Act XVI of 1869.

See Bhootan Duars act.

Act XVIII of 1869.

See Stamp act 1869.

Act XXII of 1869 (Garo Hills.)

Notes:—Rep: Act XIV of 1874.

Act VII of 1870.

See (1) Court Fees Act.

(2) Hindu Wills Act, 1870.

Act X of 1870 (Land Acquisition)

See Compensation.

Notes—Rep act 1 of 1894.

C. C 25

Act-*Contd.*

Act X of 1870.

See Land Acquisition act, 1870.

Act XIV of 1870.

See (1) Limitation Act, (1908) Art 132.

(2) Statute, Construction of.

Act XIV 1870.

1-Procedure of High Court—Act XIV of 1870 (the Repealing Act 1870) did not affect the procedure of the High Court. **Ramchunder v Chooneelal. 12 B L R 35.**

Act XXI of 1870 (Hindu Wills)

See (1) Hindu Wills Act.

(2) Probate and Administration Act

Act XXIII of 1870 (Coinage)

Notes—Rep. Act III of 1906.

Act I of 1871 (Cattle Trespass.)

Notes-[Am; Act 1 of 1891,declared in force-in the Sonthal Parganas, reg. III of 1872, s. 3, as amended by reg. III of 1899, s. 3; in the Angul District, reg. 1 of 1894 s.3; in the Arakan Hill District, reg. Reg IX of 1874, s. 3; in Upper Burma (except the Shan States), Act XIII of 1898, s. 4; in British Baluchistan reg. 1 of 1890, s. 3.]

Act VI of 1871.

See Bengal Civil Courts Act, 1871.

See Pre-emption.

Act VIII of 1871.

See (1) Registration Act, 1871.

(2) Registration Act, 1877.

Act IX of 1871.

See Limitation act, 1871.

Act XV of 1871.

See (1) Broach Taluqdars' Relief Act, 1871.

(2) Jurisdiction of Civil Court—Rent and Revenue Suits—Bombay.

Act XXIII of 1871 (Pensions).

Notes: [Rep in pt. act XII of 1891, Am. (locally) act XXI of 1886: Declared in force—in

Act-*Contd.*

the Sonthal Parganas, reg. 111 of *1872*, s. 3, as Amended by reg. III of 1899. s.3; in the Arakan Hill District (Except ss. 1 and 2 and the Schedule), reg. IX. of 1874, s. 3; in Upper Burma (except the Shan States), act XIII of 1898. s, 4; in British Baluchistan. reg. 1 of 1890. s. 3.

Act XXIII of 1871.

See Pensions act.

Act XXV of 1871.

See Railway act, 1871

Act XXXII 1871. S. 18.

See Appeal to Privy Council—cases in which an appeal lies or not—Appealable orders.

Act XXXIII of 1871.

See Land Revenue Act (XXXIII of 1871.)

Act XXXIII of 1871.

See Punjab land aevenue act, 1871.

1—Act XXXIII of 1871. sections 42 and 43—execution of decree of Civil Court—lien for revenue

There is no lien for revenue, until the revenue is in arrear under Section 42, Act XXXIII of 1871, and attachment has been made under Section 43. Therefore, where a Civil Court attaches in execution of decree the immoveable property of an agriculturist, it is not necessary to arrange first for the payment of the revenue, paying the balance to the judgment-creditor, but the judgent-creditor is entitled to payment in full.—

Comur Deen v. Hashum PR 62 of 1874.

Act XXV of 1871 (Railway Act Amendment Act)

Notes—Rep: Act IV of 1879.

Act I of 1872.

See Evidence Act, 1872.

Act III of 1872 (Sipecial Marriage).

Notes-(Rep in pt act XVI of 1874 Act XII of 1876; Am; Act VI of 1886, s. 29; Declared in Force—in the Sonthal Parganas, Reg. 111 of 1872 s. 3. as amended by Reg. 111 of 1899. s. 3; in the Angul District, reg 1 of 1894, s. 3; in British Baluchistan reg. 1 of 1890, S. 3.]

Act III of 1872 s. 10.

See Hindu Law—inheritance—Divesting of, Exclusion from, and forfeiture of inheritance.

Act-*Contd.*

Act IV of 1872.

See (1) Punjab Custom, inheritance.
(2) Equity.
(3) Excise.
(4) Insolvency.
(5) Jurisdiction.
(6) Limitation Act (1908) s. 16.
(7) Pre-emption.
(8) Sarnal.
(9) Tirni.
(10) Track Law.
(11) Punjab Laws Act (IV of 1872).

Act IV of 1872 (Punjab Law Act)

See cases under appeal Acts.

Act V of 1872.

See Insolvent Act, s. 5.

Act VI of 1872.

See Oaths Act, 1872.

Act VII of 1872 s. 58.

See Advocate.

Act IX of 1872.

See Contract Act.

Act XV of 1872 (Christian Marriage).

Notes:-Rep. in Pt., Act XVI of 1874; Rep. in Pt.and Am., Act XII of 1891. Am., Act VI of 1886. S. 30 cls. (a), (b), (d); Act II of 1891; S, 82 & sch. II, Am , Act I of 1903; declared in force—in the Sonthal Parganas, Reg. III of 1872, S. 3; as amended by Reg. III of 1899, S. 3; in the Arakan Hill District, Reg. IX of 1874, S. 3; in Upper Burma (except the Shan States), Act XIII of 1898, s. 4; in British Baluchistan Reg. 1 of 1890, S. 3.

See Marriage Act, 1872.

Act XXII of 1872.

See (1) Collector.
(2) Right of suit—Fresh suit.

Act III of 1873.

See Madras Civil Courts Act, 1873.

Act IV of 1873 S. 19.

See Limitation.

Act IV of 1873 Ss. 21, 22.

See Municipal Committee.

Act-*Contd.*

Act VIII of 1873.

See Northern India Canal and Drainage Act 1873.

Notes—Rep in Pt Act XII of 1873; Act XVI of 1874; (in Punjab), Act XVI of 1887; Am. Act XII of 1891; Act XVI of 1899; Am in the Peshawar District, in the N. W. Frontier Province and (when notified) in certain other ports of the N W Frontier Province and in part of the Punjab, Reg IV of 1898; declared not to apply to any Canal which is for the time being included under either Sch I or Sch II to the Punjab Minor Canals Act of 1905 (Punjab Act III of 1905),—See S. 2 (3) of that Act.

Act IX of 1873.

See (1) Appeal.
(2) Special or Second Appeal.
(3) Repeal of Act.

Act X of 1873.

See Oaths Act, 1873.

Notes—Rep in pt., Act XII of 1873; Act XII of 1876; s. 7, Expl. (as to Lower Burma) Rep., Act VI of 1900. s. 48; Declared in force—in the Sonthal Parganas, Reg. III of 1872, s. 3, as amended by Reg. III of 1899, s. 3; in the Angul District (with an exception), Reg. I of 1894, s. 3; in the Arakan Hill District (except s. 2 and the Schedule), Reg. IX of 1874, s. 3; in Upper Burma (except the Shan States), Act XIII of 1898, s. 4: in British Baluchistan, Reg. I of 1890, s. 3)

Act XV of 1873.

See North-Western Provinces and Oudh Municipalities Acts.

Act XVII of 1873.

See Nawab Nazim's Debts Act 1873.

Act XVIII of 1873.

See North-Western Provinces Rent Acts.

Act XIX of 1873.

See North-Western Provinces Land Revenue Act.

Act I of 1874

See Collector.

Act II of 1874

See (1) Administrator General's Act, 1874.
(2) Letters of Administration

Act-*Contd.*

Act II of 1874

(Administration General's)

Notes:—Rep in pt. Act I of 1879; S. 68 (3) (As to Lower Burma) Rep., Act VI of 1900, S. 48; Rep. in pt. And Am., Act IX of 1881, and Act V of 1902. Am; Act II of 1890 Ss. 10 to 15 Act XII of 1891, Act VII of 1901 S. 4; Declared in force—In the Sonthal Parganas, Reg III of 1872 S, 3. As amended by Reg. III of 1899 s.3 in the Angul District Reg I of 1894, S. 3 1872, S, 3; in the Arakan Hill District Reg. IX of 1874, s. 3 in Upper Burma (except the Shan States), Act XIII of 1898, S. 4: in British Baluchistan, Reg, I of 1890, S. 3.

Act III of 1874

See Married Woman's Property Act.

Notes—Rep in pt, Act XII of 1876: Act VI of 1888, s. 9, Act XII of 1891; Declared in force—in the Sonthal Parganas Reg. III of 1872, S. 3 as amended; by Reg III of 1899 S, 3, in the Arakan Hill District, Reg IX of 1874, S. 3, in Upper Burma (except the Shan States) Act XIII of 1898 S. 4.

Act VI of 1874

See Cases under Appeal to Privy Council.

Notes:—Rep Act X of 1877.

Act VI of 1874 S. 19

See Execution of Decree—Orders and Decrees of Privy Council.

Act XIV of 1874 Schedules Districts

Notes:——Rep in pt., Act XIX of 1879: Act XIV of 1881, S. 14 Act XXV of 1881; Act VIII of 1883 Act VII of 1885; Act XX of 1890 S. 8 (1) Reg 1 of 1900 Act VI of 1902 rep in pt. and am; Act XII of 1891 Am Act II of 1893; Declared in force—in the Arakan Hill District except S 10: reg IX of 1874 S. 3, as amended by Act XIII of 1898 S. 16; in Upper Burma (except the Shan States Act XIII of 1898 S 4; in British Baluchistan Reg 1 of 1890 S 3; in the Angul District Reg 1 of of 1894, S. 3

See Scheduled District Act

Act XV of 1874.

See Laws Local Extent Act.

Act I of 1875 (Distress),

Notes—Rep: Act XV of 1882,

Act IV of 1875 (Merchant Shipping).

Notes—Rep: Act V of 1883,

Act-*Contd.*

Act IX of 1875 (Majority)

Notes.—[*Am.*, Act VIII of 1890, s. 52; Declared in force—in the Arakan Hill District, Reg IX of 1874, s, 3 as Amended by Act XIII of 1898 s 16; in Upper Burma (except the Shan States), Act XIII of 1898, s. 4.]

See Majority Act.

Act X of 1875 (Advocate—General's Powers.)

Notes:—Rep., Act V of 1898.

Act XII of 1875.

See Ports Act, 1875.

Act XIII of 1875.

See (1) Letters of Administration.
(2) Probate—Power of High Court to Grant, and form of.

Act XIII of 1875 s. 6.

See Court Fees Act, s, 19D.

Act XIV of 1875.

See Judicial Official.

Act XIV of 1875 s. 3.

See Civil Procedure Code (Act XIV of 1882), S. 483,

[Act XVII of 1875.

See Burma Civil Courts Act.

Act XVIII of 1875 (Indian Law Reports.)]

Notes:—Rep. in pt. Act XII of 1876.

Act XX of 1875.

See Pre-emption.

Act VI of 1876.

See Chota Nagpore Encumbered Estates Act.

Act VIII of 1876 (Native Passenger Ships.)

Notes:—Rep., Act X of 1877.

Act X of 1876.

See Bombay Revenue Jurisdiction Act.

Act-*Contd.*

Act XI of 1876 (Presideney Banks).

Notes:—[Rep in pt., and Am., Act V of 1879; *Am.*, Act XX of 1899, ss. 10, 14, 37 (f) rep in pt. ss. 36,37, 63, Am, s. 42-A Ins, Act I of 1901. Declared in force in Upper Burma (except the Shan States), Act XIII of 1898, s. 4.]

Act XI of 1876.

See (1) Bank of Bengal.
(2) Presidency Banks Act.

Act XII of 1876 (Repealing Act)

Notes—Rep., Act XII of 1891.

See Small Cause Court, Mofussil—Jurisdiction —Copyright.

Act XVII of 1876.

See Oudh Land Revenue Act.

Act XVIII of 1876.

See Oudh Laws Act.

Act I of 1877.

See Specific Relief Act.

Act III of 1877.

See Registration Act, 1877.

Act IV of 1877.

See Presidency Magistrates Act.

Act X of 1877.

See Civil Procedure Code, 1882.

Act XV of 1877.

See Limitation Act, 1877.

Act XVII of 1877.

See (1) Special or Second Appeal.
(2) Repeal of Act, effect of.

Act XVIII of 1877 (Salt).

Notes:—Rep, Act XII of 1882.

Act I of 1878

Act I of 1878 (Opium).

Notes:—[Rep in pt., Act IV of 1894; Rep in pt. and Am, Act XII of 1891; Declared in force—in the Sonthal Parganas, Reg III of 1872, s. 3, as amended by Reg III of 1899, s. 3; in the An-

Act-*Contd.*

gul District, Reg I of 1894, s. 3, in British Baluchistan, Reg I of 1890, s. 3; in Upper Burma (except the Shan States). Act XIII of 1898, s. 4.]

Act VI of 1878 (Treasure Trove).

Notes:—Rep in pt., Act XII of 1891, Declared in force—in the Sonthal Parganas, Reg III of 1872, s.3; as amended by Reg III of 1899, s, 3; in the Angul District, Reg I of 1894, s. 3; in Upper Burma (except the Shan States), Act XIII of 1898, s. 4.]

Act VII of 1878 (Forest)

Notes:—[Rep in pt. (Locally), Act VI of 1879; Am., Act V of 1890, ss. 2 to 14, Act XII of 1891; Rep in pt., and Am.. Act V of 1901; Rep (in Assam), Reg VII of 1891. Declared in force—in the Sonthal Parganas, Reg III of 1872, s. 3: as Amended by Reg III of 1899, s 3, in the Angul District, Reg I of 1894,s. 3; in the Chittagong Hill Tracts, Reg I of 1900, s. 4.]

Act VIII of 1878 (Sea Custom)

Notes:—[Am., Act IX of 1885, ss. 5, 6; Act II of 1887, ss. I to 4; Act IV of 1889, s. 10 (as Amended by Act IX of 1891, s.3)and s.II Act VIII of 1889, ss. I, 2; Act IX of 1891, s. 3; Act XII of 1891, s. 11. s. 18 (e) Rep in pt., Act XVI of 1904; Supplemented, Act VIII of 1896; Applied with Modifications, Act I I of 1896, Application of s. 150 extended, Act XIII of 1899, s. 9; Declared in force—(ss. 144 to 154) in the Angul District, Reg I of 1894, s, 3; in Upper Burma (except the Shan States), Act XIII of 1898, s. 4.]

Act XI of 1878 (Arms)

Notes:—[Rep in pt.. Act XII of 1891; Declared in force—in the Sonthal Parganas, Reg III of 1872, s. 3; as amended by Reg III of 1899, s. 3; in Upper Burma (except the Shan States) Act XIII of 1898, s. 4.]

Act XII of 1878.

See Punjab Laws Act 1872, Section 10.

Act XVII of 1878 (Northern India Ferries)

Notes:— Ss, 8 12. (b), 13, 15, 26 Am., Act III of 1886; s. 36 rep., Act XII of 1897, s. 15; rep in pt., Act II of 1901; Rep in pt in N. W. Frontier Province, Reg VII of 1901, s. 3, Am. (in the Central Peovinces and the Sambalpur District) Act I of 1883, ss. 43, 44; (in United Provinces), U P Act II of 1906, s. 22, (in Punjab), Act XX of 1883 ss. 78, 79,(in the Central Provinces, the Sambalpur District and the Punjab), act XII of 1891, s. 17; Am. (in the Central Provinces), Act IV of 1907.

Act I of 1879—(General Stamps)

See Mortgage (Form of)

See Stamp Act 1879.

Act IV of 1879 (Railways)

Notes:—Rep Act IX of 1890

See (1) Carriers
(2) Railways Act 1879

Act VIII of 1879

See North West Provinces Land Revenue Acts.

Act VIII of 1879 S. 23

See Guardian Disqualified Proprietors.

Act XII of 1879. (Registration and Limitation Act, Amendment Act)

Notes—Rep. Act XVI of 1908.

Act XII of 1879

See Civil Procedure Code.

Act XII of 1879 36.

See Civil Procedure Code 1882 s. 258.

Act XII of 1879 S. 102

See Execution of Decree—Effect of Change of law pending execution.

Act XIII of 1879.

See Oudh Civil Courts acts 1879.

Act XIV of 1879 (Hackney carriage)

Notes—S. 4 Rep in Pt; Act XIII of 1889; s. 3; Am Act I of 1903; Declared in force in Upper Burma (except the Shan States) Act XIII of 1898 S. 4

Act XVII of 1879

See (1) Dekkhan Agriculturists' Relief Act 1879.
(2) Transfer of Property Act 33 Bom 44.

Act-*Contd.*

Act XVII of 1879—Ss. 3 15 A

See (1) Mortgage Construction

Act XVIII of 1879

See (1) Legal Practitioners Act.
(2) Mooktear.
(3) Pleader—Removal Suspension and Dismissal.

Act XVIII of 1879(Legal Practioner's Act).

Notes-Am Act IX of 1884: Act XI of 1896; (in Lower Burma Act VI of 1900;S. 47: S.42:Am Act I of 1903: Ss. 4, 7, 25. 38 Am. Act I of 1908; Rep in N W Frontier Province (Except s. 36 as substituted by s. 4 of Act XI of 1896) Reg VII of 1901 S. 5: Declared in force in the Angul District Reg 1 of 1894 S, 3.

Act III of 1880 (Cantonment)

Notes:—Rep Act XIII of 1889.

Act IV of 1880.

See Portuguese Convention Act 1880.

Act VII of 1880 (Merchant shipping).

Notes—Rep in Pt., Act XIV of 1882; Act X of 1889, Rep in Pt and Am, Act XII of 1891, Am, Act VI of 1891 ss 6 to 8; Act XVII of 1891 ss. 3,4 Am s. S. 85 Am from 1st October 1909, Act XVIII of 1908.

Act XV 1880.

See Bombay Revenue Jurisdiction Act 1880.

Act V of 1881.

See (1) Practice—Civil Cases—Testamentary Matters.
(2) Cases under Probate
(3) Probate and Administration Act.

Act XII of 1881.

See North Western Provinces Rent Acts

Act XV of 1881 (Factories)

Notes—Rep in Pt and Am Act XI of 1891

Act XVIII of 1881.

See Land Revenue.

Act XXI of 1881

See Broach and Kaira Encumbered Estates Act

Act-*Contd.*

Act XXII of 1881 (Excise)

Notes:—Rep Act XII of 1896

Act XXIII of 1881.

See Dekhan Agricuturists: Relief Act 1881.

Act XXVI of 1881.

See (1) Hundi.
(2) Negotiable Instrument Act 1881.

Act II of 1882

See Trusts Act.

Act IV of 1882.

See Transfer of Property Act

Act V of 1882.

See Easements Act

Act V of 1882 Ss. 60 and 61

See Waste Lands

Act VI of 1882 (Companies.)

Notes—Am, Act VI of 1887; Act XII of 1891: Am and supplemented, Act XII of 1895: s, 35 Rep, Act II of 1899. Supplemented Act IV of 1900, declared inapplicable to societies registered under the Co-operative Credit Societies Act 1904 —See Act X of 1904 S, 28 declared in force in Upper Burma (except the Shan States), Act XIII of 1898, s. 4

Act VI of 1882

See (1) Companies Act
(2) Company
(3) Appeal Acts—Companies Act

Act XII of 1882 (salt)

Notes:—Rep in Pt Act XX of 1884 Act XII of 1891, rep in Pt and Am; Act XIX of 1890, declared in force—in the Sonthal Parganas (except s 31), Reg, III of 1872 S 3, as amended by Reg III of 1899 s. 3, in British Baluchistan, Reg 1 of 1890 s. 3 in Upper Burma, except the Shan States (ss.1, 2, 6, 7 and 8 and Ch. IV), Act XIII of 1898 s. 4

Act XIV of 1882

See Civil Procedure Code 1882

Act XV of 1882

Act-*Contd.*

Act XV of 1882 S. 69.

See Aden Courts Act.

Act XX of 1882 [Paper currency.]

Notes:—Rep Act III of 1905.

See Paper Currency Act.

Act XXII of 1882.

See Cases under Dekkhan Agriculturists' Relief Act.

Act V of 1883 (Merchant shipping)

Notes—Rep in Pt Act X of 1889, s. 15 (*2*) (as to Lower Burma rep Act VI of 1900, s. 48; Rep in Pt; and Am; Act VI of 1891, ss. 9 to 13. Act 12 of 1891.

Act IX of 1882.

See Oudh Tenancy Act.

Act XV of 1883

See N W P and Oudh Municipalities Act 1883.

Act XIX of 1883 (Land Improvement Loans)

Notes—Rep in Pt Act XII of 1891, Am; Act XVIII of 1899, ss 1, 4, 6, 11 Rep in Pt s. 10 Am Act VIII of 1906, ss. 2 to 5. S. 12; Rep Act XVI of 1908, Declared in force in the Sonthal Parganas Reg. III of 1872 s. 3 as amended by Reg III of 1899 s. 3 in Upper Burma except the Shan States Act XIII of 1898 S. 4.

Act II of 1884.

See Agricultural Loans Act.

Act V of 1884.

See Chota Nagpore Encumbered Estate Act, 1884.

Act XII of 1884. (Agriculturists' Loans).

Notes:—(S 4 Am, Act VIII of 1906, S. 6 Declared in force in Upper Burma (Exept the Shan States), Act XIII of 1898. s. 4.

See Agriculturists' Loans Act

Act XIII of 1884.

See Nuisance.

Act-*Contd.*

Act XVIII of 1884.

See Punjab Courts Acts, 1884.

Act III of 1885

See Transfer of Property Act Amendment Act.

Act VIII of 1885.

See Bengal Tenancy Act, 1885.

Act II of 1886 (Income Tax)

Notes:—Rep. in Pt. Act XII of 1891. ; Act VI of 1902 ; Ss 5, 41 and Sch II Am, XI of 1903 ; Declared in force—in the Sonthal Parganas. Reg III of 1872; S. 3, As Amended by Reg. III of 1899, S. 3 ; In Upper Burma (Except the Shan States), Act XIII of 1898. S. 4.

See Income Tax Act.

Act IX of 1886.

See Deo Estates Act.

Act X of 1886 (Criminal Law Amendment).

Notes:—Ss. 1 to 19 Rep Act V of 1898; Ss. 20, 24 (2) Rep., Act XII of 1891 ; S 25 Rep, Act III of 1900 ; Ss. 21 to 24 (1) Declared in force in the Sonthal Parganas, Reg III of 1872, S.3, as Amended by Reg III of 1899, S. 3.

Act XIV of 1886.

See N. W. P. Rent Act, Amendment Act.

Act XVII of 1886.

See Jhansi and Morar Act.

Act XVII of 1886. Section 8.

See Res Judicata—Causes of Action.

Act I of 1887

See General Clauses Consolidation Act.

Act VII of 1887.

See Suits Valuation Act.

Act IX of 1887.

See (1) Provincial Small Cause Courts Act.
(2) Small Cause Court, Mofussil.
(3) Subordinate Judge, Jurisdiction of

Act XII of 1887 (Bengal Agra and Assam Civil Courts).

Notes:—(S. 23 (C) Rep Act VII of 1889; S. 23

Act *Contd.*

(B) rep Act VIII of 1890: S. 2; rep in Pt; Act XII of 1891; S. I (2) rep in Pt., (in Agra) Act XX of 1890 S. 9 (1); Declared in force in the Sonthal Parganas with modifications. and as regards certain suits only, Reg. V of 1893, Ch III; Ext. Sambalpur District and s. 36 (1) (A) Am; Beng Act IV of 1906 s 2.

See Bengal N. W. Provinces and Assam Civil Courts Act.

Act XVI of 1887.

See Punjab Tenancy Act 1887.

Act XVII of 1887.

See Punjab Land Revenue Act, 1887.

Act V of 1888 (Inventions and Designs)

See Inventions and Designs Act.

See Patent.

Notes:—Rep in Pt Act II of 1899: Declared in force—in British Baluchistan Reg. I of 1890, S. 3; in Upper Burma (except the Shan States), Act XIII of 1898 s. 4.)

Act VI of 1888

See (1) Attachment—Attachment of Person (2) Insolvency—Insolvent Debtors under Civil Procedure Code.

Act VI of 1888. s. 5

See Security for Costs—Suits.

Act VII of 1888 —(Civil Procedure Code Amendment)

Notes:—Rep except s 1, s 65 and s 66 (1) (3) and (4) Act V of 1908; Title and Preamble Rep in Pt, s. 66 Rep Act IX of 1908: Residue Rep—Act XVI of 1908

See Civil Procedure Code Amendment Act (VII of 1888).

Act VII of 1888.

See Certificate of Sale, Civil Procedure Code, 1882 Section 318,

Act X of 1888 (Presidency Small Cause Courts Law)

Notes:—Rep Act V of 1908.

Act-*Contd.*

See Civil Procedure Code Amendment Act (X of 1888).

Act XII of 1888 s 3.

See Appeal-Bombay Acts-Bombay Municipal Act, 1888.

Act XIII of 1888.

See Punjab Courts Act, 1884.

Act IV of 1889 (Merchandise Marks)

Notes:—Rep in pt. and Am. Act IX of 1891, s 10 Rep in Pt Act XVI of 1904; Declarad in force in Upper Burma. (Exeept the Shan States). Act XIII of 1898 s 4.

Act VI of 1889.

Act VI of 1889

See Probate and Administration Act Amendment Act.

Act VII of 1889.

See Succession Certificate Act.

Act X of 1889. (Ports).

Notes:—Rep Act XV of 1908.

See Ports Act.

Act XI of 1889.

See Burma Courts Act, 1889.

Act XIII of 1889 (Cantonments)

Notes—Rep in Pt Act XII of 1896; Act V of 1898; (as to Burma). Act XIII of 1898 s. 18; Rep in Pt. and Am., Act XII of 1891; Am Act I of 1891, s 11; Act XV of 1897; s 6 (1) Am, Act I of 1903, ss. 13, 15 (1) Am; Act V of 1908; Declared in force—in British Baluchistan (with additions), Reg I of 1890 ss. 3, 4 as amended by Reg V of 1890 s, 45; in Upper Burma (except the Shan States), Act XIII of 1898, s. 4.]

Act XIV 1889 s. 1 cl (6).

See Settlement officer.

Act I of 1890 (Revenue Recovery)

Notes—Rep in Pt (As to Burma), Act XIII of 1898, s. 18; Modified in its application to the Benares Family Domains, U P Act III of 1904, S. 15; Declared in force.—In the Sonthal Paraganas Reg III of 1872, S. 3, as amended by Reg III of

Act-*Contd.*

1899, S. 3; in the Angul District Reg: 1 of 1894, S. 3 in Upper Burma (Except the Shan States) Act XIII of 1968, S. 4

Act VIII of 1890.

See Guardians and Wards Act.

Act IX of 1890 (Railways.)

Notes—Rep in pt (as to Burma) Act XIII of 1898 S. 18 : Rep in Pt and Am Act IX of 1896 Supplemented Act IV of 1905 ; Declared in force.—In the Sonthal Parganas. Reg III of 1872 S. 3 as amended by Reg III of 1899, s. 3 ; Upper Burma (Except the Shan States), Act XIII of 1898 S. 4.

Act XI of 1890 (Prevention of Cruelty to animals.)

Notes —Declared in force—in the Sonthal Parganas Reg III of 1872, S. 3: as amended by Reg III of 1899, S. 3; In Upper Burma (Except The Shan States), Act XIII of 1898, S. 4.

See Railways Act 1890.

Act XX of 1890.

See N W P and Oudh Act 1890

Act III of 1891.

(Amending the Evidence Act (I of 1872) and the Criminal Procedure Code (X of 1882))—

Act VIII of 1891.

See (1) Easement. 18 Bom 616.

(2) Prescription—Easements—Right of Way.

Act XII of 1891 (Amending Act.)

Notes—(Rep. in Pt. Act IX of 1894; Act XII of 1895; Act X of 1897; Act V of 1898; Act XI of 1898, S. 100; Act XIII of 1898, s 18; Act II of 1899 Act XIII of 1899; Act XIII of 1899; Act XXIV of 1899; Act III of 1900; Act VI of 1900, s. 48; Act VI of 1901; Reg. I of 1899; U P Act II of 1901; Sch II Part I Virt Rep. in Pt. Act XII of 1894, s. 2, Rep. as to Act XXIII of 1867, in British Baluchistan Reg. IV of 1901, S. 16; Rep as to Act XIX of 1881, Bur Act IV of 1902; Title, Preamble, Ss 1. 2 (2) and Sch. II Rep. in Pt. ss 2 (1), 3 and Sch. I Rep. Act I of 1903; Rep. as to Act XVIII of 1889, Act XVI of 1903; Rep. as to Act XVI of 1885, Act II of 1904; Rep. as to Act IV of 1872. s. 12 Pun. act II of 1905; Rep. as to Acts XIV of 1882 and V of 1888, Act V of 1908; Rep. as to Act III of 1877, act XVI of 1908; Declared in force in the Sonthal Parganas Reg III of 1872, s. 3, as amended by Reg III of 1899, s. 3).

Act XIII of 1891.

See Bankers Books Evidence Act.

Act XIV of 1891.

See Oude Courts Act, 1891.

Act XVIII of 1891.

See Bankers Book Evidence Act.

Act XVIII of 1891 (Bankers' Books Evidence).

Notes—(Am, Act I of 1893; Act XII of 1900; declared in force—in the Sonthal Parganas, Reg III of 1872, s. 3; as amended by Reg. III of 1899 s. 3; in Upper Burma (Except the Shan States), Act XIII of 1898 s. 4.)

Act XX of 1891.

See Punjab Municipal Act, 1891.

Act IV of 1892.

(Limitation Act and Civil Procedure Code Amendment).

Notes.—(Title, preamble, Rep. in Pt. ss. 2,3, 4 Rep. Act V of 1908; Title, preamble, Rep. in Pt. s. 1 Rep. Act IX of 1908: s. 5 is spent.)

Act VI of 1892.

See Civil Procedure Code Amendment Act, 1892.

Act IV of 1893.

(Partition).

See Partition act. 1893.

Notes—(Declared in force in Upper Burma (Except the Shan States). Act XIII of 1898, s.4)

Act I of 1894 (Land Acquisition).

Notes:—(Applied to the Calcutta Municipality with modifications Ben. act III of 1899 s. 557; Declared in force—in the Sonthal Parganas Reg. III of 1872 s. 3, as amended by Reg. III of 1899, s 3, in Upper Burma (Except the Shan States), Act XIII of 1898 s. 4.)

See Land Acquisition Act, 1894.

Act V of 1894.

(Civil Procedure Code Amendment.)

Notes—Rep act V of 1908.

Act-*Contd.*

See Civil Procedure Code Amendment Act, 1894

Act VIII of 1894 (Tariff).

Notes:—(AM. Act III of 1896; Act XIV of 1899 s. 8 B ins. by Act VIII of 1902 and continued in force by Act XI of 1904; supplemented, Act IX of 1903 ss. 2 to 7; s. 5 AM Act IX of 1903, S. 8, S. 8 (1) Am, Act XII of 1903 s 2; Sch III AM Act I of 1906; Sch III No I AM Act II of 1908 declared in force in the Sonthal Parganas Reg. III of 1899, s. 3.)

See Tariff Act, 1894.

Act I of 1895.

See Presidency Towns Small Cause Courts Act (1 of 1895).

Act VI of 1895.

See Dekkhan Agriculturists Relief Acts Amendment Act.

Act XII of 1895 (Companies Memorandum of Association).

See Company—Meetings and Votings

Notes:—Declared in force in Upper Burma (except the Shan States), Act XIII of 1898, S. 4.

Act XV of 1895 (Crown Grants).

Notes:—Declared in force in Upper Burma (except the Shan States), Act XIII of 1898, S. 4.

See Crown Grants

Act I of 1896.

See Administrator General Act.

Act XI of 1896- (Amending Legal Practitioners Act)—

See (1) Legal Practitioners act.

(2) Mooktear.

(3) Act XVIII of 1879.

Act XII of 1896

See Excise Act. 1896.

Notes—S. I. (2) Rep. in pt. (As to Burma) Act XIII of 1898, s.18; rep. in pt. and Am in N W Frontier Province, reg. VII of 1901, s. 3; ss. 3 65 supplemented in Burma, Bur. Act III of 1901; ss. 3, 18, 21 Am; Act VII of 1906; declared in force in Upper Burma (except the Shan States), Act XIII of 1898, s. 4,

Act-*Contd.*

Act III of 1897.

(Epidemic Diseases)

Notes—[Rep. in pt. (as to Burma), Act XIII of 1898, s 18; declared in Force—in the Sonthal parganas, reg. III of 1872, s. 3. as amended by reg. III of 1899, s. 3. in Upper Burma (except the Shan States), Act XIII of 1898, s. 4.]

Act IX of 1897—(Provident Funds).

See Provident Funds Act.

Notes [Rep in pt. (as to Burma), act XIII of 1898, s. 18. S 4, Am; Act IV of 1903; declared in force in Upper Burma (except the Shana States Act XIII of 1898, s. 4.]

Act X of 1897 (General Clauses)

See General Clauses Act 1897.

Notes—Ss. 3, 20, 21, 24 Am; s. 2 and sch. rep. Act I of 1903; Declared in force—in the Sonthal parganas, reg. III of 1872, s. 3, as amended by reg. III of 1899, s. 3; in the Chittagong Hill tracts, reg. I of 1900, s, 4; in Upper Burma (except the Shan States). Act XIII of 1898, s.4.

Act VI of 1898 (Post-Office)

Notes—Rep in pt.(as to Burma).Act XIII of 1898, s. 18, s. 2, Am. Act II of 1903; Declared in force in the Sonthal parganas, reg. III of 1872, as amended by reg. III of 1899, s. 3; in the Chittagong Hill tracts, reg. I of 1900 s. 4; in Upper Burma (except the Shan States), Act XIII of 1898, s. 4.

Act X of 1898.

See Presidency Towns Insolvency Act.

Act II of 1899.

See Stamp Act.

Act VI of 1899.

See Contract—Alteration of Contracts-Alteration by Court.

Act IX of 1899

See Arbitration Act.

Notes—s 23 (as to Lower Burma) Am. Act VI of 1900 s. 47.

Act XI of 1899 (Court-fees Amendment)

Notes—[S. 2 virt. Am. Act X of 1901, s. 3 (2) Declared in Force in the Sonthal parganas, reg. III of 1872, s. 3, as amended by Reg. III of 1899, s. 3.

See Court-fees Act Amendment Act 1899,

Act-*Concld.*

Act XXII of 1899 (Coinage and Paper Curreney.

Notes—Rep. (as to Paper Currency Act), Act III of 1905; as to coinage Act. Act III of 1906.

Act XXV of 1899.

See Punjab Courts act,1884.

Act II of 1902 (Cantonment House Accommodation.)

Notes—S. 2 (1), 10 (1), 11 (D), 15 (1) 35 (1), 36 (2), (3), 37, 39 (2), (3), (4) Am: Act V of 1909.

Act IV of 1903.

See Provident Funds Act.

Act III of 1905 (Paper Currency)

Notes.—S 8 (3) Rep in Pt) Ss. 14, 15. Am Act 11 of 1909.

Act III of 1907.

See Provincial Insolvency Act.

Act V of 1908

See Civil Procedure Code

Act IX of 1908,

See Limitation Acts.

Act XVI of 1908.

See Registration Acts.

Act III of 1909.

See Presidency Insolvency Act

Act, Construction of.

See Statutes, Construction of.

Act done by husband in pursuance of common business, binding on wife.

See (1) Buddhist Law Husband and wife.

(2) Husband & wife.

(3) Hindu Law.

(4) Contract.

(5) Principal and agent. Authority of Agents.

Act done in official capacity.

See Subordinate Judge, Jurisdiction of

Act done in the exercise of sovereign Powers.

See Damages—Suits for damages-Torts

Act of Bankruptcy

See Insolvency.

Act of foreign power

See Hindu Law—Endowment—Dismissal of Manager.

Act of God

See Carriers.

Act of insolvency

See Insolvency Act s. 9

1—Act of insolvency—Debtors—Composition deed—Assignment of all goods—Trustees—Fraudulent intent.

The execution by a trader of a deed purporting to be a general assignment of all his property to trustees for the benefit of his creditors in an act of insolvency.

Though a deed may not be fraudulent within the doctrines of Common law, it still may be fraudulent within the meaning of the Insolvency Act, and it is clear that the absence of pressure though relevant to the question of fraudulent preference, is not a necessary element of an act of insolvency consisting in an assignment of the whole of a trader's goods. **Kursondas v Maganlal. 4 Bom L R 94.**

2—S. 24—Insolvent—Transfer of property—Fraudulent intention.

A transfer of property made by a party in insolvent circumstances is absolutely void although there be no evidence of any fraudulent preference.

Where a person conveys all his property to trustees in favour of his creditors, his act is an act of insolvency and all his property vests at once

Act of insolvency-*Contd.*

in the Official Assignee, it not being necessary to prove that the assignment is void as being fraudulent. **Kursondas Ramjee 4 Bom L R 154.**

Act of Parliament

See Statute.

Act of state

See (1) Grant—Resumption or Revocation of Grant.

(2) Hindu Law—Custom—Impartibility **29 Cal 828.**

(3) Native states. **10 C W N 361.**

(4) Parties—Parties to Suits-Government Right of Suit—Act done in exercise of Sovereign Powers.

(5) Secretary of State. **27 Bom 189.**

1—Seizure of Raj of Tanjore—Jurisdiction of Municipal Courts—Independent States.

The transaction of Independent States between each other are governed by other laws than those which Municipal Courts administer. The seizure by the British Government, acting as a sovereign power, through its delegate, the East India Company, of the Raj of Tanjore, with the property belonging thereto, was, with its consequences, an act of State over which a Municipal Court has no jurisdiction. **The East India Company v Kamachee Boye Sahiba 4 W R P C 4. S C Secretary of State for India v Kamachee Boye Sahiba 7 Moore's I A 476.**

Notes:—Ref: 6 Bom L R 131.

2—Arrest under Beng Reg III of 1818—Jurisdiction of Municipal Courts.

A Mahomedan subject of the Crown was arrested in Calcutta, taken into the mofussil, and there detained in jail, under a warrant of the Governor-General in Council in the form prescribed by Reg, III of 1818. *Held* that such arrest and detainer were not acts of State, but matters cognizable by a Municipal Court. **Ameer Khan. 6 B L R 392.**

Act of state-*Contd.*

3—Resumption of Jagir by East India Company—Regulation law.

Where lands were held by a jagirdar under the sovereign of an independent State on a jaidad tenure, i.e., on a grant of land, together with the public revenues thereof, on the condition of keeping up a body of troops to be employed when called on in the service of the sovereign, and on the conquest of the State by the East India Company the jagirdar remained in the same position to the Company—*Held*, that the resumption of the lands by the Company, and the seizure of the arms and stores appertaining to the tenure, on the death of the jagirdar, was not an act of State, and therefore the Municipal Courts had jurisdiction to entertain a suit by the representatives of the jagirdar against the Government for the possession of the land and for the value of the arms and stores. This was so, although, at the time of the resumption, the Regulation law was not introduced into the territories in which the jagir was comprised. **Forrester v Secretary of State 12 B L R 120: 18 W R 349, L R I A Sup. Vol 10.**

4—Confiscation of territories of King of Delhi—Forfeiture.

The status of the King of Delhi was that of a King recognized by the British Government and the confiscation of his territories in 1857 was an act of State. and not an act done under color of any legal right of which a Municipal Court could take cognizance. His tenure of the territories assigned him by the Government was a tenure merely *durante regno*, and no power was conferred upon him of creating incumbrances which would survive his deposition. The word 'confiscation' does not necessarily import that the appropriation is to be made as a penulty for a crime, nor, when used in that sense, does it necessarily imply that the forfeiture has accrued upon the action but it may also be properly used as applicable to appropriations of property by Government as an act of State. **Saligram v Secretary of State. 12 B L R 167: 18 W R 389 L R I A Sup vol 119.**

Act of state - *Contd.*

5—Confiscation by Governor of Foreign State —Title to timber.

The plaintiff brought a suit at Tonghoo in British Burma to recover possession of certain timber which he alleged the defendants had wrongfully, and in collusion with the Burmese Governor of Ninghan, taken out of his possession in foreign territory and removed to Tonghoo. The defendants stated that they had acquired the timber from the Governor of Ninghan in terms of an agreement between them and the Burmese Government. It appeared that the Governor of Ninghan had confiscated the plaintiff's timber in contravention of a royal mandate. After the institution of the suit, the defendants removed the timber from Tonghoo to Rangoon. *Held* that, a British Municipal Court might enquire into the character of the act of the Governor of Ninghan, and was not bound to accept it as an act of State.

Bombay Burmah Trading Corporation v Mahomed Ali Sheragee. 10 B L R 345: 19 W R 123

6—Resumption by Government—Act of State —Jurisdiction of Civil Court.

By the treaty of the 31st July 1801 between the then Nawab of the Carnatic and the Governor in Council at Madras, the sovereign rights of the Nawab in the Carnatic were vested in the East India Company. *Held* that, a resumption by the Madras Government of a jagir granted by former Nawabs, as Altamghah inam. before the date of the treaty and a re-grant by Madras Government to another for a life estate only, was such an act of sovereign power by the East India Company as precluded the Supreme Court at Madras from taking cognizance of a suit by the heirs of the original grantee in respect of such resumption. **East India Company v Syedally 7 Moore's I A 555.**

Notes:——18 W R 339; 14 Mad 131; 7 M I A 476. Dist; 3 M H C R 59 Ref. 4 B H C R 1: 6 Bom 598; 8 Bom 548; 5 Bom L R 983; 6 Bom L R 131: 33 Cal 219 P C=10 C W N 361=3 C L J 395=8 Bom L R 129=3 A L J 250=16 M L J 115=1 M L T 115=33 I A 1.

Act of state - *Contd.*

7—Resumption of village granted by Peishwa of the Deccan.

A village having been granted in inam by the Peishwa of the Deccan was, after the death of the grantee, seized by the mamlutdar or farmer of the revenues for an alleged debt due to him, and retained until the treaty of Poona in 1818 when it came into the possession of the British Government. In a suit instituted by the representatives of the original grantee for possession of the village, and payment of the arrears of revenue so sequestered. it was held by the Judicial Committee, affirming the decree of the Provincial and Sudder Courts, that the original resumption was the wrongful act of an individual, and not an act of the State, the British Government were therefore ordered to restore the village, but pursuant to Bom Reg V of 1827, s 3, with only six year's arrears of revenue. **Mills v Modee Pestonjee Khoorshidjee 2 Moores I A 37.**

8.—Sequestration by British Government of private property of independent Sovereign—Jurisdiction of Municipal Court.

A sequestration by the officers of the British Government of the private property of the Angria of Kolaba, a native independent Soverign, though made contrary to the express orders of the Court of Directors originally given, would not be liable to question in a Municipal Court if subsequently ratified, but *aliter* where there is no such ratification. **Zuleff Ali v Yeshvadabai Saheb. 9 B H C 314.**

9.—Seizure by right of conquest—Jurisdiction of Municipal Court.

Where an estate is seized by the Crown in right of conquest, and not by virtue of any legal title, such seizure must be regarded as an act of State, and is not liable to be questioned in a Municipal Court. 7 Moore's J. A., 476 Followed.

Bhagwan Singh v Secretary of State for India in Council. 2 I A 38.

Notes:—Ref: 6 Bom L R 131.

Act of state-*Contd.*

10—The effect of resumption under Act XI of 1852 and Bombay Act VII of 1863 is to leave untouched the right to the land in the possession of the Inamdar.

Hari Sadashiv v Ajmudin
11 Bom. 235

Notes:—Ref: 6 Bom L R 131=29 Bom 480=7 Bom L R 497.

11—Begum Sumroo.—The judgment of the Chief Court holding the Begum Sumroo to be a soverign (No. 14 of 1867, Civil) *reversed* by the *privy Council.* **Forester v. The Secretary of State for India in Council P R 1 of 1872.**

12—Jurisdiction—Sovereignty.

The assumption by Government, upon taking possession of conquered or ceded territories, of a jagir granted by former Rulers, is in act of sovereign power over which no Municipal Court has jurisdiction.

And if, when taking possession of conquered or ceded territories, the Government so limits the act of conquest as to exempt the lands of a particular jagirdar from being brought under its administration, the effect of such exemption is to maintain the jagirdar in political relations to the state, and to prevent any act of the Government towards the jagirdar or his property, whether public or private, from being made the subject of enquiry in a Municipal Court.

Perfect independence is not a necessary attribute of sovereignty and the fact that a territory has been conquered makes no difference as regards the political independence of its Ruler if such independence is recognized by the Government. (P R 13 of 1867.)

This judgment of the Chief Court in what was termed the "Badsha-pore suit," was affirmed by the Judicial Committee of the Privy Council, on

Act of state-*Contd.*

the ground that the plaintiffs had failed to prove the title asserted by them: their Lordships differing from the Chief Court as to the first ground of defence, *viz.*, that the Government took possession of the jagir in question as an act of State, propriety and validity of which were not cognizable by any Municipal Court.) **Forester v. The Secretary of State for India in Council. P R 1 of 1872.**

Act of State—Jurisdiction of British Courts to take cognizance of an act done by a Foreign State in the exercise of its Sovereign powers and not professing to be justified by Municipal Law.

See Jurisdiction.

13—Ferry rights—Jurisdiction.—Plaintiff purchased the ferry leases of the Chenab and Pulkhu rivers at Wazirabad for the years 1870-74, the leases entitling him to collect all tolls. He sued the defendant for damages, for that the Government in constructing that part of the Northern State Railway which crossed the Chenab and Pulkhu, had established their own ferry and by that means conveyed their material trucks and employes across those rivers.

Held, that the rights to establish a ferry and take tolls were State rights: but that plaintiff's suit was cognizable by a Municipal Court, as the Government had, by Regulation III of 1793 submitted, in regard to such a suit, to the jurisdiction of the Courts; and that the submission was not abrogated or taken away, as to the Punjab Courts, by the repeal of the Regulation by Act IV of 1872.

Held, upon the facts, that as the Railway Department had used the plaintiff's ferry as far as they possibly could, and had used their own ferry for carrying plant and materials which were too heavy for the plaintiff's boats or bridges, and for carrying men and materials to places in the river to which plaintiff's ferry did not go, a cause of action had not been made out. **Sujan Singh v. The Secretary of State for India In Council.**
P R 56 of 1876.

Act of State-*Contd.*

14-The property of a person resident in a place under the control of rebellious subjects treated by the Government as enemies, whether that person is attached to the rebel cause or not may be seized by the State as enemies' property.

A declaration by Government of its intention to restore, or an order issued by Government to the Executive Authorities to restore property seized in war, gives no legal title or right of suit to the former owner, nor does it confer any jurisdiction upon the Municipal Court.

By Regulation III of 1793 and Regulation II of 1803, Government subjects itself and its officers to the jurisdiction of the Civil Courts only in regard to the matters specified in those Regulations, and in no other matters ; and the jurisdiction thus conferred has not been extended by any subsequent Regulation, Act or Order.

The Secretary of State for India in Council v. Wagentrieber. **P R 6 of 1867.**

15—Jurisdiction of British Courts to re-open executive orders of Foreign States.

The defendants entered into a timber contract with the Bhawalpur State, the plaintiff being surety for its due performance. The Bhawalpur State cancelled the contract as it considered that there had been a breach on the part of the defendants and plaintiff was compelled to pay to the State the amount of advances made to the defendants, which had not been worked off. Plaintiff thereupon sued to recover from defendants the sum he had been compelled to pay as their surety to the Bhawalpur State. The defendants pleaded that there had been no breach of contract on their part with the Bhawalpur State, and that therefore, they were not liable, the plaintiff having wrongfully paid that State. The order rescinding the contract and compelling the plaintiff to pay was an executive one, passed by the Political Agent and Superintendent of Bhawalpur, and was an order which the plaintiff could not disobey.

Act of state-*Contd.*

Held, (Boulnois, J., dissenting) that the order of the Superintendent of Bhawalpur which found a breach of contract was conclusive between the parties, and could not be questioned by the British Courts, and that the plaintiff having under that order been compelled as surety to refund advances made to defendants was equitably entitled to recover.

Per Boulnois, J.—The Courts of one country have never done more than recognize judgments of the Courts of another country as, under some circumstances, conclusive, and no committee requires that executive orders should be treated as conclusive in regard to facts proper for establishment. *Held*, therefore, that the British Courts are bound to enquire into and decide the question whether or not there had been a breach of contract, the order of the Superintendent not being conclusive.

Held, further, that the defendants not having committed any breach, the plaintiff could not recover, the payment by him not having been rightfully made, notwithstanding that the order of the Superintendent of the Bhawalpur State was supposed by that officer to be right and by the plaintiff to be irresistible. **Sujan Singh v. Hardyal Singh,** **P R 36 of 1877.**

16.—Resumption of rent-free lands by the British Government in 1849—Jurisdiction of Civil Courts.

Plaintiff claimed possession of a rakh which had been granted by the Maharajah Runjeet Sing to plaintiff's father. The rakh was held rent-free for the purpose, chiefly, of supplying fodder to a contingent of cavalry which the owner was bound to supply for the service of the Government. Plaintiff alleged that the rakh upon the death of his father devolved by inheritance upon his brother who was killed at the battle of Ferozepore in arms against the British

Act of state-*Contd.*

troops; that upon his brother's death his uncle, Raja Teja Sing, took possession of the rakh as his (plaintiff's) guardian, and that a grant of it was made by the British Government, after the conquest of the territory, to Teja Sing for his life. Teja Sing died in 1861, whereupon the property was resumed by the Government. Plaintiff sued for possession of the rakh as heir of his deceased brother

In March 1849, a proclamation was issued by the British Government, that "jaghirs and all the property of Sirdars or others who had been in arms against the British should be confiscated to the State," and two days later (31st March 1849) a Board of Administration was constituted, with special directions with respect to rent-free lands. Those directions stated "that by our "occupation of the country, after the whole Sikh "nation had been in arms against us, we have ac- "quired the absolute right of conquerors, and "would be justified in declaring every acre of "land liable to Government assessment. There "is no reason why we should maintain in per- "petuity an alienation of the Government revenues "which would not have been maintained by the "power we have succeeded. All grants were re- "sumed by the Sikh rulers at will, without re- "ference to the terms of the grant. On the "death of the grantor, they lapsed as a matter of "course. Every holder of rent-free land, who is "confirmed in his tenure by the Government, "must yield up every document in his possession "which entitled him to the exemption from "revenue, and a grant must be given to him under "the Board's seal, &c, declaring that the grant is "a free gift of the British Government."

Held (affirming the judgment of the Chief Court—*See Punjab Record* for 1875, Privy Council, p. 7, *Note*), that the Governor-General made as an Act of State, a *tabula rasa* of these rent-free tenures, and that the grant to Teja Sing was made in pursuance of the right of conquest referred to in the proclamation, and was an act of State not questionable by any Municipal Court. Plaintiff's suit dismissed. **Sirdar Bhagwan Singh v The Secretary of State for India in Council.** **P R. 1 of 1875 Privy Council**

17.—Of Municipal Courts—Question of succession to the Raj of a Foreign Sovereign State—

Act of State-*Contd.*

Suit ostensibly for obtaining a declaration in regard to rights to immoveable property within British territory belonging to a foreign sovereign—Tipperah Raj—

Per Curiam. The Court in British India have no jurisdiction to decide the question as to who is entitled to succeed to the Raj of a Foreign Sovereign State. Where a suit was brought ostensibly for a declaration in regard to rights to immoveable property within British territory belonging to a Foreign Sovereign but with the real object of setting aside the appointment by such Sovereign of his son as his immediate successor. *Held*—That the Court had no jurisdiction to go into the question of the validity of such appointment. When the question is one of succession to immoveable property on the demise of the owner, the fact that such owner is a Foreign Sovereign, does not deprive the Court of its jurisdiction to decide the question; nor in deciding such question, is the Court bound merely to register the decree of the Foreign Sovereign, however opposed it may be to the law of the land. **Shamarendra Chandra Deb Barman v Birendra Kisore Deb Barman 12 C W N 777=8 C L J 1=35 Cal 777 S B.**

18.—Act of War—Rebellion.

A Government may exercise the rights of war in suppressing a rebellion of its subjects, and the seizure of property in the exercise of those rights is an act of power in a matter of State over which no Municipal Court has jurisdiction. Every direct consequence of the seizure is excluded from forensic jurisdiction; and a Civil Court cannot declare as to property seized by the Government after a mortgage thereof, that the mortgagee's interests are not affected by the seizure. **Salig Ram v The Secretary of State for India in Council.** **P R 7 of 1867.**

19.—Jurisdiction of Civil Courts—Confiscation of timber filled in Native States.

Pliantiffs, British Indian subjects, residing in Simla, sued the Secretary of State for India for the value of timber purchased by them from the Rana of Ghond, and confiscated by order of the Superintendent, Simla Hill States, while it was within the limits of the Koti States, preparatory to being brought into Simla. Under the Punjab

Act of State-*Contd.*

Government Rules, the sanction of the State Forest Officer was necessary to the felling of the trees. and all trees, before being removed from the forest, were to be marked with the State sale hammer-mark, and any trees removed without such mark were liable to confiscation. The timber in question not having been so marked, *held* that the confiscation was the act of the Superintendent acting in his political capacity, in respect of a property of a Foreign State, and was done in foreign territory as such was not liable to be questioned in a Municipal Court in British India.

There cannot be an act of State by a sovereign against his own subjects. Such proposition, however, refers to an act directed towards the subject, and it does not refer to an act not directed towards the subject, but which indirectly implicates such subject. L J R P C (1899), 144 L R 19 Esq. 509, 6 Bom L R 131;7 M I A 537 Ref. **Kembo v The Secretary of State for India 105 P R 1908.**

20.-Seizure of property in time of war-Qualified or absolute restoration—Evidence.—

Plaintiff sued the Government for certain marble forming part of a tomb which was taken into the possession of Government by way of hostile seizure at the capture of Delhi in 1857,—the tomb being near the walls of the fort and within the space taken up after the occupation of Delhi by the British troops for the purpose of the defence of the fort. The tomb remained undisturbed, being respected as a tomb by the Government. In 1856, the Government sanctioned plaintiff's repairing the tomb, and in 1869 paid a purchaser from the plaintiff the value of certain marble then taken away; and it also appeared that the plaintiff had been permitted to burn a light in the tomb and take general charge of it. Upon these facts the plaintiff contended that though the original seizure in 1857 was beyond the province of forensic litigation, the plaintiff's rights in the tomb had been since restored to her by the Goveanment. *Held*, that though a slight amount of evidence is sufficient to show restoration of private rights in immoveable property seized in time of war, there was in this case an absence of evidence showing an intention to restore, and that accordingly plaintiff's suit was untenable.

Per Boulnois, J. -That the Government had

Act of State-*Contd.*

so acted in derogation of its absolute title, that the plaintiff, though not entitled to claim the possession or value of the materials, might restrain Government from disposing of them or diverting them from the purposes of the tomb. **Mussammat Ikramal Nissa v Secretary of State for India in Council. P R 14 of 1872**

21—Seizure of property in time of war—Restoration of property so seized—Public Agent—Scope of authority—Ratification—Act IX of 1859.—

Plaintiff, a Mahomedan, was with all the residents turned out of Delhi in September 1857 after the fall of the city. The place was held by military occupation until January 11th, 1858, when the management of the city was transferred to the Civil authorities. On the 27th September 1857, the Collector, Mr. Egerton, recorded a proceeding to the effect that by a general order the houses of the Mahomedans in the city of Delhi had been attached, and the Kotwal had been instructed to seal up each house. On the 26th January 1858, Mr. Egerton issued a proclamation to the effect that as by general order the houses and lands of the Mahomedans had been attached, and it was desired to release the property of those who were not concerned in the mutiny, Mahomedans might prove their loyalty within one month, failing which their houses and lands would be confiscated to Government. A list of persons who had joined the rebellion was prepared, and in this list the plaintiff's name appeared, with the entry that Rs. 50 was offered as a reward for his capture. In March 1858, plaintiff was taken by the police from Sonepat, where he was then residing, to Panipat, and there detained in custody until 3rd April 1858, when he was released by the Magistrate of Panipat and allowed to return to Sonepat on entering into a personal recognizance of Rs. 400. In May 1858 he was again arrested and sent to the Deputy Commissioner of Panipat, who forwarded him to Delhi with other prisoners. At Delhi he was tried by the Special Commission, who, on the 10th July 1858, ordered that he should be released on security of Rs. 100 for one year, or in default suffer imprisonment for that period. The scurity was given, and plaintiff was released. On the 17th July 1858, on the petition of plaintiff, Mr. Egerton, one of the Special Commissioners and Deputy Commission-

Act of State-*Contd.*

er of Delhi, ordered plaintiff's name to be struck off the list of rebels. By the Queen's proclamation of 1st November 185 , there was promised to all, save those who had been or should thereafter be convicted of having taken part in the murder of British subjects or of having knowingly given asylum to such murderers or instigated revolt, unconditional pardon, on their return to their homes and peaceful pursuits.

In December 1858, plaintiff petitioned the Commissioner of Delhi for a restoration of his houses: the petition was sent to the Deputy Commissioner for report. A report was made, but no order passed on it. On the 29th December 1859, the Governor-General informed the Lieutenant-Governor of the Punjab of his (the Governor-General's) desire that the attachment upon the houses of the Mahomedans of Delhi should be removed. A copy of this letter (No 848) was sent by the Governor-General to the Commissioner of Delhi for information and guidance, and by the Commissioner to the Deputy Commissioner. On the 24th January 1860, the Deputy Commissioner was informed by the Kotwal that plaintiff was applying for the release of his property, with reference to the "general order of release". The Deputy Commissioner passed an order on the 9th March 1860, that plaintiff should be "informed through the Kotwal that he cannot take advantage of the general order of release, and that it cannot affect his property". On the 11th March 1860, plaintiff petitioned the Deputy Commissioner for a release of his property; on the 12th the Deputy Commissioner referred the matter to the Kotwal to inquire whether there were sufficient grounds for the release The Kotwal reported on March 22nd to the effect that there were sufficient grounds for release. On the 27th March, Mr. Plowden, Officiating Deputy Commissioner, passed an order that the plaintiff's "property be released: Kotwal to put him in possession and give him a ticket as usual". On the 28th April, the Kotwal reported that plaintiff was in possession. In March 1861 plaintiff petitioned the Punjab Government for permission to travel where he pleased in search of employment, and sent with his petition certificates, one of which signed by the Commissioner of Delhi, stated that plaintiff "had been cleared of all complicity in rebellion and all his property had been restored to him". The permission to travel was granted. In July 1861, Mr. Cooper, Deputy Commissioner of Delhi, reported to the Commissioner that Mr. Plowden had apparently released the property of the plaintiff without sufficient reasons. The Commissioner forwarded the papers to the Judicial Commissioner of the Punjab, who, in July 1861, replied that Mr. Plowden had no authority to release the property, and that "the release was void from the non-competency of the party who released". On this the plaintiff's property, by order dated 5th August 1861, was reattached, and he was ousted. Against this the plaintiff protested in a petition, which was sent up to the Local Government, but the Government declined to interfere with the order of the Judicial Commissioner. Again plaintiff petitioned, and the Government of India, in January 1869, "disallowed the claim" of the plaintiff. Plaintiff then memorialized the Secretary of State for India, who refused to interfere. Plaintiff thereupon sued the Secretary of State for India to recover possession and for mesne profits; and the following issues were fixed:—

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1 Was the original act of seizure in 1857 an act of State, and has the Civil Court jurisdiction in regard to a complaint arising out of it?

2 What is the effect on the plaintiff's rights of the order of restoration dated 27th March 1860, and the effect of the counter order of the 5th August 1861, and the actual possession enjoyed by the plaintiff between these dates.

3 What is the effect on plaintiff's rights of Act IX of 1859?

4 What, if any, mesne profits are to be allowed?

Held Per Melvill, J.—That the plaintiff lost all title to the property in suit by the act of seizure of 1857, which was an act of State, and the subsequent refusals to restore it, and he could only acquire a fresh title by the voluntary action of the Government, performed with full knowledge of what it was doing. That the letter of the Governor General (No. 848) could have no higher force than the Queen's amnesty; that the latter had no retrospective effect, and therefore the former had no such effect; that Mr. Plowden had no authority to put his own construction on the letter No. 848, and release the plaintiff's property; for these reasons, that the letter was addressed to the Punjab Government, and not to the Deputy Commissioner; the fact that a copy of it was sent to the Commissioner did not confer on the local officers any power which they

Act of State-*Contd.*

would not have had if no such copy had been sent; and the power of the local officers was not to release property at their pleasure, but to do so after reference to and in subordination to the Punjab Government. That Mr. Plowden's act was not ratified by the Government, the fact of the release being merely mentioned in correspondence, the object of which was to ascertain whether plaintiff should be allowed to travel at his pleasure, and the Government tacitly accepting the statement regarding the release of the property without full knowledge of all the circumstances; that the Government, as soon as it was aware of Mr. Plowden's unauthorized act, repudiated it. That Act IX of 1859 did not affect the case one way or the other; for the reasons that, with regard to plaintiff's case, first, plaintiff had not surrendered himself for trial, but had been involuntarily arrested at Sonepat; secondly, because he had not been acquitted by the Special Commission; and, thirdly, because Her Majesty's proclamation was not retrospective:—and with regard to defendant's case, that Section 20 of the Act did not bar the suit on the ground of limitation, as the Act referred only to attachments and seizures made before the passing of the Act. That for these reasons plaintiff's suit should be dismissed.

Per Boulnois, J.—That although the Government had, before plaintiff became repossessed of the property in March 1860, the matter entirely in their own hands to retain possession of plaintiff's property as well as every part of the captured city of Delhi, the fact that plaintiff became so re-possessed entitled him to put Government to the proof of their proprietary title; in 1861, when he was ousted, he was entitled to be maintained in possession until dispossessed in due course of law, and it was for the Government in this suit to show that they took back the property from the plaintiff in 1861 by reason of the strength of their own title. That Government could not rely upon the original seizure alone, but must show that the act of restoration to the plaintiff in March 1860 was unauthorized and inoperative. That the restoration of the property by Mr. Plowden was not without legal operation with regard to a third party, one of the public, for the reasons that the Government did not establish any official department for dealing with the immovables of the conquered city of Delhi: from the first the Deputy Commissioner, *ex-*

Act of State-*Contd.*

officio exercised no little control over the questions relating to the immovables and the disposal of them; the general attachments of September 1857 and January 1858 were effected by the Deputy Commissioner; the order of the Governor-General (No. 848) to the Commissioner was sent by the latter to the Deputy Commissioner, who seemed as much authorized to carry it out as the Commissioner, there being no organized department to which it was issued, no instructions from the Government of the Punjab as to the mode of carrying out the intention of the Governor-General, and no system of application for sanction in cases of restoration of property. That if Mr. Plowden exceeded his authority, the Government tacitly consented to and acquiesced in his act, as it was not to be presumed that for the space of a year the Government remained ignorant of what was done, while the plaintiff had, to a certain extent, brought home to the Government actual notice of the restoration of the property when he applied for leave to travel. That plaintiff was therefore entitled to a decree, unless his suit was barred by Act IX of 1859; and that it was not so barred, for if the Act applied at all, the plaintiff had not been convicted of rebellion neither had he kept out of the way to evade justice: but that Act IX did not apply to the case, as the Act contemplated property actually remaining under seizure in the hands of Government, while the plaintiff, as soon as he recovered possession in 1860, was so placed that it would have been useless, if not impossible for him to have taken proceedings to have his title declared.

Per Lindsay, J.—That all property was not actually confiscated in 1857, but was appropriated for a time for various reasons and liable to be forfeited. That plaintiff's property was never formally adjudged to have been forfeited nor declared forfeited on conviction, and plaintiff was entitled to a restoration of his property as soon as he was released. That it was open to doubt whether Mr. Plowden had full authority to order the restoration of the property in 1860, but that under the circumstances Government could not equitably refuse to ratify that order, and in fact did ratify it with full knowledge of the facts.

Per Boulnois and Lindsay, JJ. — That the plaintiff was entitled to mesne profits for 6 years previous to date of institution of suit until he should obtain possession under the decree, the

Act of State -*Contd.*

actual amount to be adjusted in execution of decree. **Hakim Saad-ud-din v The Secretary of State for India in Council, P R 12 of 1874.**

22—In cases of confiscation, limitation runs, not from the date on which the confiscation is sanctioned by the Government, but from the date of actual seizure. **Deo Karan v. Mahomed Ali Shah. 3 N W 328.**

See also cases under Limitation Act.

23—Special leave to appeal—Act of Governor General of India in Council acting in his political and sovereign character-Removal of Maharajah of Panna from his State—Act of state—Right of Appeal—Commission appointed to enquire into Maharajah of Panna's case.

The Act of the Governor-General of India in Council removing the Maharajah of Panna from the Government of the State of Panna was an Act of State done in the interest of the Panna, the inhabitants of Panna and for the peace and good Government of India generally. Leave to appeal to His Majesty in Council from such an order was refused. The commission which enquired into the charges against the Maharajah was one appointed by the Viceroy for information of his own mind, and was not in any sense a court, or if a court, not one from which an appeal lay to His Majesty in Council. **Maharaja Madhava Singh, P C 8 C W N 841; 6 Bom L R 763; 1 A L J 691: 31 I A 239.**

24—Test—Jurisdiction of Municipal Court—

The test whether an act is or is not an Act of State excluding the jurisdiction of the Courts, is not whether it is capable of being legally performed only by persons specially empowered in that behalf as authorized by the law to perform specific acts of Government, but whether it is an Act of State in those external relations, which Municipal or positive law addressed by political superiors to political inferiors does not profess to regulate. An Act of State in respect of which the jurisdiction of the Courts is barred must be an act which does not purport to be done under colour of a legal title at all, and which could neither assert or violate any right conferrable by law, but which must rest for its jurisdiction on

Act of State -*Contd.*

considerations of external politics and interstate duties and rights. Per Jacob J.—The Resolution issued by the Government of Bombay libellously censuring a public officer for his delinquencies is not an Act of State and has therefore no absolute privilege. **Jehangia v Secretary of State 6 Bom L R 132.**

Notes:—5 Bom L R 30=27 Bom 189 confirmed.

25—Act of State.

A tribunal of Commissioners appointed by the Viceroy and Governor-General of India in Council for enquiring into, and reporting upon, the truth or otherwise of an imputation against the Ruler of a Native State is not a—No appeal lies from such a Court, if it were one, to the Privy Council, **Maharaja Madhava Singh, 32 Cal 1 (P C).**

Act of state—no appeal to the Privy Council against an—Privy Council Practice of—Special leave to appeal and to defend appeal, **6 Bom L R 763.**

Act of State-Stay of execution-Secretary of State offering to give security whether an-Civ Pro Code, 1908 O XLI rr5, 6. **15 C W N 475: 13 C L J 365**

26—Act of Sovereignty—Governor in Council—Members of Council—Liability to be sued in Municipal Courts for acts done in their public capacity—Sovereign—Public servants—Right to dismiss reduce or reprimand public servant—Action of libel against public servant for public acts.

The Governor and the Members of his Council are exempt from the jurisdiction of the High Court *so far as their acts in public capacity are* concerned. *A fortiori* no suit in respect of these acts can be maintained against the Secretary of State for India in Council. The Sovereign, his Ministers and those who represent him, have the right to employ and dismiss public servants at pleasure on public grounds. This power, however, is limited by any statutory provision that may have been enacted for the benefit of such public servants; and it has no application to such of the servants of Government as are not charged with functions which are in themselves the acts or attributes of sovereignty. Where a person fills

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an employment which can only be given to him by the Sovereign or the Agents of the Sovereign and which would not be given to him by any private individuals, he is liable to be dismissed at the pleasure of the Crown or Agents of the Crown. The power to dismiss a public servant includes power to reduce him, or to censure and reprimand him. A charge of libel against a public officer must fail if it is contained in a document which is privileged. because that document cannot be produced and so is incapable of being produced in a Court. (Confirmed 6 Bom L R 131) **Jehangir v Secretary of State 5 Bom L R 30=27 Bom 189.**

Act Repeal of.

See (1) Bombay Act III of 1901 S. 2 (1)

Actionable claim.

See (1) Transfer of Property Act s 130, 135 137
(2) Jurisdiction of Civil Courts
(3) C P C (1908) S 9
(4) Assignment
(5) Contract

1—Actionable claim—Benefit of an executory contract of an actionable claim—Insolvency Act S. 7:—The benefit of an executory contract is an actionable claim within the meaning of S. 3 of the Transfer of Property Act. It is such property as would vest in the Official Assignee under S 7 of the Indian Insolvent Act. **Jaffer Meher Ali v The Budge Budge Jute Mills Co. 11 C W N 566=34 Cal 289**

Actionable claim—T P Act Ss 3 and 8—Attached to the earth. Standing crops pass with mortgaged property. Transfer of P. Act—See **15 C P L R 141.**

2.—T P Act S. 130—Actionable Claim, meaning of. S. 8 cl. 5—"Debt"—Set off—Mortgagee—Principal and surety-Estoppel by conduct:—

A claim is not actionable within the meaning of S. 130 of act IV of 1882 (before the amendment by Act VI of 1903) unless it is a claim in respect of a cause of action which has already matured, and which subject to procedure may be enforced by suit. 25 Mad 610; Ref; 18 All 265. Appr. 27 Beav. 349; 28 Beav. 341 I P C 50. 39 Ch D 636; 42 Ch D 610 Ref. **Arunachellam Chetti v Subramania Chetti, 17 M L J 87=30 Mad 235.**

Actionable claim-*Contd.*

3—Purchase of property to which adverse claims exist, legality of—Purchase merely for litigation illegal.—Plaintiffs alleged that one T, with the authority of her late husband adopted S, the first defendant in the suit, that they purchased from S, the plaint villages, which S had inherited fom his adoptive father, and that they were resisited by other defendants in obtaining possession of the villages. The defendants, other than S, pleaded that the plaint sale-deed was a champertous transaction, that no consideration passed for it and that the agreement itself was void, its object being to disturb the peace of the defendants' family and to promote gambling in litigattion. Preliminary issues were framed as to whether the sale-deed represented a real and *bona fide* transaction, and whether the transaction evidenced by the sale-deed was of a champertous nature and, as such, opposed to public policy. On the evidence, the District judge found that the purchase was speculative, that no considersation passed to S, and that the transaction was entered into mainly with a view to harass the defendant and, in the view that the entire transaction was a speculation in litigation rather than a *bona fide* purchase of an actionable claim, he dismissed the suit. *Held*, on appeal, reversing the decision —even if the recital in the sale—deed as to the consideration is a false recital and the transaction is one of a highly speculative character, it does not necessarily follow that the agreement would be an offence against the law of champerty or that its objects could be regarded as immoral or opposed to public policy. The question in such cases is whether the real object of the transaction has been to acquire an interest in property for the purchaser or merely to speculate in litigation on the account either of the vendor and purchaser jointly or of the purchaser alone. It is not unlawful to purchase an interest in property though adverse claims exist which make litigation necessary for realizing the interest, but it is unlawful to purchase an interest merely for the purpose of litigation. In other words, the sale of an interest, to which a right to sue is incident is good, but the sale of a mere right to sue is bad for champerty The object of the law is not so much to prevent the purchase or assignment of a matter then in litigation as the purchase or assignment of a matter in litigation for the

Actionable claim-*Concld.*

purpose of maintaining the action. 8 M 1 A 170 14 Bom 72, 18 Mad 374, 22 Mad 310, 27 All 271, Ref **Deorao Gopalji Kunbi v Sadashed, 2 N L R 17.**

4—House trespass and adultery—Damages—Attempt to commit adultery.

Where a suit for damages for house trespass and adultery was dismissed on the ground that though the motive of the trespass was adultery, yet adultery had not actually been committed. *Held*, that the plaintiff was entitled to damages for house trespass and that the intention to commit adultery should be taken into consideration in assessing the damages. *Semble*, that a mere attempt to commit adultery is not actionable wrong apart from the house trespass.

Kathappudayan v Muthappudayan. 10 M L J 230.

Actionable claim—Sale of a share in a law-Suit—Sale of a doubtful right—Right of pre-emption. U P Act XVII of 1876 ss. 212, 220.

9 O C 76 B.

Actionable claim—Whether an executory contract comes within the definition of an-within the meaning of s. 3 of the Transfer of Property Act, 1882. **10 C W N 755=33 Cal 702.**

Actionable wrong.

See Cases under:—

(1) Tort.
(2) Damages
(3) Defamation.
(4) Malicious Prosecution.
(5) Nuisance.
(6) Cause of action.
(7) C. P. C. O. 22.
(8) C. P. C. (1882) s. 483,
(9) Compensation.

Action Cause of.

See Cause of action.

Action for damages.

See Damages.

Action for deceit.

See Cases under Fraud.

Action for recission of a contract

See Contract Act S. 71.

Action for slander

See (1) Slander.

(2) Damages—Suit for damages—Tort.

Action form of.

See Cases under.

(1) Plaint.
(2) Pleadings.
(3) Practice.

Action framed in Tort.

See (1) Onus of proof.

(2) Damages—Suit for damages Tort

Action in Rem.

See Admiralty or vice—Admiralty—Jurisdiction.

1—Action in Rem—Owner impleaded indirectly—Contract of Towage—Vice—Admiralty.

M S a steam tug was hired for towing a barque N down the Hughli, and on account of the negligence of the master of the tug and wilful disobedience to the order of the pilot on board the N, whilst so employed, the latter ran foul of a sailing vessel, the S. F. Both the sailing vessels were considerably damaged. The S. F. took proceedings against the N for the damage sustained and an action in rem was brought (pending the action taken by the S. F.) by the N against M S to recover damages, inclusive of the amount of damages that the N might have to pay to the owners of the S F. The defence set up was protection under its towage contract. It was to the effect that the proprietors of the tug were not responsible under any circumstances for any loss or damage to any vessel whilst in tow of the tug, whether it should happen on account of the default of master or sailors or through the incompetence or want of skill of the pilot in charge. The Original court held that the accident befell through the disobedience of the master and such action amounted to "default" within the meaning of the clause in the towage contract: but inasmuch as the action was one in rem and not against the proprietors, the clause was no answer to the suit. Held on appeal, that the clause was a sufficient

Action in Rem-*Concld.*

answer for that, although in every case of a proceeding in rem the suit is directly against the ship itself, still the owner of the ship must always be considered as indirectly impleaded.

The "Mary Stuart" v The "Nevada" 10 Calc, 866.

Action of Public Servant ultra vires not binding on Government

See (1) Principal and Agent.

—Liability of Principal.

(3) Right of Suit—Acts done in exercise of sovereign powers.

(4) Government officers.

Action of Salvage

See Salvage.

Action on Contract

See Appellate Court-Exercise of powers in various cases.

Actio personalis moriter cumpersona

See (1) Tort.

(2) C. P. C. O 22.

(3) Damages.

(4) Cause of action.

(5) Malicious prosecution.

(6) Defamation.

(7) C. P. C. (1908) O. 35 r. 5

(8) Act XIII of 1855

1—Definition of.

To be regarded, in law, as the act of God, the occurrence must be overwhelming and not only unforeseen, but incapable of being foreseen and absolutely incapable of being prevented or guarded against. **Vithaldas v Municipal Commissioner of Bombay, 4 Bom L R 914**

2—Appeal by defendant after satisfaction of decree—Death of defendant—Son brought on record—Abatement of appeal.

Plaintiff sued to recover damages on account of a libel : and obtained a decree for damages against defendant. Defendant paid the amount of the decree and filed an appeal in the High Court, after which he died : his son was then brought on the record as his heir and legal representative. To this it was objected that at defendant's death the appeal abated and his son had no right to continue the same: *Held* by *Fulton*

Actio personalis moriter cumpersona-*Concld.*

and Crowe JJ (*Candy. J., dissenting*) that the appeal did not abate. **Gopal v Ramchandra, 4 Bom L R 325=26 Bom 597.**

Notes:—Fol. 26 Mad 495.

3—Action on tort in the nature of actio personalis not available against the heir—Guardians and Wards Act (XIII of 1890)—Findings of fact.

Plaintiff sued the defendant for his tortious conduct in illegally depriving the plaintiff of the custody of his children. During the pendency of the suit defendant died ; and his widow was brought on the record as his heir : *Held*, that the claim was in the nature of an *actio personalis*, and that, therefore, the cause of action did not, at the death of defendant, survive as against his widow. It is open to a father to institute a regular suit for recovering the custoy of his children. The Guardians and Wards Act, 1890, nowhere lays down that his only remedy is an application under the Act. **Sharifa v Munekhan Dost 3 Bom L R 167=25 Bom 574.**

Notes:—Dist: A W N 1904, 135: 26 All 594.

Active Prosecution of a contentious suit.

See T. P. A. S. 52.

Actor sequitur Forum Rei

See " Foreign Judgment.

Acts

See cases under:—

(1) Bengal Acts.

(2) Bombay Acts.

(3) Madras Acts.

(4) Punjab Acts.

(5) U P Acts.

(6) Oudh Acts.

(7) C P Acts.

(8) Berar Laws.

(9) Burma Acts.

(10) Appeal (Acts).

(11) Act.

Acts amounting to waiver of covenant

See Waiver.

Acts and grant of certificate

See Certificate of Administration.

Acts done by the defendant in his official capacity

See Government officer.

Acts done in exercise of sovereign Powers

See (1) Act of State.
(2) Right of suit—Act done in exercise of Sovereign Powers.

Acts in Force in the Punjab.

1.—Acts of the Legislature, general in their terms and unrestricted as to their local application, are in force in the Punjab.—Twitchen (P R 23 of 1867, Civil). and Jabha v Mehtaba P R 67 of 1867.

Acts of a judicial officer protected, though done erroneously, illegally or not in good faith.

See Judicial officers, liability of.

Acts of bad faith committed by applicant for declaration of insolvency antecedently to his application.

See Insolvency—Insolvent debtors under C P Code.

Acts of mother and guardian how far binding on minor son

See guardian.

Acts of ownership

See Limitation Act-Adverse possession.

Acts of user necessary to establish adverse possession

See
(1) Possession—Adverse possession.
(2) Limitation Act Art 144.

Acts, Retrospective effect of

See Madras Act III of 1895 S 21.

Actual pecuniary damage, suit for

See Small Cause Court Moffusil—Jurisdiction—Damages.

Actual possession

See Mamlatdars, jurisdiction of Mamlatdars Courts Act.

Adat kacchi

See
(1) Principal and Agent.
(2) Custom of Trade.

Adat pakki

See (1) Principal & Agent.
(2) Custom of Trade.

Adding a defendant in a suit where leave to sue under cl 12 of the letters Patent 1865 was necessary

See Parties-Adding Parties to Suit, adding a defendant.

Adding of parties

See (1) Joinder of Parties
(2) Parties.
(3) C P C Ss:—26 32.

Adding parties as plaintiffs

See Parties—Adding Parties to Suit—plaintiffs.

Adding parties to suit

(Defendants)
See Parties.
(Appellants).
See Parties.
(Generally).
See Parties.
(Plaintiffs).
See Parties.
(Power of Revenue Court to add Parties)
See Parties.
(Respondents)
See parties

Additional Court-fees on claim for mesne profits.

See Valuation of Suit—suits.

Additional District Judge.

Power of District Judge to assign function of trying a case to additional District Judge—Case in excess of pecuniary limits of latter Court's jurisdiction.

See Punjab Courts Act 1884, Section 75.

Additional Evidence.

See Appellate Court—Evidence and additional evidence on appeal.

Additional Evidence in appeal.

See appellate court.

Additional rent.

See (1) Bengal Tenancy Act VIII of 1885 S. 52
(2) Enhancement of rent.

Addilional rent for excess-land.

See Enhancement of rent.

Additional Subordinate Judge.

See subordinate judge.

Additional Written statement.

See Written statement.

Addition of a defendant residing out of jurisdiction in a suit brought against other defendant under clause 12 of Letters patent 1865.

See Letters Patent.

Addition of a party in second appeal.

See Parties—Adding parties to suits

Addition of a respondent by the Appellate Court.

See Parties-Adding Parti s to Suits-Respondent

Addition of a witness's signature subsequent in execution of bond is a material alteration.

See bond.

Addition of fixtures.

See Landlord and tenant—Alteration of conditions of Tenancy.

Addition of parties.

See Parties—Adding parties to Suits.

Address

See Company.

Address sufficiency of

See Madras Municipal Act 1884 s. 43.

Ademption of Legacy

See Will

Aden

See Bombay Act (II of 1864) Ss. 8, 9

Aden Civil and Criminal Justice Act

See Bombay Act II of 1864.

Aden Court of Resident at

See (1) Letters Patent for Bombay, cl 13
(2) Transfer of civil case-Letters Patent
(3) High Courts Cl 13.

1—Civil Court of Resident at Aden—High Court—Transfer of case.

The Civil Court of Resident at Aden, as constituted by Bombay Act 11 of 1864, is subject to the suprintendence of the High Court of Bombay within the meaning of, 13 of the Letters Patent 1865 and the High Court of Bombay can, therefore remove a suit from the Court of the Resident and try and determine the same. **Municipal Officer Aden v Haji Ismail. 8 Bom L R 4= 3 C L J 5=1 M L T 1=3 A L J 53= 10 C W N 185=16 M L J 73= 30 Bom 246 (P.C)**

Aden Courts Act

1-2-Ss. 8 9-Resident at Aden—Statement of case to the High Court of Bombay—Presidency Small Cause Court Act XV of 1882 s. 69

Aden Courts Act-*Contd.*

A party requiring a case to be stated by the Resident at Aden to the High Court of Bombay under s. 8 of the Aden Courts Act 1864 should make an unconditional application to him before delivery of judgment. 15 Bom 276; 16 Bom 818 Appl.

S. 9 of the Aden Courts, Act 1864, give the Resident the same option either reserving his judgment or delivering it contigent on the opinion of the High Court as s. 69 of the Presidency Court of Small Causes Act 1882,gives to the Presidency Small Cause Court. **Bhagvandas Dharamsi v A Besse Frenchman. 11 Bom L R 830**

3——Ss. 8 15—Resident's Court at Aden—Suit for declaration and injunction—Claim valued for Court fee purposes at Rs. 130 —Court fee Act VII of 1870 ss. 7 sub s 4 cl. 'c' and 'd'—Suits Valuation Act VII of 1887 s. 8 Reference to the High Court by the Resident C. P. C. Act V of 1908 s. 115—High Court of Bombay—Revisionary powers.

The plaintiff sued for declaration and injunction with regard to certain property worth upwards of Rs. 50,000. The claim was valued at Rs 130 and the plaint was engrossed on a stamp paper of Rs. 10 under the provision of the Court fees Act s. 7 sub s. 4 cls. c and d. The first Court rejected the claim on the ground that the plaint was not properly stamped. The plaintiff appealed to the Court of the Political Resident at Aden and shortly after this, the plaintiff, applied, under s. 8 of the Aden Act II of 1864 for reference of the following questions in the appeal, for decision of the High Court of Bombay, namely. "Is the plaint sufficiently stamped, and was the order of the Court rejecting the plaint under s. 54 cl. (b) without making an order what the requisite stamp should be legal. The Resident, however dismissed the appeal under s. 551 of the Civil Procedure Code 1882.

Held that the Resident's Court was subordinate to the High Court of Bombay which had therefore the power of Revision under s 115 of the Code of 1908 with regard to questions that should be submitted by the Resident under s. 8 of the Aden Act 11 of 1864.

Held, further, that, as under s. 15 of the Aden Act, the Court of the Resident was to be guided by the spirit and principle of the laws and regulations in force in the Presidency of Bombay and administered in the Courts of that Presidency not established by Royal Charter and in the High Court in the exercise of its Jurisdiction as a Court of Appeal from these Courts, the provisions of the Suits Valuation Act s. 8 are "the law for the time being in force for the valuation of claims," as required in s. 8 of the Aden Act II of 1864.

Aden Courts Act-*Concld.*

Held also, that, assuming that the plaintiff's claim had been correctly valued under the Court Fees Act, as appeared to be the case on a consideration of the reported decisions of this High Court, her claim estimated according to the law for the time being in force would be Rs, 130 and was, therefore, a claim which did not fulfil the requirements of s. 8 of the Aden Act so as to give the plaintiff a right to demand the statement of the case upon any question of fact or law arising in her suit. **Rahimbai Jamalbhoy v Mariam Abdul Rasool. 12 Bom L R 149= 34 Bom 267.**

4—Aden Act s. 36—Suit for declaration—Declaration that the plaintiff is the eldest son of a deceased representative vatandar—Vatan-Civil Court—Jurisdiction.

A suit for a declaration that the plaintiff is the nearest heir of a deceased representative vatandar is maintainable in a Civil Court, although the declaration is sought for the purpose of establishing a fact, which will enable the plaintiff to have his name entered in the vatan register. **Rahimkhan Hyder Khan v Dadamiya Hyder Khan. 11 Bom L R 1339=34 Bom 101= 4 Ind Cas 833.**

See **Aden Act**

Adequacy of Consideration.

See (1) **Consideration**
(2) **Contract Act s. 25.**

Adhiras

See **Specific Relief Act s 9**

Adhlapi Tenure

See **Specific Relief Act 1877 s. 42.**

Adhyapakam office

See **Jurisdiction of Civil Court—Offices right to.**

Adhyapakam Office -*Contd.*

1—Practice—Adjournment of cases—Consent of parties—Court's duty.

Parties to a suit cannot obtain by consent an adjournment of a case as a matter of course. The Court does and will, in all proper cases, grant adjournment: but to regulate its own procedure is entirely the business of the Court. **Madhowprasad Ramgopal v Ajudyaprasad Narandas.** **13 Bom L R 161.**

Adimayavana Tenure

See (1) **Malabar law.**

(2) **Res judicata.**

(3) **Landlord and Tenant(Forfeiture)**

(4) **Land tenures**

1—Adimayavana tenure—Landlord and tenant—Ejectment suit.

An Adimayavana tenure in Malabar is a permanent tenure and when lands are granted in that tenure for past services, they are not resumable. Quære:— Whether they can be resumed if granted for future services, on the nonperformance of such services, involving the necessity for having the tenants discharged by others. **Theyyan Nair v. Zamorin of Calicut** **27 Mad 202.**

Notes:—Dist: 29 Mad 501=16 M L J 358= 1 M L J 290. Ref: 30 Mad 303.

For Cases under other Tenures See Land Tenures.

Ad-interim injunction

See cases under:—

(1) Injunction.

(2) C P C (1882).

Ad interim Protection

—Application for—Insolvency——Practice—and Procedure. **9 C W N 221.**

Adjective Law

See (1) C. P. Code.

(2) Evidence

(3) Evidence Act

Adjournment

See Cases under:—

(1) Civil Procedure Code (1908), O 9 r. 5-13

Adjournment-*Contd.*

(2) Civil Procedure Code, (1908) O 27 r 6, & O. 21.

(3) Pensions Act s. 4

(4) Practice—Civil Cases—Adjournment.

(5) Witness— Civil Cases—Summoning and Attendance of Witnesses.

Adjournment—Application for

See Appearance

Adjournment—Costs of.

See Commission,

Adjournment for convenience of Counsel

See Practice—Civil Cases—Affidavits.

Adjournment for final disposal, Dismissal of suit after.

See Cases under Civil Procedure Code (1908) O 17 r. 3.

Adjournment of sale

See sale in Execution of Decree setting aside sale—Irregularity.

Adjournment of sale for compromise.

See Execution.

1—Adjournment—O. 16 r, 1—Right of a party to have summons issued—Right to an adjournment when summons prove abortive—Inherent power of Court to prevent abuse of its process under S. 151.

The right of a party to have summonses issued for securing the attendance of his witnesses, if applied for before the hearing, is absolute. But the Court has inherent power under S. 151 to prevent abuse of its process, and refuse to issue summonses, where it is convinced that a vexatious desire to obstruct the course of justice is the governing motive of the party applying for summonses.

Though to have summons issued, if applied for before the hearing, is an absolute right of a party, that right does not extend to his being entitled to an adjournment, if, for any reason which is an ordinary incident of the proceedings for service of process, the summons fails of its object. When the Court gives reasonable time for securing effective service and its advantage is lost owing to anything being left undone which could and should have been done the party guilty of such laches cannot ask that the trial be prolonged in order to escape from the consequences of his own laches. 13 C. P. L. R 152 and 9 Bom 308 Ref. 18 Mad 179 and 31

Adjournment-*Contd.*

Cal 111, Fol; 6 All 560 (574) and 16 Bom 29 Ref
Moti v Kanhya **5 N L R 181.**

2—Adjournment—Application for, to summon witnesses—Conditions under which adjournment granted, failure of applicant to comply with:—

In a case under section 311, Civil Procedure Code, the 5th January 1901 was fixed for evidence. Some witnesses of the appellants did not attend the Court on that date and the hearing of the case was postponed to enable the appellants to summon them for the 2nd February. The care was not taken up till the 4th May, but no application to summon those witnesses had been made. The appellants applied for time to have those witnesses summoned and the Court granted the application but added that if in future the case were adjourned owing to the absence of the appellants' witnesses the cost of the adjournment would be borne by the appellants. On the 15th June summonses had been issued to the witnesses but they did not appear and the Court refused to adjourn the case again unless the appellants paid into Court the expenses of the decree-holder's witnesses and pleader's fee within a week. The amount was not paid and the Court, after recording the evidence of the decree-holder's witnesses on the 22nd June dismissed the appellants' application under section 311, Civil Procedure Code on the 24th June. *Held*, that the adjournments subsequent to the 4th May were conditional and as appellants failed to comply with the condition which were not unreasonable, the Court properly refused to again adjourn the case and disposed of it. **Chandika Bakhsh v. Brij Bihari Lal,** **6 O C 41.**

3—Discretion:—

In an appeal before a District Judge, a respondent engaged two pleaders. On the day of hearing the pleader being ill had transferred his brief to the other pleader whom the Judge declined to hear as his name did not appear in the vakalatnama. The junior not being instructed to argue applied for a day's adjournment to get himself ready. This was refused and the appeal was decreed. Held—the Judge had erroneously exercised his discretion. He ought either to have allowed the pleader who appeared to argue the case, or allowed an adjournment making if necessary an order for costs in favour of the appellant. **Hari Krishna Mahanti v. Bhusan Chandra Mahanti** **7 C L J 426= 12 C W N 888=35 Cal 799**

Adjournment-*Contd.*

4—Adjournment—Practice—Adjournment—Refusal of—Discretion of Court.

A defendant's summons had remained unserved for a long time. Many adjournments had been granted and the summons was returned after service only a day previous to the date of hearing plaintiff applied for a short adjourment to enable him to have his witnesses in attendance, and the Judge refused the application and dismissed the suit.

Held, under the circumstances that in rejecting the application the Judge did not exercise a wise direction and that his order dismissing the suit was unjust.

When a party has been misled by the former practice of the Court, it is the dutyof the Court to allow an adjournment, to correct the effect of the misapprehension. 28 Cal 37 Ref.
Khiomal Vaparimal v Yasanamal Sahijram **2 Sind L R 64.**

5—Practice—Adjournment-Appeals preferred in analogous cases—One to Superior Court and another to an inferior court—Discretion.—

When appeals preferred in analogous cases are pending some in a inferior and others in a Superior Appellate Court, the Inferior Court of appeal would exercise a wise discretion to await the decision of the Superior Appellate Court.
Mohant Gobind Ramanuja Das v Lakhnu Parida **11 C W N 112.**

6—Adjournment—of the suit, on, if imperative—Opportunity to adduce evidence—

The Court is competent, in granting an adjournment, to make an appropriate order for costs; the second paragraph of s. 156 of the Code gives the Court ample discretion as to the particular directions to be given in the matter of costs occasioned by the adjournment.

In the circumstances of this case, the Court might have adjourned the case to a subsequent date and made the hearing on that date conditional upon the payment of costs before that date. Such an order would have enabled the plaintiff or his legal adviser to comply with the order for costs. In the circumstances of this case sufficient

Adjournment-*Contd.*

opportunity was not given to the plaintiff to enable him to carry out order of the Court and to produce his evidence. **Dhanu Ram Mahto v Murli Mahto.** **11 C L J 150,**

7—Adjournment—Party misled by procedure of court—Witnesses not ready—

Where the defendant's failure to have all their witnesses in attendance was due to a belief induced in him by the previous procedure of the court in the case that there was no chance of all their witnesses who were present being examined on that day, and such belief was not unreasonable, the court would exercise a sound and wise discretion in granting an adjournment.

Surjamoni Dassee v Kali Kanta Das.
5 C W N 195=28 Cal 37.

8—Adjournment—Summons for production of documents—Documents not specified— Non-production—Application for adjournment for their production—Refusal—Property—Survey records—Public inspection—Right to obtain copies —Bombay Land Revenue Code, S. 213

Where an application for summons gave no specific description of the documents required but was virtually a request that the Court should require the officers in charge to search their records for papers relevant to plaintiff's suit, and where the papers were not produced in Court in response to such summons.:

Held, that an adjournment of the hearing for the purpose of producing such papers was rightly refused.

Survey records are open to public inspection and copies are available under S. 213 of the Land Revenue Code. **Aludomal wd. Jhangimal. v Alu** **5 S L R 49.**

See also " Evidence,"

9—Adjournment of hearing-Process fees for summoning witnesses:-

Under the rule of this Court, no process-fee could be properly charged for serving summonses

Adjournment-*Contd.*

for witnesses a second time, in consequence of an adjournment made otherwise than at the instance of the party, and a suit cannot be dismissed, because, at such an adjourned date of hearing, plaintiff had not, as directed by the Court in the previous hearing, paid the process-fee for summoning witnesses and brought no witnesses. **Sundar v Sambhal Singh.**
A W N 1886 220.

10—Witness failing to attend in obedience to summons—Acceptance of goods—Contract Act, ss. 113, 118—

Where a witness called by a party fails to attend in obedience to the summons, the Court is not bound to grant an adjournment of case for securing the presence of the witness and for taking his evidence. The word acceptance distinguished from the word receipt of goods—Contract Act, s. 118 (15 Cal 1 Ref.)

Devehand Khatoo v Birjee Coomaree.
2 L B R 91

Notes:—Ref. 5 L B R 25.

Adjournment—Reasons for, when to be recorded.

8 Ind Cas 990.

Adjournment—Pleader engaged transferring brief to another whose name not mentioned in vakalathnamah—Judge refusing to hear such pleader —Junior pleader not instructed to argue—Duty of Court to grant adjournment— Ben act X of 1859.

7 C L J 426=12 C W N 888=35 Cal 799.

Adjournment-Application for- by appellant's pleader on ground of absence of pleader Dismissal for default—Judgment not written—Validity of order— Appeal—Practice and Procedure.

26 Mad 267.

Adjournment—Right of a party to an adjournment when summons prove abortive— Civ Pro Code 1908 O XVI r 1, **5 N L R 181.**

Adjournment–*Concld.*

Adjournment Practice-Costs-Power of Court to alter its order fixing the amount of costs of an—Costs—Special Cases, **A W N 1902, 98.**

Adjournment—of suit absence of plaintiff or his pleader on adjourned date-Dismissa l for default Resjudicata Cause of action **6 Ind Cas 233= 8 M L T 60=20M L J 535.**

Adjournment—Suit adjourned for hearing -Necessity f for issuing fresh summons, to witnesses already summoned-Practice-Summons. **24 Mad 200.**

Adjournment for attendance of witnesses.

See **Witness--civil cases—summoning witnesses.**

Adjournment of sale

See **(1) sale in execution of decree-only of sale.**

(2) sale for arrears of revenue

(3) sale for arrears of rent

Adjudication

See **(1) Insolvency**

(2) Insolvent act

Adjudication by Collector as to stamp duty chargeable

See **Oudh Revenue act (XVI 1of1876) s 70**

Adjudication of claim

See **(1) C. P. C. s 2**

(2) Decree

Adjudication of Insolvency

See **(1) Insolvent act.**

(2) Insolvency.

Adjudications

See **Res-judicata.**

Adjustment not certified

See Civil Pro. code O. 21. r. and O. 21, r. 2.

Adjustment of Account suit or decree.

See **cases under.**

(1) C. P. C. (1908) O. 23 r. 3.

(2) Accounts.

(3) Compromise.

(4) Decree,

(5) Execution of decrees.

(6) Cause of action.

(7) C. P. C. O. 21 rr. 1 & 2.

Adjustment of Decree—Money-decree against several defendants—Agreement discharging one of them-Part adjustment of decree—Certificate necessary—Civ. Pro. Code, 1908. O. XXI r. 2. **4 M L T 229.**

Adjustment of decree—by another decree superseding it, effect of—Decree—Alteration or amendment of decree. **7 C W N 54.**

Adjustment of Decree

1—CPC O. 21.r.2: The Second Schedule (1882) Ss. 258, 521, 525 and 526). Execution of decree-

Arbitration out of Court—Decree according to award—Adjustment not certified—Power of execution Court to enquire into the factum of adjustment.

The provisions of s. 258, Act XIV of 1882, were never intended to apply to a case where the

Adjustment of decree-*Concld.*

parties agreed between themselves that their debts were to be privately adjusted before any decree came into existence.

Where disputes between a creditor and a debtor were settled by arbitration without the intervention of a Court, and the decree was obtained in the terms of the award under s. 526, act XIV of 1882, notwithstanding that the debtor's objection that, in pursuance of the award, he had already assigned debts te the creditor in part satisfaction of the aggregate amount awarded to the latter by the arbitrator, and upon the decree-holder subsequently applying for execution of his decree in full, the judgment-debtor repeated the same objection, held, that the assignment was not an adjustment of a decree in whole or in part within the meaning of a decree in whole or in part within the meaning of s. 258, and the execution Court was bound to consider that debts, if any, had been assigned, before directing. execution as claimed by the creditor.

Per Banerji J. [*contra*]—The alleged assignment of debt, if true, became an adjustment of the decree, as soon as the decree was made, and not having been certified in the manner provided by s. 258, could not be recognised by the Court executing the decree.

Gauri Singh v. **Gajadhar Das. 6 A L J 403. =2 Ind Cas 608.**

Adjustment of Decree barred by limitation.

See Civil Pro Code

o. 21. r. 1 and O. 21 r. 2.

Adjustment of Decree by stranger

See Civil Pro Code. O. 21. r. 1 and O. 21 r. 2.

Adjustment of Decree invalid

See Civil pro Code o. 21. r. 1. and o. 21 r. 2.

Adjustment of decree out of Court.

See C. P, Code.

O. 21. r. 1 and

o 21. r. 2.

Adjustment of partition Decree after attachment.

See C P C O. 21, r. 1. and O. 2I. r. 2.

Adjustment of suit.

See Compromise, Compromise of suits under C P Code.

Adjustment of Decree suit upon.

See C P C O. 21 r 1 and

O 21 r 2.

Adjustment of Decree without certificate of court.

See Civil Pro Code

O 21 r 1 & O 21 r 2..

Adjustment of Decrees more then three years old.

See appeal—Execution of decree Civil Pro Code O 21 r 1 & O 21 r 2.

Adjustment of Satisfaction of Decree.

See Civil Pro Code.

O 21 r I and O 21 r 2.

Administration.

See (1) Administration Bond.

(2) Administrator.

(3) Executor.

(4) Hindu Wills Act

(5) Probate

(6) Probate and Administration Act

(7) Succession Act

(8) Act V of 1881, S. 78.

(9) Evidence

(10) Evidence Act s 44

(11) Limitation act 5 7

Administration-*Contd.*

(12) Certificate of Administration

(13) Letters of Administration

Administration--Effect of

See (1) Company—Rights of shareholders

(2) Debt

Administration—Suit for

See (1) Hindu Law Presumption of Death.

(2) Hindu Law Reversioners Administration suit by.

(3) Letters Patent-High courts, 1815 cl 12

(4) Mahomedan Law. Debts.

(5) Security for Costs—Suits.

(6) Will—Renunciation by Executor.

Administration—Under act1 XX of 1841

See Superintendence of High Court Civil Procedure Code. S 622.

Administration

1.—Petition for administration summons—Plaint.—

A petition for an administration summons may be ordered to be taken as a plaint, and as the foundation of an administration suit.

Mackintosh v Wilkinson.
3 B. L. R. Ap. 3.

2.—Limitation—Persons whose claims are not barred can bring the suit.

In England, actions for the administration of the estates of deceased persons can only be instituted by persons whose claims to recover are not barred by any statue of limitation. The same principle applies in India.

Nandlal v Gopilal. *(9 Bom L R 316.)*

3.—Suit for share of estate of deceased—Recorder. p ower of.

Where one son of a deceased party sued in the Recorder's Court another son who had obtained a certificate under Act XXVII of 1860 for his share of the deceased's estate, it was held that the Recorder had no power to trans form the suit into a general administration suit.

Oh Ling Tee v Awkinifee.
10 W R 86

Administration-*Contd*

4.-Heirs at-law under Mahomedan Law opposing grant of probate—Right to bring administration suit pending probate proceedings—Probate and Administration Act (V of 1881). Section 34.

The plaintiffs as heirs-at-law had entered caveat in an application by the executor for the probate of an alleged will of the deceased. The application was set down as a contentious cause, and the executor appointed administrator *pendente lite*. As heirs under Mahomedan Law, the plaintiffs were entitled to two-thirds share in the property left by the deceased, even if the Will was not established. *Held*, that the plaintiffs were entitled to maintain a suit for administration by the Court against the administrator *pendente lite*, even though the probate proceedings have not been determined.

Kuratul Ain Bahadur v Broughton.
1 C W N 336.

5.—Suit by creditor—Misjoinder—Multifariousness—Practice.

The principle of the rules that creditor of a deceased person suing for administration is in the same situation with regard to all other persons as if he were bringing an action at law against the administrator, and that a debtor to the estate of a deceased person can only be made unswerable as such debtor by the representative of deceased's estate, is to be adhered to in this country, where there is a different procedure. Therefore, where, to a suit brought against the Administrator-General as administrator of the estate of one W B by a creditor of the deceased, other persons who also had a claim against the estate were made defendants, on the allegation that they had realized and were in possession of assets of the estate of the deceased-*Held*, that, there being nothing to show that such persons were in the position of an executor or administrator *de son tort*, or that they had been partners with the deceased, or that they could not be sued, if necessary, by the legal representative himself, and there being no other circumstances which would make it equitable that they should be sued jointly with the legal representative, they were wrongly made parties, and the suit ought to be dismissed as against them for misjoinder. Even assuming the facts were such that the plaintiff was entitled to sue them as legal representatives

Administration-*Contd.*

of the estate, he should not mix his own claim with that which the Administrator General might have against them. **Dhunraj v Broughton. 15 B L R. 296.**

6.—Administration suit—Executor's acts of Maladministration—Different course of action.

Where the suit is one about the administration of the assets of a deceased person, and in the claim various acts by the executors of the estate are complained of as acts of maladministration and sought to be redressed, such acts do not constitute separate causes of action and such a suit is not bad for multifariousness.

Nistarini Dassi v Nundo Lall Bose. 26 Cal 891=3 C W N 670

Notes.—Affirm 30 Cal 369. Ap: 25 All 48; 5 C W N 559. Dist 31 Cal 233, 28 Mad 216. Ref (1904) W N 25; 11 C W N 489; 29 All 418; 24 All 242; 26 All 272, 27 Mad 157; 6 C L J 404

7.—Suit by one creditor on behalf of others—Legal personal representative—Suit by receiver.

Persons who are not the legal personal representatives of the testator, though interested in his estate, will not be allowed to sue persons possessed of assets belonging to the testator, unless it is clearly and satisfactorily proved that there exist assets which might be recorded and which would probably be lost to the estate if not recovered by such a suit. Such a suit may be upheld where the relation between the legal personal representative and the debtor to the estate presents a substantial impediment to the prosecution by the legal personal representative of a suit against the debtor, to recover the assets of the testator and where there is strong likelihood that such assets would be lost if such suit be not allowed. But where there is an administration suit pending, the proper course to follow is to obtain an order in the administration suit, directing either a suit to be brought in the name of the legal personal representative or to appoint a receiver for the purpose of suing and in this country the courts might have the power to give direction to the receiver to bring a suit in his own name

Oriental Bank Corporation v Gobinloll Seal. I. L. R. 10 Cal 713.

C. C. 29

Administration-*Contd.*

Notes—Ref: 25 Cal 642; 5 C L J 270. Ref 34 Cal 305.

8.—Frame of suit by. A creditor's remedy is not limited to an administration suit.

Narayanaswami Pillay v Esa Abbayi Sait 28 Mad 351

See also cases under

(1) **Debtor and Creditor**

(2) **Banker and Customer**

(3) **Contract Act Ss 16 & 74**

9—Taking of accounts in an administration suit—Rights of creditors to seek remedy in the suit—Decree by consent—Execution of the decree—Sum borrowed by executors to discharge testator's debts—Personal liability of executors—

To liquidate a debt owed by the testator, his executors borrowed a sum. The testator's daughter filed an administration suit in the High Court; and while this was pending, the creditors sued the executors, to recover the sum in the Small Causes Court. In the latter, an arrangement was come to that, on the claim being admitted, the plaintiff agreed to seek her remedy in the administration suit which was then pending: and accordingly a decree was passed by consent against the estate of the testator. The creditor notwithstanding applied for the execution of the decree against the testators estate, and got the same transferred to the High Court. Shortly after this, the creditor died leaving a will whereof one of the first named executors was the executor. The High Court suit was next decided and referred to the Commissioner for usual accounts. The creditor's executor then proceeded with the execution of her decree, got the first testator's property attached and advertised for sale. A Chambers summons was then obtained to stop the sale and raise the attachment.

Held, that the creditor was not entitled to proceed with the execution of decree: she could under the arrangement seek her remedy in the administration suit, since the executors had the right to stand in the place of the discharged creditor in the taking of the accounts, A claim for money lent to the executors can be enforced against them personally; a judgment therefore cannot lie directly against the assets,

Administration *Contd.*

of the testator. L R 7 Ch 123 (1871) Fol.
Byramji Rustomji Mistri v Heerabai.
11 Bom L R 250=2 Ind Cas 161.

10. Injunction—Order on summons under Act VI of 1854.

The Court will restrain by injunction a creditor from proceeding in an administration suit, after an order has been made on a summons obtained by another creditor, under s 24 of Act VI of 1854, for the administration of the same estate. **Lntcheemund Sett v Kamulmoney Dossee. 1 Ind, Jur N S 9**

11.– Dividend in respect of debt against the estate—Proof of debt—Date from which amount of debt is to be estimated.

In the administration by the Court of the estate of a deceased, the dividend in respect of a debt against the estate is to be estimated on the amount of the debt at the date of the order for payment. and not at the date of proof,
Agra and Masterman's Bank v Robinson, Land Mortgage Bank of India 6 B L R Ap 140,

12—Decree in administration suit, effect of —Subsequent suit to set aside sale by executor,

A decree in an administration suit brought by the parties whose interest had been sold against the executor of their father's will, by whom the sale had been made, held to be no bar to the maintenance of a suit against the purchaser to have the sale set aside. **Dhonendro Chunder Mookerjee v Mutty Lall Mookerjee 14 B L R 276= 23 W R, 6; L R, 2 I A 18**

13—Supplemental suit–Debts due by appointed managers under the will of the testator–Limitation—One N had two sons A and B.

In a suit brought to administer N's estate it was declared that A and B were indebted to the estate. It was also declared in this suit that a certain sum of money should be set apart and paid into Court for the performance of certain religious ceremonies. A and B died leaving their debt unsatisfied. In a suit which was supplemental to the above suit, the descendants of the sons of N, including the descendants of A and B, claimed their share of the funds which were in hands of the court, and asked for a division of

Administration–*Contd.*

accumultation of interest also. *Held*, that notwithstanding that the debt due from A and B to the estate was barred, the descendants of A and B could not be allowed to share in the accumulation of interest in the hands of the court, if they do not first satisfy the debt due by their ancestors to the estate. **Lokenath Mullick v Odoychurn Mullick. 7 Cal 644.**

14.—Liability of the share of one of next-of-kin for a debt due by him to the intestate—Debt barred at the date of the death of the intestate.

Semble that the rule followed by the Court of Equity in England, whereby, notwithstanding the provision of the Statutes of Limitation, the share of one of the next-of-kin in the estate of an intestate while in the hands of the administrator is liable for a debt due by the next-of-kin to the deceased, though barred at the date of the death of the latter, is to be applied in the Courts of British India. **Dhanjibhai Bomanji Gugrat v Navazbai. 2 Bom 75.**

Notes:—10 Bom L R 417; 53 Bom 122.

15.—Accounts—Liability of Executor.

Without intending to rule that, in all cases when an ordinary administration account has been directed, the value in money of a specific chattel shown to have been possessed by an executor, and not forthcoming, is to be charged against him.—*Held* that, notwithstanding the language of the decree, it was, in the undoubted circumstances of this case, within the competency of the master in taking the account, and, within the competency of the Court upon the report, to charge the executor for the value of certain property, it being impossible to doubt that the original executor had possessed himself of the property, and that the property so possessed was not forthcoming and accounted for. As to payments stated in the schedule and in the discharge, as made on account of just demands on the estate, it is competent to the executor to prove them as having been made on other dates than those stated in the schedule and discharge.
Aga Mahomed Rohim Sherazee v Ally Mahomed Shoostry. 4 W R P C 106.

16.—Administration suit when allowable in an administration suit after the passing of the preliminary decree.

A Court ought not to sanction a compromise which entirely ignores the claims of some of the

Administration-*Contd.*

defendants, the other parties arranging to take the property and relieving the executors from further accounting and also paying them a certain amount of money. **Ajoy Kumari Debi v Manindra Nath Chatterjee. 32 Cal 561.**

17.—Civil Procedure Code Ss. 213, 276, 295—Effect of Administration decree—Injunction.

One R. L obtained a money decree against P. C. on the 22nd July 1886. P. C. died on the 5th November 1886. R L applied on the 18th December 1886, to attach certain properties belonging to the estate of his judgment-debtor, which were actually attached on the 8th and 12th January 1887. One S brought a suit to administer the estate of the deceased on the 21st December 1886 and obtained an administration decree on the 20th January 1887. In may 1887 S filed an application praying for an order to stay all proceedings taken by R. L. against the estate of P C, and to direct him if he liked to join and prove his claim in the administration suit:—*Held*, that the attachment did not create any interest in, or charge upon, the properties in favour of the attaching creditor as against other creditors, and order prayed for ought to be granted. **Soobul Chunder Law v. Russick Lall Mitter. 15 Cal 202.**

Notes.—*Fol*: 29 Cal 428 F B. *Dist*: 27 Cal 351; 26 Mad 673. *Ref*: 20 Mad 224; 16 Bom 91; 29 Bom 405=7 Bom L R 488.

18.—Succession Act (X of 1865), s. 202—Estate of intestate Native Christian—Suit for partition of estate by purchaser of widow's share before completion of administration—Dismissal of suit—Only remedy by way of administration suit.

A person to whom the Indian Succession Act, 1865, applied having died intestate in April 1884, his widow and son were in September of the same year granted letters of administration, which were cancelled for want of stamp duty, a fresh grant being made on 19th January 1885. Plaintiff, alleging that the said widow had executed a promissory note in her favour in September 1884, filed a suit against her on 6th January 1885, and, there being no appearance of the defendant, obtained an *ex-parte* decree. In execution of the decree so obtained, plaintiff attached portions of the estate of the deceased and brought them to sale, becoming herself the purchaser of the one-

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third share of the widow in each lot sold. In March 1885 the son was appointed sole administrator; in January 1888 he died, and the letters of administration were revoked in consequence, and the amin of the District Court was appointed administrator of the estate until October 1894, when the son's widow was so appointed in his stead. Plaintiff now sued for partition of the property comprised in the estate of the deceased in order that she might obtain delivery of the portions of it which she had purchased in execution of the decree against the widow previously obtained as aforesaid. The estate of the deceased had never been administered or distributed. The defence was that the said previous decree had been obtained by fraud:—*Held* that, under s. 44 of the Indian Evidence Act, the defendants were entitled to set up this defence; and that, the property of the deceased having become vested in his administrator under the Indian Succession Act, it remained so vested until the administrator had distributed the estate, and that, in consequence, the widow had no saleable interest in any part of the estate until in the course of the administration thereof her share had been determined and allotted to her. Until such allotment (which had not yet taken place) the only process by which plaintiff could legally claim the widow's interest in the estate was by a suit for the administration of the estate, to which suit the widow, if alive, would be a necessary party. If not alive, letters of administration to her estate would be necessary administrator being made a party. *Held*, also, that the suit could not be treated as an administration suit.

Srirangammal v Santhammal. 23 Mad 216.

19.—Trust—Administration by court—Appointment of new trustee, if sanction of court necessary-Concurrent sanction of Court.

Where a suit has been instituted for the administration of a trust and a decree has been made, that attracts the jurisdiction of the court and the trustee cannot afterwards exercise the power given to him by the settlor to appoint new trustees without the concurrent sanction of the court, his power in such a case being merely one of nomination to be confirmed by the court on consideration of the fitness of the nominee to be a trustee. 54 L J N S Ch 527; 51 LT N S 90, 1885 dist. **Amrita Bibee v Kanhai Lal Agarwalla 9 C W N 239=32 Cal 448.**

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20-Contract Act Ss. 20, 142, 143—Mistake as to authority of the person guaranteed—Administration bond—Sureties, liability of-Mutual mistakes.

Where a person made false representations to the court and thereby obtained an order granting him letters of administraoion to the estate of a deceased person and induced two other persons to stand surety for him by means of similar misrepresentations and showing them a copy of the said order, whereupon they in ignorance of the true state of affairs executed an administration bond and letters were issued in his favour. *Held*, per *Maclean. C. J. Mitra and Geidt*, JJ., (*Harrington* and *Stephen* JJ., dissenting.) The case is not governed by S. 20 of the Indian Contract Act, which says that where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void. The fact that A was not entitled to the letters is a fact not essential to the agreement between the court and the sureties. The Court simply said that it would not issue the letters of administration unless A and the sureties gave the bond. *Held* per *Harrington* and *Stephen* JJ.,-A mistake as to the authority of the person guaranteed is a mistake on a matter of fact essential to the agreement, because it directly affects the risk undertaken by the sureties. They guaranteed the due performance of the duties of an administrator by a person authorized for that purpose by the beneficiaries and not by a person not so authorized. They do not undertake the heavier risk in the latter case. The case, therefore, falls within the scope of S. 20 of the Contract Act. 17 W R (Eng) 139; 2 Q B 494 Expl. and Dist. *Per Geidt* J.—The mistakes which invalidate contracts of guarantee are specified in Ss. 142 and 143 of the Contract Act. A mistake induced by the principal debtor does not come within the sections.

Debendra Nath Dutt v The Administrator-General of Bengal; and Banku Behari Banerji v The Administrator-General of Bengal. 10 C W N 673=3 C L J 422=33 Cal 713.

Notes.—*Fol:* 12 C W N 481. *Affirm*: 35 Cal 955 P C=8 C L J 94=12 C W N 802=18 M L J 367.

21—C P C, O. I, r. 8—Parties, addition of—Administration suit—Practice.

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If a person, belonging to a body of persons on whose behalf the suit has been filed, claims to be added as a party, he must show that his interests will be seriously affected to his prejudice if he is not allowed to come in. He must show that the conduct of the suit is not in proper hands or that action is being taken by the parties, who purport to represent him, in some way which is prejudicial to his interests.

In an administration suit, it is extremely undesirable that individual creditors should be added as parties, unless they show some very strong reason that the person, who has filed the suit on their behalf, is not conducting it in the proper way. It is not enough that they should be willing to bear their own costs. There is considerable delay caused by a fresh party coming in, and the costs of other parties, consequently are increased.

Vasanji Tricamji & Co. V. Ismailbhai Shivji, 11 Bom L R 1054=34 Bom 420.

22—Administration—Administration bond—Administrator, fraud of —Sureties neither parties to nor cognisant of fraud—Misappropriation—Discovery of fraud—Cancellation and fresh grant of Letters of Administrator—Assignment of bond to new Administrator—Sureties, liability of.

A surety to an administration bond is liable under it even though it subsequently transpires that the Letters of Administration were obtained by fraud and are revoked on that ground.

Debendra Nath Dutt v The Administrator General of Bengal; 8 C L J 94=10 Bom L R 648=12 C W N 802=18 M L J 367=35 Cal 955=35 I A 109 (P C.)

23—Administration suit. High Court, jurisdiction of—Leases of land situate outside the jurisdiction.

Where the primary object of a suit is the administration of the estate of a deceased person resident within the ordinary original jurisdiction of the Calcutta High Court the principal executor being also resident there and the actual administration going on there, the High Court of Calcutta, in its ordinary jurisdiction has a right to order administration of the estate, and, as ancillary to such an order, to set aside deeds obtained by the fraud of the executor.

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The circumstances that a decree has been granted by the Court of the 24 Pargunnahs making a fraudulent award an order of Court will not protect that decree from the jurisdiction of the High Court at Calcutta when redressing that fraud.

For the due administration of the estate the High Court is entitled to set aside leases of land outside the territorial limits of their jurisdiction these leases having been made as incident of the same fraud. **Benode Behari v. Srimati Nistarini, 7 Bom L R 887=33 Cal 180=9 C W N 961=2 C L J 189=32 I A 193=15 M L J 331.**

Notes:—Ref: 11 C W N 489, 6 C L J 404.

24—Suit to recover a debt from the heir of a deceased person:—

Distinction between pointed out. 19 All 504 doubted. 4 Cal 402; S. C. 51 All 112 explained. **26 All 28 at 32.**

25—Further directions— Advocate—General added as a party—Advocate General entitled to raise a point as to the validity of the gift—Accounts and enquiries—Beneficiary—Trustee.

K by his will dated 4th September 1864 declared a trust for the payment of a sum of Rs. 1,000 per month for the benefit of his daughter L and for the benefit of the children of L if she should die leaving children. The residuary estate was kept on trust the income of which was directed to be spent in some charities. K died on the 4th October 1864. In 1868, the Advocate General commenced a suit for the administration of the testator's estate. A decree for administration was passed on the 5th December 1873. L died on the 15th December 1869. In 1870, L's children and husband commenced a suit (370 of 1870) against the executors to recover the arrears of the monthly sum due at L's death, and to have a sum set apart to answer the monthly sum in future. On the 6th November 1871, a decree for general administration was passed. The Commissioner made his first report on the 31st March 1884, but it was in July 1889 that his final report was completed. In June 1902, the case came up before the Court for further directions; at this stage of the suit, the Advocate General was added as a party at the instance of the executors and with the assent of the other parties. The Advocate General then raised a contention that the gift to L's children was bad as transgressing the rule in the *Tagore case* and that the gift therefore lapsed into the residuary gift. The Divison Court held that the Advocate General was not at that stage, entitled to raise the point:

Held, that the Advocate General was entitled to raise his point even at the stage the proceedings in the administration suit (370 of 1870) had reached.

A beneficiary is generally taken as sufficiently represented by his trustees: but this does not hold where the contest lies between beneficiaries themselves. **Advocate General of Bombay v. Karamally, 4 Bom L R 857.**

26—Carriage of the suit—Suit by heirs of the deceased—Subsequent administration suit by a creditor—Conduct of the suit.

The heirs of a deceased person filed an administration suit with regard to his property. Subsequently, one of the creditors of the deceased filed another administration suit respecting the same estate. It appeared that the creditor's claim was just. The defendants, the heirs, contended that the creditor ought not to be allowed to obtain an administration decree and have the subsequent conduct of the proceedings:-

Held, that the plaintiff was entitled to an administration decree; but the carriage of the suit should be entrusted to the heirs of the deceased. **Ahmed Abdulla v. Mahomed Shaikh, 10 Bom L R 1166.**

27—Receiver—Discharge before final decree:-

No order can be made for the discharge of a receiver appointed in an administration suit and directing him to make over possession of the estate to the plaintiff before the completion of the administration decree. **Bhugwan Das Sureka v. Heera Lal, 5 C W N 417.**

28-29—Transfer of Property Act (IV of 1882) sections 52, 55 Lispendens—Fraudulent transfer—Pleadings—Execution sale—Prior purchase of equity of redemption by mortgagee decree-holder—Estate under administration—Purchase from and rights of residuary legatee or heir.

Where the estate of a deceased person is under administration by the Court or out of

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Court, a purchaser from a residuary legatee or heir buys subject to any disposition which has been, or may be, made of the deceased's estate in due course of administration, the right of the residuary legatee or heir being only to share in the ultimate residue, which may remain for final distribution, after all the liabilities of the estate, including the expenses of administration, have been satisfied.

So, a purchaser at a sale, held in due course of administration, is entitled to priority over a purchaser at a sale in execution of a decree, held during the pendency of the administration-suit.

Chutterput Singh v. Maharaj Bahadoor Singh, 9 C W N 225 P C=32 Cal 198= 2 A L J 190.

Notes:—Fol: 11 C W N 889. Ref: 6 C L J 410; 34 Cal 999. Dist: 34 Cal 427; 4 C L J 495.

30-C P C, O 1. r. 10 (1)-Party-Addition and substitution of accounts, suit for—Bona fide mistake—Mistake of fact or in law—Administration, order for, when relates back—High Court's power of interference—Interlocutory order.

O. I. r. 10, sub r. (*1*) of the Code of Civil Procedure is applicable only to cases where it is established that the suit has been improperly instituted through a *bona fide* mistake, but such mistake may be one of fact or of law.

Three of the five heirs of the testator, viz. A, B and C, after the decision by the lower Court as to the invalidity of the will in a suit for construction of the will, and during the pendency of an appeal against that decision, instituted a suit against the representatives in interest of the executor and the other heirs for accounts. After the suit for construction of the will was withdrawn, owing to adverse decision of the question by a Full Bench, A and D, one of the shebaits under the will, after obtaining letters of administration, applied in the account suit that they be substituted or added as parties and that B and C might either be removed from the suit or transferred to the category of defendants.

Held, that A and D were to be added to and substituted for the parties, and they were entitled to maintain the suit.

Although an act done by a party, who afterwards becomes administrator, to the prejudice

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of the estate, is not made good by subsequent administration, yet if the act is for the benefit of the estate, the order relates back, so that by virtue of the appointment, the administrator is able to recover against such persons as have interfered with the estate, and thereby to prevent from being prejudiced and despoiled.

It is within the powers of High Court to interfere with interlocutory orders, if the Court is satisfied that such interference is needed in the interests of justice. **Charu Chunder Dutt v. Sarat Chunder Singh, 12 C L J 537.**

31—Administration suit—Suit for account against administrator—Prayer for his removal—Jurisdiction—Ordinary Civil Court.

In an administration suit against an administrator for the purpose of compelling him to account for the assets of the estate of the deceased and to carry out the duties of his office, a prayer was joined for the removal of the administrator.

Held, that the suit was cognizable by the ordinary Civil Court, that the prayer for the removal of the administrator might be treated as surplusage, or it might form the basis for the grant of such relief as the appointment of a Receiver against the administrator, and that it was not a prayer for the revocation of the letters of administration.

Gajendra Nath Nandi v Ganendra Kumar Nandi. 7 Ind Cas 804.

32.—Hindu's estate—Estate belonging to a living Hindu—Civil Court—Competency to entertain the suit—Civil Procedure Code (Act XIV of 1882), S. 11.

An administration suit brought to administer the estate of a living Hindu debtor cannot be maintained in a Civil Court. (29 Bom 96= 6 Bom L R 853 Expl:) **Gangaram Keval v. Nagindas Khushaldas. 10 Bom L R 519= 32 Bom 381.**

33—C P C S. 52 (1882 S. 252) Cutchi Memons Administration of property—Hindu Law-Administration of deceased's property-Heirs-Unsecured creditors—Payment to same creditors—Executor *de son tort*.

The heirs of a deceased Hindu or Mahomedan are entitled to take possession of the property, to

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administer the property and to pay debts without being liable to account to the Court, otherwise than as heirs.

The unsecured creditors of a deceased Hindu have no charge or lien on the inheritance. If payments are not made by the heir rateably, it does not follow that he has failed to apply the assets duly. Every payment on account of a debt is perfectly lawful, irrespective of its effect upon the other creditors. **Haji Saboo v Ally Mahomed 6 Bom L R 1135 = 30 Bom 270.**

34—Administration suit—Creditors—Costs of creditor—Party and party—Attorney and client.

In a creditor's action for administration the costs shall be as between party and party payable out of the estate when the estate is sufficient to pay the debts in full.

But in a proper case the difference of costs between attorney and client and between party and party may be ordered to be borne rateably by the whole body of creditors. **Iswaradas v Chandik. 7 M L T 400 = 6 Ind Cas 267.**

35—Mortgage suit—Administration suit—Residuary legatee mortgage by—Administration. subsequent, of testator's estate—Receiver, sale by, of mortgaged property before completion of administration.

Defendant mortgaged certain properties, which he took under the will of his father to the plaintiff. Plaintiff brought this suit on the mortgage and obtained a decree and an order for sale by the Registrar. In the meantime a suit for administration of the testator's property had been filed and an order made in that suit appointing a Receiver. Plaintiff now applied that the sale of the mortgaged properties might be held by the Receiver appointed in the administration suit instead of by the Registrar. The administration suit was still pending and administration of the testator's estate had not been completed.

Held—That the sale could not be held by the Receiver before the completion of the administration.

That till completion of administration it could not be said that the defendant was entitled to the mortgaged properties. **Netai Chand Chuckerbutty v Ashntosh Chuckerbutty. 5 C W N 408.**

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36—Will—Executor— Legatee—Suit—Administration suit.

The plaintiff, a legatee under a will, brought a suit, against the executors of the will, to recover the sum bequeathed to him by the testator. The Court of first instance awarded his claim. The lower appellate Court, was of opinion that the plaintiff should have brought an administration suit, making the other legatees under the will parties to it. The Court asked the plaintiff to amend the plaint and to add all the legatees as parties. This the plaintiff declined to do. at which the Court dismissed his suit as one not properly framed. On appeal to the High Court:

Held, that the lower appellate Court was in error in holding that the plaintiff was not entitled to sue the executors for the legacy bequeathed to him. **Purshotam v Kala. 3 Bom L R 932 = 26 Bom 301.**

Notes:—*Ref* 9 Bom L R 404.

37—Letters of administration—Mitakshara family—Widow, application by—Jurisdiction.

A Hindu widow governed by the Mitakshara law is entitled to obtain letters of administration that he left separate property; the Court cannot go into the question whether the property left was joint or separate. 3 C W N cl. XXVII foll.

Raghunath Misser v Musst Pate Koer. 6 C W N 345.

Notes:—Dist. 8 C W N 51; 31 Cal 133. Fol: 6 Bom L R 960; 28 Bom 644.

38—Administration suit—Reversionary heir under Hindu Law, right of, to institute suit:

A daughter of the deceased entitled to the estate after his widow under the Hindu Law is entitled to bring a suit for administration of the estate. 4 C L R 413 distinguished. **Rojomoyee Dasee v Troylukho Mohiney Dassee. 29 Cal 260 = 6 C W N 267.**

Notes:—Ref: 10 C L J 355 F B. Disap: 14 C W N 18 F B Fol: 3 C L J 224.

39—Administration of estate by Court—Position of creditors—Default on creditor's part—Creditor admitted so as not to disturb past dividends, position of—Equity:

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The general principle governing the position of creditors of an estate under administration by the court is that they will on due cause shown be let in at any time while the fund is in court even where the money has been apportioned amongst the creditors and transferred to the Accountant-General for payment to them. 11 Ves 602 (1085)*1* Mad 529 (1816) and Mylne and Keen s p. 203 (1833) ref to. Where however, a creditor has been guilty of remissness in the ascertainment of his claim, his default shall not be allowed to operate so as to prejudice or inconvenience others more diligent than himself 8 Beav 243 (1845) ref to. The legal position of a creditor who for some reason or other has been excluded from a first dividend and subsequently gets his claim admitted to the schedule *so as not to disturb past dividends*, is that if further assets come in he is entitled to have a preferential dividend paid to him out of such assests before any further dividend is paid. 1 Atkyns 246 (1743) ref to

Rose v Sreemutty Biddahurry Dassee 9 C W N 167.

40—Administration Bond.

An administration bond is not invalidated by reason of mutual mistake on the part of the Court and the surety, or misrepresentation by Court. *10* C W N 673=33 Cal 713, Fol· **Sarat Chandra Roy Chowdhury v Rajoni Mohan Roy, 12 C W N 81.**

41—Administration bond—Religious and Charitable Endowments—Administrator of trustee—Letters of Administration—Sureties.

Where Letters of administration were granted and the bond recited that it was the duty of the Administrator to transfer and deliver over the trust securities to a properly constituted trustee and the Administrator sold the securities and applied the proceeds to his own use, the securities of the Administrator are liable to make good the amount in an action brought against them by the regularly constituted trustees **Seshachallam Chetty v Swami Chetty. 7 M L T 90= 5 Ind Cas 761.**

42—Practice—Pleadings—Adoption—Administration—Suit for—Will, construction of Administration, prayer for, without asking for declaration with regard to an alleged adoption—Amendment-Adoption, preliminary trial of the question of.

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Suit for administration and construction of a will, under which plaintiff's interest was restricted in case a son was adopted to the testator. Plaint, *inter alia* stated that plaintiff was informed that in Jaisto 1297 the widow of the testator purported to take in adoption a son whose natural father was at the time and is now a Brahmo and had renounced the Hindu Religion. She submitted that such adoption was absolutely invalid and did not operate to pass any title to the adopted son There was, however no prayer asking for any declaration with regard thereto

Held, that upon the suit as at present constituted, the question of adoption was not in issue, and upon the pleadings the fact and validity of the adoption must be taken to be admitted.

That if a declaration with regard to the adoption is sought the plaint must dispute the fact or validity of the adoption and should contain a prayer for a declaration as to the fact or validity thereof.

The whole substance in the claim for administration being dependent on the adoption being out of the way, the questions raised in the suit cannot be gone into till the questions of adoption is determined once for all.

Ordered that on the plaint being amended, the issue as to the adoption to be tried as a preliminary issue between plaintiff and the adopted son **Sri Kusumkumari Ray v Satya Ranjan 5 C W N 162.**

43—Administration of assets—Accountability of administrator 'de bonis non' for predecessor's acts—

It is the duty of an executor when he comes of age to take the accounts of the administrator *durante minoritate* and the beneficiaries are entitled to call upon the executor to render an account not only for the period of his executorship but also for the period during which the estate was in charge of the administrator *durante minoritate*—When the administration determines by reason of the cessation of the minority of the executor, the administrator *durante minoritate* may be and ought to be called upon to account by the executor or other person who succeeds him in the administration, and it is the duty of the latter to get the whole of the es-

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tate of the testator into his possession, to call upon the personal representatives of his predecessor in office to render account of the estate and to recover damages, if necessary, for waste and misappropriation by his predecessor, and, if required, by the institution of appropriate judicial proceedings. If he fails to do so, he must be held liable to the extent to which the estate would have been benefited if he had faithfully performed his duty.

(3 Atkyns 603; 1 Modern 175; 1 Cas Temp. Lee 15; 1 Strobh Eq (S. C.) 393; 3 Cranch C. C. 355; 22 Fed Cases 456; 66 Texas 704; 1 S W 803 160 Ill 203; 43 N E 385; 117 Ind 139; 19 N E 758; 115 N C 415; 20 S E 516; 103 Alacama 436, 16 Southern 25 Ref.) **Baroda Prosad Banerjee v. Gajendra Nath Banerjee 9 C L J 383=13 C W N 557.**

44—S. 34—Trustee-Power to refer a question for opinion of the Court-Appeal from the opinion—Executor cannot refer—Administration suit is the only remedy available to him. No appeal lies from an opinion expressed by the Court under S. 34 Trusts Act 1882.

An executor, who has not become a trustee by assenting to the legacies cannot claim the advantages provided for trustees by S. 34 of the Act. His remedy, if he fee's any doubt as to the manner in which he should administer the estate come to his hands, is to file an administration suit **Trimbak Madhav Tilak v. Narayan Hari Lele 11 Bom L R 495=33 Bom 429=3 Ind Cas 164.**

45—C P C O.23 r 3 (1882 S. 375)-Oral submission-Arbitration Act (IX of 1899)—Necessity for submission in writing—Award on oral submission—Validity—Civil Procedure Code (Act XIV of 1882) S 375—Adjustment of suit—Award on oral submission not an adjustment. The parties to an Administration suit, consented (at the hearing), to its being referred to the Commissioner, to take the usual accounts and to determine their respective shares.

Accounts and objections were filed before the Assistant Commissioner, and the parties appeared before him, when it was orally agreed, to save the costs of a lengthy inquiry, that the Assistant Commissioner should deal summarily with all matters in dispute and draft terms by which the

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parties were to be finally bound, and the Assistant Commissioner personally explained to defendants 1 and 6 that they would be bound by his decision even if he decided to give them one rupee. To this they agreed. The Assistant Commissioner, in due course, arrived at a decision, but defendants 1 and 6 considered that it awarded them an insufficient amount and declined to be bound by it. Upon application being made by plaintiff that an adjustment of the suit might be recorded under S. 375 of the Civil Procedure Code, on the basis of the Assistant Commissioner's decision.

Held, that there had been no adjustment of the suit. There had been no written submission to arbitration as provided by S. 4 of the Indian Arbitration Act, and, consequently, there had been no legal and valid reference to arbitration, and the Assistant Commissioner's award [for it really was an award and nothing else] had no legal foundation, and could have no legal consequence. As there had been no reference to arbitration and no award, there had been no adjustment.

Semble, that the Indian Arbitration Act applies to such an arbitration.

Where a special procedure is provided for extraordinary extra-judicial methods of setting disputed claims, *semble*, that it was the intention of the Legislature, that that procedure and no other was to be followed. [20 Bom 304 and 26 Bom. 79, *commented on and distinguished.*]

Rukhanbai v. Adamji Shaik Rajbhai, 10 Bom L R 366=33 Bom 69 =1 Ind Cas 622.

46—Succession Act S.181,186,187,196-Will-Probate-Residuary legatee—Administration suit-Probate of the will.-The plaintiff instituted a suit for the construction of a will, and for a declaration that certain property was at the time of the death of the testator at his disposal and that the same has been validly disposed of by his will in favour of plaintiff and one Dharamshi in equal shares, and for administration. The Court below construed the will and decided in plaintiff's favour, but directed that the decree should not be drawn up until the plaintiff obtained the letters of administration with the will annexed. The plaintiff appealed. *Held*, that notwithstanding the terms of S. 181 of the Indian Succession

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Act, 1865, the plaintiff as residuary legatee could obtain a grant that would satisfy the requirements of S. 187 of the Act; and that until he had done so, he was not entitled to establish his claim in a Court of law.

Gordhandas v. Ramcooverbai
3 Bom L R. 874=26 Bom 267.

47—, Procedure when legacies are contested. With regard to particular legacies which may be contested, the usual course, in administration suits, is to deal with them when the case comes up for further directions on the report after the usual inquiries have been made as directed by the administration decree. **Fanindra Kumar Mitter v. The Administrator-General of Bengal & ors.** **6 C W N 321**

48—Creditor—Taking out administration of debtor's estate—Effect—Extinguishment of debt—Whether doctrine applicable when one of two creditors takes out administration—Joint mortgages—Payment to one, effect of—Contract Act (IX of 1872) S. 45—Right of suit—other—mortgagee to sue administrator for his share of debt—Limitation Act (XV of 1877), S. 22—Transfer of *pro forma*—Defendant to category of plaintiff—Interest—Assets sufficient for re-payment of debt.

If a creditor takes out letters of administration to the estate of his debtor, although this alone may not operate as an extinguishment of the debt, if the debtor has assets which the creditor may retain to pay himself, it is an extinguishment, for possession of assets amount to payment. But this doctrine is not applicable where only one of two obligees is appointed one of several executors of the obligor. Payment to one of two joint—mortgagees, does not necessarily operate as a discharge of the debt in so far as the other mortgagee is concerned. (12 W R 926 Ref.) Consequently, the appointment of one of the mortgagees as administrator to the estate of the mortgagor does not extinguish the right of action of the other mortgagee in respect of his share of his mortgage—money. But the mortgagee other than the administrator must bring his suit to recover his share of the mortgage money, not against the heirs of the mortgagor, but against the administrator in whom the estate of the mortgagor is vested.

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Obiter:—The transfer of the name of a *pro-forma* defendant from the category of defendant to that of the plaintiff cannot rightly be treated as the addition of a new plaintiff within the meaning of S. 22 of the Limitation Act. 1877. (8 C L J 266, 17 Mad 12 Rel. on) No interest should be allowed upon the mortgage—debt from the date when sufficient assets became available to the administrator for re-payment of the mortgage—money. **Husainara Begum v. Rahmanessa Begum.** **8 Ind Cas 837. =13 C L J 3.**

49—Will by *Khoja* Mahomedan—Suit for administration by Advocate-General—Suit for administration by the legatee—Case coming for further directions in the legatee's suit—Advocate-General added as party in the suit by consent—Validity of legacy, right to question—Estoppel—Stale claim—Testamentary capacity of a *Khoja*—Gift to a class—Will, Construction of—Burden of proof

In 1864, a *Khoja* Mahomedan merchant of Bombay died leaving a will and a codicil, by which he gave his property, to trustees, upon trust, to pay his daughter a monthly sum during her life, and, after her death, to pay it to her children. The residuary estates were charged in favour of certain charitable objects. In 1868, the Advocate-General brought a suit for the administration of the testator's estate. In 1869 the daughter died leaving, her surviving, three sons, the plaintiffs in the present suit, and a daughter. In 1870, her husband brought the present suit for the administration of the testator's estate and got a decree in his favour in 1871, even though the Advocate-General's suit was pending at that time. In 1873, the Advocate-General got a decree in his suit, which gave him liberty to join in taking the accounts and making the enquiries in the present suit. Meanwhile, the husband died and his sons were substituted as plaintiffs in this suit. In 1899, the Commissioner, appointed in this suit, made his final report, to which exceptions were filed. In 1902, when the case came before *Tyabji*, J., for further directions, the Advocate-General was, by consent of the parties, added as a co-defendant, to simplify and regularize the suit. Up till now, the validity of the gift to the daughter's children had not been questioned by the parties and the

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Commissioner's report, was based on the assumption that it was valid. At this stage, the Advocate-General contended that the gift to the daughter's children was bad as transgressing the rule laid down in the Tagore case, and claimed that the fund was applicable to the charitable purposes indicated in the residuary gift. The learned Judge decided that the Advocate-General was precluded, by the Commissioner's report from questioning at this stage the validity of the legacy. *Held (reversing Tyabji J.)* that the Advocate-General was not precluded even at this stage, from questioning the validity of the gift to the daughter's children, as there had been no definitive pronouncement in favour of the validity of the gift. Where the accounts, actually taken and completed in another suit, are adopted, the ordinary course is to allow the result of those accounts and enquiries to be questioned in the suit wherein they are adopted. The rule that a beneficiary is sufficiently represented by his trustee does not apply where the contest is between the beneficiaries themselves. A person is not barred by the staleness of his claim. At this stage, the case was urged as to the construction of the will, and further evidence was taken as to the age of one of the plaintiffs. *Held*, that the will of a *Khoja* Mahomedan of Bombay must be construed on the basis of the testator having the testamentary powers of a Hindu resident of Bombay, inasmuch as the civil rights of a *khoja* are determined by the law governing Hindus in this presidency. *Held* on the construction of the will, that such of the testator's daughter's children, as were in existence at the death of the testator, were entitled to the annuity after the daughter's death. The *onus* lies on the person who asserts that he was *enventure sameri* or was born at the time of the testator's death. Where, in a gift to a class, the vice is that the class includes those not in existence at the date of the testator's death, *held*, that such a defect is essentially distinct from an infringement of the law of remoteness. **The Advocate-General v. Karm li Rahimbhai, 29 Bom 133.**

Notes:—Ref: 32 Cal 992, 9 Bom L R 1117.

Administration—Suit for— See Hindu Law—Adoption, **5 C W N 162.**

Administration—Mismanagement by administrator—Powers of Court—Administrator's liability to account—Effect of widow being administrator—See Hindu Law—Widow, **9 M LT 296.**

Administration—Scheme for—Of a deceased testator's estate, when necessary—See Hindu Law—Will,

Administration—Obtaining probate of will constitutes part of the cause of action in a suit for—See Letters Patent High Court, Madras 1865 cl 12,

Administration—Claim for legacy— Ancillary claim for administration—See Limitation Act 1908 arts 120, 123,

Administration—See Parties to suits—

Administration Bond.

See (1) Administration. (40) **12 C W N 481**

(2) Guardian and Wards Act, Ss., 34 35 36 37.

(3) Administration.

(4) Probate

1-Assignment of Bond-*Succession Act*, s. 257.

Upon a petition presented to the High court for the transfer of an administration bond under s. 257 of the Succession Act; on the allegation that the administratrix had refused to pay certain moneys due to the petitioners on a promissory note given to them by the deceased, and it being admitted that the estate of the deceased was capable of meeting the alleged claim.—*Held*, on a *prima facie* case having been made out, that under the circumstances it was competent for the High Court, on a petition being presented to it for the asstignment of an administration bond, to pass an order authorizing the transfer of it, and empowering the assignee to sue as a trustee for the benefit of the creditors. **Saunders 6 N W 62.**

2—s. 74-Contract Act-Exception] *Held* that the failure by an administrator to make a true

Administration Bond-*Concld.*

inventory of the estate and exhibit the same to the Court on the fixed date (which he was bound to do under the bond) was a breach of the condition of the bond, which entitled the assignee of the bond to recover the damages he had sustained by such breach. But he was not entitled to recover the whole amount mentioned in the bond as recoverable in case of breach of the bond. The case not coming within the exception to s 74, Contract Act **Lachman Das v. Chatter and Another.** **10 All 29=7 W N 279.**

Notes—Ref: 16 Mad 474.

3——In the case of the High Court, the practice is to take administration bonds in the name of the Chief Justice, and the proper person to assign such a bond under sec 257 of the Indian Succession Act is one of the officers of the High Court, e. g; the Registrar of the Original Side. sec. 257 of the Indian Succession Act is not confined to private individuals only and an administration bond may be assigned to the administrator-General. **Debendra Nath Dutt v. The Administrator General of Bengal (F. B** **10 C W N 673.**

4—Administration — Administration bond—Administrator fraud of—Sureties neither parties to nor cognisant of fraud — Misappropriation—Discovery of fraud—Cancellation and fresh grant of Letters of Administrator-Assignment of bond to new Administrator—Sureties, liability of.

A surety to an administration bond is liable under it even though it subsequently transpires that the letters of Administration were obtained by fraud and are revoked on that ground.

Debendra Nath Dutt v. The Administrator General of Bengal 8 C L J 94=10 Bom L R 648=12 C W N 802=18 M L J 367=35 Cal 955=35 I A 109 (P. C.)

Administration Bond—under the Succession Act—Application to vacate—Legality—**See** Succession Act, *1865*, S 256,

Administration Bond—Surety under an—**See** Surety—Discharge of Surety,

Administration Certificates Act

See (1) **Certificate of Administration.**

(2) Act X of 1851.

Administration de bonisnon.

See 1 Probate and Administration Act.

(2) Probate

(3) Letters of Administration.

Administration Decree.

See Administration suit for.

Administration of Part of claim.

See Variance between pleading and proof.

Administration of the estate of a Shiah Mahomedan under his will.

See Mahomedan Law-Will.

Administration Pendente lite.

See Probate-Revocation of grant.

Administration Letters of.

See Probate and Administration Act 1881.

Administration Reports.

This order prescribes dates for the submission of the Administration Reports and Periodical Statements. **Civ. & Crim. Ord. No. 4, 24 W. R. Rules & Ors. of the H. C. P. 1.**

Administration-Suit.

See (1) Civil Procedure Code (1908). **O. 20 R. 13.**

(2) Administration.

1—Creditor's action against deceased's estate to be treated as administration suit—Plaint to be amended accordingly——Failure to so amend—Form of decree in such case—Practice.

The mofussil Courts must bear in mind the necessity of treating a creditor's action against a deceased person's estate as an administration suit and insisting upon the amendment of the plaint in such a suit on that basis. Where the

Administration Suit-*Contd.*

plaintiff is not willing to amend, the Court, if it finds the claim proved, should pass a decree simply giving him a declaration to that effect and declaration besides that he is entitled to its satisfaction according to law in due course of administration and not otherwise. It is the duty of the Court to see in such actions that one creditor is not enabled to gain advantage over other creditors by getting an unconditional decree for full payment and executing it against the deceased's estate to the prejudice of other creditors.

Bai Meherbai v. Maganchand, 6 Bom. L.R. 853=29Bom 96.

Notes:—Expl. 32 Bom 381=10 Bom L R 519: R. 31 Bom 73, 8 Bom L R 885, 11 Bom L R 250.

2—Practice—Contested legacies—With regard to particular legacies which may be contested, the usual course, in administration suits, is to deal with them when the case comes up for further directions on the report after the usual inquiries have been made as directed by the administration decree. **Fanindra kumar Mitter v. the Administrator General of Bengal. 6 C. W. N. 321.**

Administration-suit—Reference of, by consent, to the Commissioner to take usual accounts-
See 10 Bom. L. R. 366= 33 Bom. 69.

Administration-Suit — by judgment-creditor against executor of deceased Judgment-debtor scope of-Whether suit merely concerned with execution of decree.

12 C. W. N. 614 =35 Cal. 1100.

Administration-Suit—Addition of parties—
Practice— **11 Bom L R 1054=34 Bom 420**

Administration-suit- 68 P R 1881.

Administration suit—By a legatee—A legatee under a will can sue the executors to recover the legacy bequeathed to him; he is under no obligation to bring an administration suit making the other legatees under the will parties to it—
See **3 om. L. R. 932=26 Bom. 301.**

Adminisiration Suit-*Concld.*

Administration—Suit—See Compromise—
15 Bom 594.

Administration-Suit—
29 Cal. 260=6. C. W. N. 267

Administration with will annexed

See Succession Act.

Administrator.

See (1) Land Registration Act s 12.
(2) Lease.
(3) Letters of Administration.
(4) De-bonisnon.

Adminitrator, Right of-

(1) Declaratory Decree, Suit for—Declaration of title.
(2) Executor.
(3) Insolvency—Property acquired after vesting order.

Administrator--Mismanagement by administrator-Powers of Court-Administrator's liability to account—Effect of widow being administrator.
9 M LT 296.

1—Liability of administrator in distribution of assets—Actual knowledge.

Semble that an administrator who pays such debts as he knows of otherwise than equally and rateably as far as the assets of the deceased will extend, in accordance with the provisions of s. 282 of Act X of 1865, is personally liable for any loss occasioned to a creditor of the deceased by such improper distribution of the assets In order to charge such administrator, his knowledge must be actual as distinguished from a constructive or imputable knowledge. **Asiatic Banking Corporation v Amador Viegas. 8 B. H C, O C, 20.**

2—Decree against—Decree passed against one is binding on others.

The executors and administrators of the deceased person form a continuing representation of the deceased's estate and therefore a decree obtained and execution had against them must bind their successors in the absence of fraud or collusion. **Bai Mehrbai v Maganchand. 6 Bom L R 853=29 Bom 96.**

Administrator-*Contd.*

Notes.—Expl. 32 Bom 381=10 Bom L R 519 Ref: 31 Bom 73 ; 8 Bom L R 885: 11 Bom L R 250.

3—Joint family—Manager : powers of-Powers of manager when administrator.

A Karta of a joint Hindu family cannot ease the obligation of a personal bond on his co-parceners. The co-parceners, however, might become liable on the bond if the karta was acting as their account or if they subsequently acquiesced in it. 22 Mad 166=21 Bom 808 at p. 816 ref. w *Obiter* A karta of a joint Hindu family, who is also the administrator of the joint estate, cannot exercise powers as karta which he is directly prevented from exercising as administrator. 15 Bom 350 ref to.

Ranjit Singh v Amullaya Prosad. 9 C W N 923.

4—Liability of administrator for loss to estate—Compromise of claim by administrator—Subsequent suit by a creditor of estate to set aside the compromise and for damages for negligence of administrator—Succession Act (X of 1865); ss. 280 and 328—Administrator's liability for neglect to get in any part of the deceased's property.

One P mortgaged certain property to H for Rs 2,667. H sued P to recover the mortgage debt. Pending the suit, P died in 1878. Thereupon A, the son of P, took out letters of administration to the deceased's estate, and contested H's claim. H obtained a decree in the Court of first instance for the sale of the mortgaged property, and in execution of this decree the property was sold for Rs.810 and purchased by H. The decree was afterwards, *viz.* on 2nd August 1883, reversed, on appeal, by the Assistant Judge. Thereupon H entered into a compromise with A, by which it was arranged that A should give up his claim under the appellate decree of the Assistant Judge, to be repaid by H the sum of Rs 810 which he had realized by the sale of the mortgaged property, and that H should pay to A Rs 240 on account of his costs incurred in the suit and in taking out letters of administration. This compromise was effected on 16th November 1883. In the meantime on 14th September 1883, the plaintiff had purchased from one B an old decree which was outstanding against the estate of the deceased P. On 10th September 1883, the plaintiff sought to execute this decree against the mortgaged property. Having failed in this attempt, the plaintiff filed a suit against A for a declaration that the compromise of the 16th November 1883 had been fraudulently effected with the object of defeating his (the plaintiff's) claim and to recover Rs. 1,000 as damages from the defendant on account of his fraudulent and negligent conduct as administrator of his deceased father's estate. This suit was dismissed by both the lower Courts, on the ground that, as there were other creditors who had claims against the estate, the plaintiff's proper remedy was an administration suit, which would enable the Court to assess the claims of all the creditors: *Held* (reversing the lower Court's decree) that the plaintiff was entitled to recover. By the compromise of the 16th November 1883, the defendant had given up his right under the Appellate Court's decree of the 2nd August 1883 to be repaid by H the sum of Rs. 810, and had thereby occasioned a loss to the estate of that amount. He was, therefore, liable to the plaintiff to make good the amount under s. 328 of the Succession Act (X of 1865), subject, however, to a deduction, under s. 280 of that Act, of the expenses incurred by him in obtaining letters of administration, and the costs of any judicial proceeding that might be necessary for administering the estate.

Khusrubhai Nasarvanji v Hormajsha Phirozsha. 17 Bom 637.

Notes:-Ref. 6 Bom L R 853; 29 Bom 96.

5—Sale not described to be so but really by an administrator—Administrators who are also heirs—Title and right of purchaser—Certain heirs of a deceased lady, who were the administrators of her estate, limited to certain Government securities, sold those securities, by a written instrument, in which they did not describe themselves as administrators, to a *bona fide* purchaser:- *Held*, that in as much as they were entitled to sell either as heirs or administrators the omission to so describe themselves did not affect the sale: and though they could not sell more than their own shares as heirs, yet the entire purchase money having been received by them, they, as administrators were bound to administer the same as part of the assets of the estate, the question whether they did so or not, is not one which would affect the title of the purchaser. L R 23 Ch D 138, L R 7 H L 731 followed in principle.

Preonath Karar v Surja Coomar Goswami. 19 Cal 26

Administrator-*Contd.*

6—Administrator pendente lite, accounts of, when not objected to by parties and passed by Court, if may be re-opened in the absence of fraud or omission—Principle on which commission is charged, objection as to—Proper time for taking objection.

When accounts submitted by an administrator *pendente lite* have been passed by the Court in the presence of parties entitled to call on him to account, and such parties have had an opportunity of being heard, he cannot thereafter be called upon to account again to such parties or their representatives, unless fraud, or mistake, or omission on the part of such administrator *pendente lite* is proved in such accounts.

An administrator *pendente lite* discharges his duties of accountability when his accounts are complete, and honest, and do not contain false or fraudulent entries or omissions.

If the parties had any objection to the principle on which he charged his commission on the assets, they should have objected to it when the account was before the Court. **Khitish Chandra Acharya Chowdhury v Osmond Beeby. 15 C. W. N. 832.**

Administrator—appointed under S. 217, Succession Act—Position of creditor advancing money to such. See Act X of 1865, (Succession) (31). **12 O C 390.**

7—Pendente life, position of, after suit-Interference—Executor de son tort—Applicability of principle to Hindus.

Where on the appointment of an administrator *pendente lite* in respect of the property of a Hindu, he continued to deal with the property in the same way as he did prior to the date when his appointment came to an end.

Held, that he could be sued as a *quasi* executor *de son tort*. **Kshitesh Chandra Acharyya Chowdhury v Radhikha Mohun Roy. 3 M L T 147=12 W N 237=35 Cal 276**

8—Act V of 1902 (Administrator-General and official Trustees S. 4 cl. 2- Discharge of Executor-Discharge as to further liability.

S. 4 cl. 2 of the Administrator General and Official Trustees Act of 1902, is intended to enable the Court to discharge an executor even on the executor's own application. The question, whether the Court will exercise that power must depend on the merits of each case. It is open to the Court, if it so pleases, to discharge the executor in regard to future liability in regard to his past transactions. As soon as an executor has discharged the debts of the testator and has paid the legacies and funeral and testamentary expenses and has invested any surplus that may have remained, he ceases to be an executor and becomes a trustee in the proper sence. **Amarchand Madhowji 7 Bom L R 195=29 Bom 188.**

9—Estoppel—Indian Trusts Act (II of 1882), Ss. 4, 5, 23—Cestui que trust concurring in a breach of trust—S made an entry in his account books in favour of his wife V to show that he had made a *bakshis* (gift) of Rs. 75,000 to her on account of his joy at her recovery from an illness. S informed all his sons and daughters of the fact when he made the entry. The amount was entered into account books as a debt due to V. S died intestate and some of his sons took out letters of administration of his estate and, with the consent of all sons and daughters, they paid Rs. 75,000 to their mother V. After seven years, M, a son of S, brought a suit against the administrators, questioning the validity of the payment, on the ground that it had been made without his knowledge, and claimed that the administrators be ordered to make good the amount to the estate of S.

The administrators (defendants) contended that the amount was given as gift to V or that a trust was created in V's favour, and that they had paid the amount to V with the consent of all parties in administering the estate.

The lower Court held that neither a valid gift was made nor a valid trust was created; that the administrators were guilty of a breach of trust; and that the amount should be made good to the estate of S.

Held, on appeal, reversing the decree of the lower Court, that, as M had consented to the payment of the amount to V by the administrators, he was estopped by his conduct and could not question the validity of the payment.

Per Chandavarkar, J—If the next of kin of an intestate, with full knowledge of the facts but under a mistake as to their legal rights, authorise his administrator to pay a certain

Administrator-*Contd.*

amount to a third person who is not in law entitled to it, and the administrator pays accordingly, he cannot be held to have acted otherwise than in due course of administration.

Per Batchelor J—S 23 of the Indian Trusts Act is limitted to trustees as defined in S 3 of the Act, and administrators do not necessarily fall within that definition

Ardeshir Shapurji Narielwala v Mancher-shaw Shapurji Narielwala. 12 Bom L R 53= 5 Ind Cas 63.

10—Administrator being out of pocket by trusteeship—Right to recoup himself by sale of property—Judge's order for recouping himself essential—Possession—Title against a wrong doer—Plea of jus tertii—Transfer of Property Act (IV of 1882), S 41—Purchase from ostensible owner—

If an administrator holding letters of administration be out of pocket by his trusteeship, he can only recoup himself by having an account taken and getting himself relieved of his appointment as trustee before the District Judge, with an order for re-imbursement of what might be found due to him out of the estate. He is not entitled to recoup himself by selling the property of the estate.

Possession is good title against all but the true owner.

Prior possession of the plaintiff, in an action of ejectment against a wrong-doer, is sufficient title even if the suit be brought more than six months after the act of dispossession complained of.

A defendant's plea of *jus tertii* cannot be entertained, when he does not state in whom any such right resides. A defendant, in order to justify a trespass, must trace the title to a third party. A mere suggestion that there may be a third party is nothing.

Where D had a good possessory title against all the world except the true owner, and there was no claimant for ownership living, and the plaintiff purchased with *bona fide* belief that D was the real ostensible owner, and all his enquiries would only go to fortify him in that opinion.

Held, that the plaintiff's purchase is protected by S. 41 of the Transfer of Property Act, even

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if D's possessory title was bad. 12 All 51 (PC); 20 Cal 834 (PC); 26 Mad 514 Ref. (1907) A C 73 Ref. 12 M I A 448; 10 W R (PC) 1 B L R 44 (PC) Fol. **Chandra Kanta Pathak v Bhagjur Bepari; 1 Ind Cas 525.**

11—Administration suit—Limitation—Persons whose claims are not barred can bring the suit—

In England actions for the administration of the estates of deceased persons can only be instituted by persons whose claims to recover are not barred by any statute of limitation. The same principle applies in India. **Nandlal Chunilal v Sopilal Manilal. 9 Bom L R 316.**

12—Final decree—Administrator pendente lite, position of—Termination of lis—

Executor de son tort—Principles, if applicable to Hindus.

The functions of an Administrator pendente lite terminate on the pronouncement of the final decree.

The principles of English Law relating to an *Executor de son tort* are equally applicable to Hindus. L R (1894) P D 262 Fol. 6 P D 29 Ref. Ind jur 2 N S 235, Fol, 17 Cal 620-9, 4 Cal 342, 14 Mad 454, Ref. **Radhika Mohon Roy v K S Bannerjee 10 C W N 566.**

13—Ss. 179, 221—Limited grant—Administrator-Conveyance from administrator-Quantum of interest conveyed—A person obtaining a limited grant under S 221 of the Indian Sussession Act 1865, becomes, by virtue thereof, the legal representative of the deceased for the purposes of his interest in the property; and such interest in the property becomes vested in the person as such legal representative under s. 179 of the Act. Such an administrator can confer an indefeasible right in the property to a person who purchases it for value. Where a conveyance from the administrator of a deceased purports to pass to the purchaser all the right, title and interest which the deceased had in the property the mere fact that the party so conveying it professes to act as administrator of the estate cannot cut down the legal effect of the conveyance or limit the right of the purchaser to the title wrongly alleged to have existed in the deceased if as a matter of fact the latter had a higher right. **Desilva v Desilva. 4 Bom L R 849=27 Bom 103.**

Administrator-*Contd.*

14—Administrator, suit by—"Letters" must issue before he can sue—Non-suit—

No suit is maintainable when instituted by a person in his capacity as the administrator of the estate of a deceased person unless and until letters of Administration are issued to him to entitle him to sue in such representative capacity.

The Administrator-General of Bengal v Lalit Mohan Roy. 12 C W N 738.

15—Criminal misappropriation by—No express finding—General observations in judgment, effect of—

Where there is no express finding in a judgment that a person was guilty of criminal misappropriation as regards any of the sums of money for which he, together with the other administrators, was held accountable, the general observations in the judgment, which go to show that, in the opinion of the Judge, that person, together with the other administrators had acted dishonestly, are not evidence that, as to any particular claim, that person was criminally liable. (16 Mad 99, 2 M L T 529 Appl 6 All 234 27 Mad 71 D.) **Erasala Gurunathan Chetty v Addippally Raghavalu Chetty 3 M L T 394= 8 Cr L J 147.**

16.—Liability of deceased's estate for unsecured debts incurred by administrator—Succession Act (X of 1865) Section. 269

Although an administrator can, under S. 269 of Act X of 1865, dispose of the property of the deceased, either wholly or in part, in such manner as he may think fit, the estate of the deceased cannot be held liable for an unsecured debt incurred under a promissory note by the administrator, for it cannot be said to amount to a disposal of any portion of the property of the deceased testator. **C. Bonny v H. J. D. Bason. 12 O C 414.**

Administrator—Agent appointed by, liability of—Principal and Agent—General.

30 Mad 243=2 M L T 326.

Administrator.—Person other than an, when could sue for debts due to estate—Probate and Administration Act of 1881 Section 4.

3 L B R 1912.

Administrator—Purchasing property from legatee at auction—Sale—Validity—Administrator *de bonis non*, if bound to take account on failure—Probate and Administration Act, 1881, Ss. 11. 91, 102. **13 C W N 557=9 C L J 383= 1 Ind Cas 289.**

Administrator-*Concld.*

Administrator.—Vesting of property of deceased in—Right of heirs to deal with the property—Application of Section 191 of the Succession Act—Letters of Administration.

8 M L T 77=7 Ind Cas 242= 20 M L J 984.

Administrator, decree against.

See (1) **Joinder of causes of action.**
(2) **Multifariousness.**

Administrator General.

See (1) Administration Bond.
(2) Illegitimacy.
(3) Letters of Administration.
(4) Succession Act, Section 282.

—Certificate of—

See Interest Act, 1839.

—Office of—

See (1) Administrator-General's Act Sec 31.
(2) Statutes, Construction of.

—Petition by—

See—Practice—Civil—Cases—Probate and Letters of Administration.

—Rights of—

See Appeal to Privy Council—Effect of Privy Council Decree or Order.

22 Calc, 1011=L R. 22 I A 203.

1.—Authority to pay debt barred by limitation—

The Administrator—General of Madras is authorized to pay a barred debt.

Administrator—General v Hawkins. 1 Mad., 267.

Notes:—Ref· 25 Mad 300 : 16 Bom 141.

2.—Liability of Administrator-General in respect of breaches of trust by Intestate Executor—

Held, *per* Norman J. (Phear, J., dissenting). that the Administrator—General, who had taken

Administrator-General-*Contd.*

out administration to the estate of an executor by whom a breach of trust had been committed by his pledging for his own benefit certain assets of his testatrix, and had redeemed the said assets with office money and applied the money recovered as part of the defaulting executor's estate, was not personally liable to make good the amount to the testatrix's estate.

Greenway v Hogg. Cor., 97, 2 Hyde 3 Bourke. A O. C, III.

3.—Right of retainer in satisfaction of his own debt.

The Administrator—General appointed under Act VIII of 1855 has the same right of retainer in satisfaction of his own debt as that which an ordinary executor or administrator has.

Ritchie v Stokes. 2 M H C 255.

Notes.—Fol l Mad 206. Ref: 6 M H C R 455.

4.—Right of, to retain assets.

Right of Administrator-General to retain assets in his hands in respect of contingent debts. **Shepherd v Hogg. Cor., 67**

5.—Grant of letters of administration to-Act XXIV of 1867, Section 17.

When ordinary letters of administration to the estate of a deceased Hindu are granted to the Administrator-General under Act XXIV of 1867 (but not under Sec 17 of that Act), his title does not relate back to the death of the deceased, nor to the date of the Judge's order directing such letters to be issued, but accrues only as from the date of the grant of such letters. *Quære.*—Whether, if letters are issued to the Administrator-General under sec 17 of that Act, the case would be otherwise, or his powers greater. **Lallchand Ramdayal v Gumtibai. Ghella Pema v Gumtibai. 8 B H C. O C. 140.**

Notes:—Dist: 23 Bom 428. Ref 8 B H C R O 244; 9 B H C R 37: 2 Bom 67, 388. F B; 6 Bom 452, 17 Bom 690 F B.

6—Administrator-General's Act (II of 1874) Ss. 17 and 18)—Order to collect assets—Decree against deceased's estate passed prior to such order—Attachment of part of deceased's estate

Administrator-General-*Contd.*

subsequently to above order—Claim of Administrator—General prior to that of attaching creditor.

On the 16th April 1898, the plaintiff obtained an *ex-parte* decree against the defendant as heir and legal representative of his deceased father. Previously to the date of the decree (*viz* on 4th March 1898), an order had been made by the High Court under Ss. 17 and 18 of the Administrator-General's Act (II of 1874), authorizing the Administrator—General to collect the assets of the deceased and ordering him, if necessary, to take out letters of administration to his estate. On the 29th April 1898, the plaintiff, under s. 208 of the Civil Procedure Code (Act XIV of 1882), attached certain money in the hands of a third party due to the deceased's estate. On the 2nd July 1898, letters of administration were granted to the Administrator-General. *Held* that, as against the Administrator-General, the attachment was void *ab initio*. At the date of the decree obtained by the plaintiff, the Administrator-General was entitled, by virtue of the High Court's order, to take possession of the estate of the deceased. As soon as that order was made, his right to possession became paramount, and excluded that of the defendant (the son of the deceased), who was then no longer entitled to recover payment of debts due to his father. A decree, therefore, subsequently obtained against the defendant could not, as against the Administrator-General, confer any rights on the decree-holder, who could not stand in a better position than the defendant, his judgment-debtor. Under ss. 278 and 280 of the Civil Procedure Code, the Administrator-General had the right to have the attachment removed, because he was exclusively entitled, at first by reason of the order under s. 18 of Act II of 1874 and subsequently by his letters of administration, to recover the debt, and was not subject to any decree which affected his title. 8 Bom 140 distinguished.

Bhaiji Bhimji v Administrator General of Bombay. 23 Bom 428.

7.—Civil Courts—Jurisdiction—Suit against Administrator-General.

A suit brought against the Administrator-General must be instituted in the District Court: it makes no difference if the Administrator and

Administrator-General-*Concld.*

General is not a party to the suit in his official capacity, but is sued simply as representing the estate of a private individual **Antone v Administrator-General of Bombay.**
6 Bom L R 546=28 Bom 529.

8.—Administrator-General's Act, S. 18—Administrator—General holding estate under *S.* 18, position of—Administrator General, what payments can be made by.

The Administrator-General holding an estate under S. 18 of the Administrator-General's Act is in no better position than a private administrator. Pending grant of letters of administration, he can only make payments for the benefit of or for the preservation of the assets of the estate. He cannot make any payment to the prejudice of the estate. 8 Ex. Ch. Rep. 302 at p. 307 ref to. **Hari Das Dutt** **11 C W N 193.**

9—C.P.C.-S.2 (17) (1882 S.2)—Public Officer—Administrator-General.

The Administrator General is a "public officer" as defined by s. 2 C. P. C. **Bholaram Chowdhury v Administrator General.**
8 C W N 913.

Notes.—*Ref:* 28 All 600.

Administrator-General.

See (1) Act VIII of 1855.
(2) Act XXIV of 1867.
(3) Act II of 1874.
(4) Administration.
(5) Administrator.

Administrator-General's Act VIII of 1855.

See Letters of Administration.

1.—Recall of letters of administration granted to Administrator-General—Commission.

When letters of administration which had been granted to the Administrator-General of Madras were recalled, and he had merely taken manual possession of cash, Government promissory notes, and the title deeds of leaseholds belonging to the deceased, the High Court, under s. 22 of Act VIII of 1855, allowed him commission at the rate of 2½ per cent. on the cash and the value of the notes, but refused to allow it on the leaseholds. **Simpson.** **1 M H C 171.**

Administrator-General's Act VIII of 1855-*Concld.*

Notes.—*Fol:* 25 Cal 65. *Ref:* 31 Cal 572.

2.—Danger of misappropriation—Debts of deceased person.

The bare possibility that the Act of Limitation may ultimately become a bar to the recovery of assets is not such danger of misappropriation as warrants the granting to the Administrator-General of an order under s. 12 of Act VIII of 1855. *Semble*—A debtor to the estate of a deceased person cannot apply for an order under that section. **Girdir Das Vallaba Das.**
1 M H C 234.

Administrator Generals Act VIII of 1885—s. 60—

See (1) Res judicata—Adjudications.
(2) Review—Orders subject to Review.

Administrator—General's Act XXIV of 1867 S. 15,

See Legitimacy.

Administrator—General's Act XXIV of 1867 S. 17.

See Administrator General.
8 Bom H C O C 140

3.—S 33—Right to payment out of assets—Distribution of assets.

Plaintiff, on the 15th June 1868, immediately after the death of his debtor, brought a suit against the debtor's widow (1st defendant) for recovery of the debt, and, before judgment, obtained attachment and sale of property of the deceased, the sale-proceeds being kept in deposit in the Court. These proceedings took place in June and July: and on the 15th August administration was granted to the Administrator-General, the widow not having taken out administration. On the 28th September, the Administrator-General was, on plaintiff's application, made defendant in place of the widow, and the suit proceeded against him to decree. Before plaintiff applied to execute this decree, the amount of the sale-proceeds was, by the direction of the Civil Judge, handed over to the Administrator-General; accordingly, on this ground, plaintiff's application to the District Munsif for execution was rejected. He appealed unsuccessfully to the Civil Court *Held*, on special appeal, that s. 33 of Act XXIV of 1867 took away plaintiff's right to payment otherwise than rateably with the other creditors. **Haninabalu Sannappa v Cook.**
6 M H C 346.

Notes.—*Ref* 25 Cal 54: 23 Bom 128.

Administrator-General's Act II of 1874.

See (1) Administration Bond.
(2) Administrator-General.
(3) Letters of Administration.
(4) Limitation.
(5) Possession.
(6) Statutes, Construction of.

Administrator—General's Act II of 1874 ss. 12, 16, 17.

See Practice-Civil Cases-Probate and Letters of Administration.

Administrator-General's Act II of 1874 s. 18

See (1) Administrator—General.
(2) Parties-Substitution of Parties—Appellants.

Administrator—General's Act II of 1874 s. 27.

See Letters Patent, High Courts cl. 15.

4.—Administrator—General's Act—Commission payable to—Collection of debts.

When there is only a collection of debts without the distribution of the assets by the administrator-General the order for giving commission under sec 27 of the Act must award only half of the full commission of 5 per cent in accordance with sec 54 of the Act. **Chengalroya Naiker-Somasundaram Chetti v Administrator-General. 1 Mad 148.**

5—Administrator-General's Act II of 1874 S 16.

Act (X of 1865), S.187—Will made in Bombay—Property worth less than Rs. 1,000—Probate——Administrator-General's certificate. A will made in Bombay is subject to the provisions of the Hindu Wills Act, and a person claiming as a legatee under the will is not entitled to sue without taking out probate, as he would be bound by S. 187 of the Indian Succession Act which is incorporated in the Hindu Wills Act.

But where the property comprised in the will is worth less than Rs. 1,000, and the legatee has obtained a certificate under S. 36 of the Administrator-General's Act to administer the effects of the deceased, such certificate entitles the legatee to receive the property. The provision of the Administrator-General's Act is not affected by the incorporation in the Hindu Wills Act of S. 187 of the Indian Succession Act. S. 5 of the Hindu Wills Act provides that nothing contained in that Act will affect the rights, duties and privileges of the Administrator-General of Bengal, Madras and Bombay respectively. **Narayan Shridhar Date v. Pandurang Bapuji Date. 12 Bom L R 471 =6 Ind Cas 905=34 Bom 506.**

Adminsitrator General's Act II of 1874 *Contd.*

6-Ss. 17, 18-Application under these sections should not be made by the Administrator-General himself. The beneficiaries or some of them ought to apply for his appointment, the Administrator-General submitting to act if the Court so ordered. By applying in person, the Administrator-General creates an impression of partisanship which ought to be avoided. Courts ought not lightly to make over estates to the Administrator-General whose Commission is heavy. *Held*,—On the facts of the case that the Administrator-General in taking possession of the estate when he knew that the Court of Wards was going to take possession, acted illegally. **10 C W N 241.**

Administrator-General's Act II of 1874-S, 31 See

Appeal to Privy Council. Effect of Privy Council decree or order. **22 Cal 1011= L R 22 I A 203.**

Notes.—*Ref.* 11 All 375.

7—Hindu Executor—Transfer to Administrator-General—Hindu Wills Act XXI of 1870 S. 5 Succession Act (X of 1865) Ss. 179, 187, and 191—Probate and Administration Act (V of 1881). A Hindu died on the 22nd February 1891. He left property in Calcutta and a will dated 5th August 1889. A probate was taken on the 17th March 1891, by the executor under the will, and they executed a deed on the 14th August 1893, purporting to transfer all estates, effects and interests vested in them to the Admintstrator—General under S 31 of the Administrator—General's Act (11 1874):—*Held* by Prinsep and Trevelyan JJ.. affirming the decision of Sale J. (Petheram C J dissenting), that the transfer was invalid. The executor of a Hindu Testator has no power to transfer the property under the will to the Administrator—General under the terms of S. 31 of Act II of 1874. That Section is only applicable to the executors and administrators of persons of the class mentioned in S. 16 of the Act, that is to say,

Administrator General's Act II of 1874-*Contd.*

persons not being Hindus, Mahomedans or Buddhists. Per Petheram C J Contra:—The transfer was valid. Even if S 5 of the Hindu Wills Act (XXI of 1870) were sufficient to prevent such transfer to the Administrator—General under S 30 of the Administrator-General's Act of 1867, which is by no means certain, a Hindu executor has power, if not since the passing of the Hindu Wills Act, at any rate since the coming into force of the Probate and Administration Act (V of 1881) to transfer his interest and estate under a will to the Administrator General as constituted under Act II of 1874. The course of legislation with reference to the creation of the office of the Administrator-General and to his duties and powers reviewed and considered in construing Act II of 1874. **Administrator-General of Bengal v. Prem Lall Mullick. 21 Calc 732.**

8—*Held*, (on appeal) by the Privy Council that the right of executors to divolve the property of their testator with all powers and duties relative to its administration, upon the Administrator-General, conferred by S. 31 of Act II of 1874 is not confined to any particular class of executors or of estates. The right is given to any executor in whom the estate of the deceased has been vested by virtue of the probate subject to the condition that the Administrator-General shall consent. It is not necessary that in a consolidating statue each enactment, when traced to its origin must be construed according to the state of things which existed at a prior time when it first became law, the object being that the Statuory law bearing on the subject should be collected and made applicable to the circumstances then existing; nor can a positive enactment be annulled by indications of intention, at a prior time gathered from previous legislation on the matter. The executors of the will of Hindu testator obtained a probate and took possession of the estate. Then they executed a deed, purporting to be in terms of S. 31 Act, II of 1874, transferring the property to the Administrator General, which was vested in them by probate:—*Held*. reversing the judgment of a majority of the Appellate Court, and affirming that of the chief justice, that under that Section the transfer was valid.

Administrator-General of Bengal v Premlal Mullick 22 Calc, 788=L R 22 I A 107.

Administrator General's Act II of 1874-*Contd.*

9—S. 31—Transfer by executors to Administrator-General —Where the executors of a will transfer their interest in the estate of the deceased under S. 31 of the Administrator-General's Act to the Administrator-General—*Held*, such a transfer would only transfer such powers of disposition over the estate as the executors themselves possessed. **Nundo Lall Mullick I.L.R. 23 Calc., 908.**

Notes:—Ref 8 C W N 362, Fol: 3 C L J 260,

Administrator-General's Act II of 1874—-S. 35.

See (1) Costs—Costs out of Estate.
(2) Costs—Suit or Appeal only Partly Decreed
(3) Succession Act. s. 282.

10.—S. 35.—Creditor's right to be paid in full if assets sufficient—Meanings of "Rateable payment" and "shall be liable to pay"—Succession Act (X of 1865) Section 282—Probate and Administration Act (V of 1881) S. 104.

In a suit brought by a creditor, if his demand be uncontested or proved and the assets are admitted by the executor, the plaintiff is entitled at the hearing to an order for immediate payment without taking accounts. The admission of assets for paying off a debt is also an admission of assets for the purposes of the suit, and extends to costs if the Court thinks proper to allow them. There is nothing in Section 35 of the Administrator-General's Act (II of 1874) which qualifies or restricts or otherwise interferes with the right of a creditor to demand immediate payment of his claim fully when the realizable assets in the hands of the Administrator—General are sufficient for the immediate payment of all claims fully. The "rateable payment" referred to in the above Section as well as in Section 282 of the Succession Act (X of 1865) and in S. 104 of the Probate and Administration Act (V of 1881) is rateable payment out of the assets, it is nowhere provided that it shall be made out of the net income of the estate or any other specific part of the assets. The words "shall be liable to pay costs" used in cl. 1 of S. 35 of Administrator-General's Act II of 1874 shows that it was intended not to impose upon a creditor to whom the condition of exemption was inapplicable, an absolute obligation to pay the costs of the suit but to

Administrator General's Act II of 1874-*Contd.*

leave a discretion to the Court to relieve him of the obligation if the circumstances of the case required it. L R 27 ch D. 662 referred to.

Omrita Nath Mitter v, Administrator-General of Bengal
25 Calc 54

Amrita Nath Mitter v Administrator-General of Bengal I C W N 500.

11—S 54—charging commission—meaning of "Collection of assets"—The administrator General is entitled to charge commission or the collection and distribution of assets under s. 54 of Act II of 1874. "Collection of assets" implies the doing of some act in connection with such assets where a portion of the estate consisted of a zemindari of which the testator had granted a patni lease subject to payment of a fixed rent and part of the zamindari having been acquired for public purposes the compensation money being by arrangements divisible in certain proportions between the estate and the patnidar. Held the Administrator General was entitled to charge commission on the rents actually collected by him and on the amount apportioned to the estate, but not on the corpus of the zemindari estate. 1 Mad 171 followed.

Courjon 25 Cal 65

Notes Ref 31 Cal 672; 6 Bom L R 75

Administrator General's Act II of 1874 s 56.

See Executor 22 Calc., 14

Administrator General's Act II of 1874. —s. 63.

See (1) Res Judicata—Adjudications

(2) Review—Orders subject to Review.

12—*Held* that the District Judge who has under the Provisions of s 64 of Act II of 1874 taken possession of the assets of a deceased person pending the happening of one or other of the events specified in that section, is not the legal representative of the deceased for the purpose of execution of a decree obtained against the deceased.
The District Judge of Azamgarh v. Baldeo
19 W. N. 221

Administrator General's Act II of 1874—*Concld.*

13—"Assets" meaning of—Revenue paying estate—Commission.

The Administrator-General is only entitled to charge one commission upon his commission. "Assets" in S. 52 does not mean net assets only and the Administrator-General is entitled to charge commission upon the entire collections of the revenue paying estate come to his hands. The Administrator-General is entitled to commission on realizations made and handed over to him by the Receiver and not on the value of the testator's estate in the hands of the Receiver. The property of a deceased person applied in payment of revenue is an "asset" within the meaning of the Act and as such is chargeable with commission. **Watkins v Surat Chunder Ghose Mullick. 31 Cal 572.**

Administrator Pendente lite.

See Administrator.

—When to be appointed—Wrong exercise of discretion in appointing—High Court's power to interfere—Executor. **2 Ind Cas 638.**

—Practice as to the appointment of—Probate and Administration Act, 1881 ss. 33, 34.
2 Bom L R 797.

Administratrix Wasting estate.

See (1) Letters of administration.
(2) Certificate of administration.

Admiralty.

See Cases under.
Jurisdiction — Admiralty & vice Admiralty Jurisdiction.

1 "Towage" and "Salvage" are questions of law.

In Admiralty cases the expert evidence should be strictly confined to questions of navigation and kindred questions, i. e, it must be expert evidence, and nothing more.

The question whether services are "Towage" or "Salvage" is a question of law for the Court to decide.
Clan Shaw v. Cashmere. **1 Bom L R 570.**

Admiralty-*Concld.*

2-Salvage-ship, arrest of-Equitable lien-Salvage services give rise to an equitable lieu—The elements to be considered in assessing the amount of salvage are:—The value of the property saved; the actual perils from which the ship and cargo were saved; the possibility of assistance from elsewhere; the state of the weather when the services were rendered; the degree of risk and peril incurred by the salvors; the degree of labour and skill exerted by the salvors; the time occupied by the services; and the injury and loss occasioned to the salvors. In fixing a proportion of the value the Court usually gives a smaller proportion where the property is large and a larger proportion where the value is small. Parties should not arrest the ship for an exorbitant sum, and if they do it is no excuse to say that the defendants did not as it were struggle to get free by applying to get the bail reduced.

Bombay and Per Sian S N Co v Cashmere. 1 Bom L R 557=24 Bom 55.

Admiralty Acts.

See Cases under Jurisdiction—Admiralty.

Admiralty and vice admiralty Jurisdiction.

See Juris-diction.

Admiralty Cases.

See (1) Jurisdiction admiralty.

(2) Admiralty Practice in—Court.

(3) Practice and Procedure.

Admiralty Court. Practice of.

See (1) Practice-Civil Cases-Admiralty Court

(2) Ship, Arrest of.

Admiralty Jurisdiction.

See Jurisdiction Admiralty.

1—Damage done by a ship—Meaning of—Warrant for arrest of a ship—

Admiralty Jurisdiction-*Concld.*

Damage done by a ship, in order to establish a maritime line must be due to the negligence or unskilful conduct of those in charge of the ship which does the mischief, the ship herself being the instrument of mischief. The *Industrie* L. R 3 ad and Eccl. 303 Bataver 15 P D 37, 3 Ad. and Eccl 161: and Energy, 3 Ad. and Eccl. 41 distinguished. 9 P D 96; 1897 A C 97 ref. to. Oil was discharged negligently from a ship. The oil floating down subsequently ignited and did damage to another ship: *Held* that the damage by the fire could not be construed as damage done by a ship so as to give rise to an action in rem for the arrest of the ship which discharged the oil. The remedy for such injury should be sought by an ordinary action founded on negligence against the person responsible.

The Admiralty Jurisdiction of the High Courts in india is the same as that of the Supreme Court of Judicature in England. **The Telena. 6 C W N 773=29 Cal 402.**

Admiralty or vice-admiralty jurisdiction

See (1) Costs—Special Cases-Admiralty or Vice-Admiralty.

(2) Letters Patent High Court Cl. 15.

Admissibility of Evidence.

1—Certified Copy—Will—Evidence—Admissibility.

A certified copy of a registered will is admissible in evidence unless the original has been cancelled. **Atmaram Purnaik v Laxmibai 12 C P L R 130.**

See Cases under:—

(1) **Evidence.**

(2) **Evidence Act Ss. 65, 91 & 92.**

(3) **Registration Act S. 50**

Admissibility in evidence of finding in former case not between same parties.

See (1) Res judicata Estoppel by judgment
(2) Evidence - Civil cases—Decrees judgments and proceedings in former suits

Admissibility in evidence of judgment in former case.

See (1) Res judicata Estoppel by judgment
(2) Evidence—Civil cases—Decrees judgments—& proceedings in former suits

Admissibility of document in evidence as to pedigree.

See Evidence—Civil cases—Miscellaneous documents

Admissibility of documents in evidence compulsorily registerable

See Registration Act—Evidence—Civil cases—Secondary evidence—Unstamped or unregistered documents

Admissibility of evidence.

See (1) Evidence.
(2) Evidence Act.

Admissibility of evidence of consideration of unstamped document

See Evidence Act Ss. 91 & 92

Admissibility of oral evidence

See Evidence—Parol evidence.

Admissibility of oral evidence to contradict the nature of a contract in writing.

See Evidence-Parol evidence.

Admissibility of petition and written statement filed in a previous proceeding.

See Evidence—Civil cases—Decrees, judgments and proceedings in former suits.

Admissibility of unregistered sale-deed in evidence.

See (1) Registration Act, s. 17
(2) Evidence-Civil cases-Secondary evidence—Unstamped or unregistered documents.

Admission.

See (1) Bengal Tenancy Act S 20
(2) Burden of proof.
(3) Estoppel
(4) Cases under pleader—Authority to bind client.
(5) Pleading.
(6) Variance between pleading and proof—Admission of part of claim.
(7) Acquiescence

Admission by legal Practitioner.

See (1) Counsel.
(2) Pleader—Authority to bind client.
(3) Evidence Act Ss. 17 to 21 and s. 32.
(4) Admissions in statements and pleadings.

(1) Admission in statements and pleading (1—43)
(1) Statement of party (1—5)
(2) Statement in former suit (6—8)
(3) Admission made in former arbitration proceedings (9)
(4) Admission in former suit (10—16)
(5) Landlord and tenant Admission by a co-tenant (17)
(6) Admission by one of several joint tenants (18)
(7) Admission made by one co-sharer. (19 & 19 A)

Admission-*Contd.*

(8) Indivisibility of an evidence 20—24)
(9) Qualified statement (25)
(10) Admission in pleading (26—27)
(11) Agreement admitted in pleading (28)
(12) Admission of title in pleading (29)
(13) Admission in written statement of defendant (30)
(14) Admission in written statement (31)
(14a) Admission in verified petition (32)
(15) Admission by not traversing allegations (33)
(16) Not traversing allegations (34—35)
(17) Written statement (36)
(18) Disclaimer of title (37—38)
(19) Untraversed allegations (39)
(20) Admission by co defendant effect of (40)
(21) Request to verify signature (41)
(22) Pleading statement in (42—43)

(2) Admission by or against third persons (44—70)

(1) Admission, effect of, against person not party to suit (44-45)
(2) Persons without title (46)
(3) Guardian, admission by (47)
(4) Admission by executors (48-49)
(5) Admission by agent (50)
(6) Admission by husband (51)
(7) Admission of Vakil (52)
(8) Admission by pleader on behalf of client (53)
(9) Admission of pleader recorded in judgment (54)
(10) Admission by owner after sale of property (55)
(11) Admission by judgment-debtor 56
(12) Admission by mortgagor (57)
(13) Admission by lumberdar (58)
(14) Admission by heirs (58a)
(15) Admission by zamindar of mokurari right (59)
(16) Admission by auction purchaser (60)
(17) Admission of lessor (61)

Admission-*Contd.*

(18) Admission of tenancy (62)
(19) Admission by raiyat (63—64)
(20) Admission of rate of rent (65)
(21) Return of amount of rent made to Collector (66)
(22) Rate of rent, evidence of (67)
(23) Consideration for sale (68—70)

(3) Miscellaneous Cases (71—88)

(1) Verbal admissions as to sum due by defendants (71)
(2) Admission of receipt of purchase-money (72)
(3) Admission in a mortgage as to amount of land excepted from its operation (73)
(4) False statement as to share being separate (74)
(5) False statement by defendant (75)
(6) Mitigation of effect of admission (76—77)
(7) Effect of admissions not action (78)
(8) Admission not action (79-86)
(9) Persons without title (87-88)

Admission.

See also cases under :—
Evidence Act Section 17.

Admission—Insufficient to pass property—
See:— **10 C W N 650.**

Administration—Made unaware of the circumstances—Not binding
9 Ind Cas 806.

Admission—Of mortgage debt by minor after becoming major—Ratification—Whether decree can be based on. **9 Ind Cas 56**

Admission.

—Of receipt of consideration before Registering Officer.

See (1) Estoppel.
(2) Registration Act (III of 1877) Ss 23-26.

Admission—By tenant of existence of relationship landlord and tenant.

See Onus of proof.

Admission—Of contents of unregistered document

Admission-*Contd.*

See Registration Act (111 of 1877) S. 49.

Admission.—Burden of proof — Admission by predecessor-in-title—Effect on *onus* of proof. **7 N L R 23.**

1. ADMISSION IN STATEMENTS AND PLEADING.

(1) Statement of Party.

1.—Statement of Party—Evidence.

A statement made by a party is not, *ipso facto*, conclusive against him, though it may be used against him and may be evidence, more or less weightly, possibly even conclusive, according to the circustances of each case, and the result come to by judicial investigation.

Ayetun v Ramsebuk. 12 W R 156.

2.—Admissions by party — Admissions by a party are evidence against him—Evidence that such admissions were mistaken or untrue is admissible—Estoppel.

What a party himself admits to be true may reasonably be presumed to be so.

Where the defendant is not a party to the deeds. and there is therefore no estoppel, the party making the admission may give evidence to rebut this presumption, but unless and until that is satisfactorily done, the fact admitted must be taken to be established.

The express admissions of a party to the suit, or admissions implied from his conduct, are evidence, and strong evidence against him: but he is at liberty to prove that such admissions were mistaken or were untrue, and is not estopped or concluded by them unless another person has been induced by them to alter his condition. In such a case the party is estopped from disputing their truth as against that person (and those claiming under him) and that transaction, but as to third parties he is not bound.

Rani Chandra v Chaudhuri. 9 Bom L R 267=11 C W N 321. =4 A L J 102=5 C L J 115= 17 M L J 103=2 M L T 109.

3.—Pleadings.

An Admission on a point of law is not an admission of a thing so as to make the admission operate as estoppel within the meaning of

Admission-*Contd*

(1) Admission in Statements and Pleading—*Contd.*

Section 115, Evidence Act. **Jagwant Singh v Silan Singh. 21 All 285.**

Notes :—Ref : 3 A L J 534= (1906) W N 182.

4.—Proof of contents of document

The statement of a party to a suit is admissible evidence against him to prove the contents of a written instrument.

Muttukaruppa Kaundan v Rama' Pillai. 3 M H C 158.

Notes—Ref. 6 M H C R 245; 2 Mad 208; 13 Mad 308; 12 Bom 443.

5.—Proof of contents of document.

The case of 3 *Mad 158*, applies to the defendant's admission of a transaction embodied in a written document not receivable in evidence, and is no authority whatever for construing a document, present to the Court, upon a defendant's admission. **Mahalatchmi Ammal v Palani Chetti. 6 M H C 245.**

Notes—Dist 27 Mad 211. Diss; 14 M L J 25.

(2) STATEMENT IN FORMER SUIT.

6.—Statement in former suit-Evidence Act, 1872, Section 18:

A statement made by the defendant in another suit may be used as an admission within the meaning of Section 18 of the Evidence Act.

Hurish Chunder Mullick v Prosunno. Coomar Banerjee. 22 W R 303.

Lalla Jugdeo Sahoy v Digambur Roy. 22 W R 304.

Kashee Kishore Roy Chowdhry v Rama Soonduree Debia Chowdhrain. 23 W R, 27.

Notes—Fol. 22 W R 303.

7. -Statements filed in Court.

In a suit by a daughter for property left by her father, in which the defendants relied upon certain admissions said to have been made by plaintiff relinquishing the share in the inheritance left by her father, and in which they also set up a will of the father conveying the property to others, the Lower Court should have enquired into the genuineness of the will, and required the defendants to prove that the admis-

Admission-*Contd.*

(1) Admission in Statements and Pleading —*Contd.*

sions, which plaintiff impugned, emanated from her, or from some one duly authorized by her to make them. The mere fact that the admissions were contained in statements filed in a Court of Justice in her name does not necessarily prove that they were made by her.

Asmutoonissa Bebee v Atta Hafiz. 8 W R 468.

Notes:—Dist: 15 W R 490,

8.—In a former suit by A against his agent for an account of the collections of a certain share in land B intervened and was made a party. In that suit the Court declared A to be the zamindar, and as such entitled to the rents and to an account. *Held*, that that finding was binding against B in a subsequent suit against him by A for recovery of the same share. Similarly, an admission made by B in the former suit is evidence against him *quantum valeat* in the subsequent suit. **Sheo Surn Singh v Ram Khelawan Singh, 14 W R 165.**

(3) ADMISSION MADE IN FORMER ARBITRATION PROCEEDINGS.

9—Admissions made in former arbitration proceedings-Admissions etc., made by the parties in a former arbitration proceeding may be used against them in evidence in a subsequent suit.

Huronath Sircar v Preonath Sircar 7 W R 249

(4) ADMISSIONS IN FORMER SUIT.

10—Admissions in former suit-Also admissions made in a former suit. **Obhoy Gobind Chowdhry v Beejoy Gobind Chowdhry 9 W R 162**

Notes—Ref: 8 Cal 238

11—Acceptance in evidence of map as correct in former suit.

Where the defendants in a boundary suit accepted in a former suit a particular map as correct, their acceptance is legal though not conclusive, evidence against them in the boundary suit, and is tantamount to an admission, and stands upon a very different footing from the decree in the first suit. **Gordon Stuart and Co v Beejoy Gobind Chowdhry 8 W R 291**

Notes—Fol 10 W R 88; 151 Ex 13 W R 84.

Admission-*Contd.*

(1) Admission in Statements and Pleading —*Contd.*

12—Deposition—A copy of a defendant's deposition in a former suit having been put in by plaintiff at a late stage of the case, when defendant had no means of explaining away any supposed admission therein—*Held* that the first Court was wrong in accepting the same as an admission binding on defendant, and that the Lower Appellate Court was right in sending for the defendant and examining him on the subject.

Komurooddeen v Monye Mundle. 16 W R 220

13—Suit of different nature.

Admissions made by a defendant in other suits brought against him by third parties cannot be treated as estoppels in a suit to recover possession of a different property under different circumstances. **Wise v Rubaa Khatoon 19 W R 299**

14—Plaintiff sued in the Revenue Court for the recovery of rents fraudulently misappropriated by defendant, and upon defendant's allegation that plaintiff was etmamdar or gomashta and not ijaradar, the Deputy Collector dismissed plantiff's suit for want of jurisdiction. Plaintiff then sued in the Civil Court, the defendant again raising the plea of non-jurisdiction. *Held*, that, any admission or allegation of the defendant in the former suit, put in evidence by the plaintiff, was amply sufficient to support the plaintiff's allegation in this suit that he had been etmamdar.

Bhugwan Chunder Dutt v Mechoo Lall Chuckerbutty 17 W R 372

15—Suit for resumption of lands—Previous suit to assess the lands—Evidence.

An admission by a jagirdar in a suit brought by Government to assess the lands, that the lands were comprised in a zamindari is evidence of that fact in a suit by the zamindar to resume those lands. **Forbes v Mir Mahomed Taki 5 B L R 529=14 W R, P C 28=13 Moore's I A 438**

16—Agreement to pay interest.—In a former suit, plaintiff, mortgagor, under a usufructuary mortgage, claimed recovery of the mortgaged property, on the allegation that there had been a satisfaction of the principal sum by reason of the profits of the estate exceeding 12 per cent, interest but having failed to prove that allegation, his suit was dismissed. He now sued for the recovery of

Admission-*Contd.*

(1) Admission in Statements and Pleading —*Contd.*

the property under an ekrarnamah which did not stipulate for payment of interest. *Held*, that the case put forward by plaintiff in the former suit did not amount to an admission that there was an agreement to pay 12 per cent., and that he was entitled to restoration of the property on payment of the principal alone. **Prosunno Coomar Mookerjee v. Buldeo Narain Singh 18 W R 62**

(5) LANDLORD AND TENANT—ADMISSION BY A CO-TENANT

17—Landlord and tenant—Admission by a co-tenant—An admission by a cotenant as to who is the landlord of a holding is not binding on the other co-tenants. **Kali Kishore Chowdhry v Gopimohan Roy Chowdhry 2 C W N 166**

(6) ADMISSION BY ONE OF SEVERAL JOINT TENANTS

18 - Admission by one of several joint tenants Suit for rent.- A suit for rent having been brought against two persons as joint tenants and a decree passed thereon in favour of the plaintiff, but for a less amount than that claimed by him, an appeal was preferred by the defendants. but subsequently pending the hearing of the appeal, one of them filed a petition admitting the correctness of the amount claimed by the plaintiff, and stating his willingness to pay half of such amount. *Held* that the admission of the one defendant did not bind the other; and that,notwithstanding such admission the suit having been brought against the defendants as joint tenants, a separate decree for half the amount admitted could not be made against the defendant who made the admission. **Chundereshwur Narain Pershad v. Chuni Ahir 9 C L R 359**

(7) ADMISSION MADE BY ONE CO-SHARER.

19.—Admission of one co-sharer—Admissibility against others—Evidence Act (I of 1872), S. 18—In a suit brought by a zamindar against his ijardars for rent, a person, who was one of the several jotedars in the mahal, was called as a witness on behalf of the zemindar and admitted the fact of an arrangement whereby he and his other co-jotedars had agreed to pay the rent to the zemindar direct. The suit was decided in favour of the zamindar. The ijardars then brought a suit, against the jotedar who had deposed as above together with his co sharers, to recover the sum

Admission-*Contd.*

(1) Admission in Statements and Pleading —*Contd.*

which the jotedars ought to have paid direct to the zamindar, and which the ijaradars had been decreed to pay. The jotedar disclaimed all liability. In this suit the evidence given by the jotedar in the zamindar's suit was received a evidence on behalf of the plaintiffs against all the defendants:—*Held* that the evidence was admissible. **Kowsulliah Sundari Dasi v Mukta Sundari Dasi 11 Calc 588.**

19 A—Evidence of partition—Statement: by father in deeds to which sons not parties.)

Statements made by a Hindu father in deeds to which his sons were not parties, that he and his sons were in union, are not evidence against the sons in a suit in which the point at issue is whether or not the father and sons were separate. **Ravji v. Shahajiram 7 B P J 171.**

(8) INDIVISIBILITY of AS EVIDENCE.

20—Indivisibility of as evidence—Whole admission.

Where a person uses the admission of another as evidence, the whole admission must be put in. He cannot put in half and exclude the other half. Those who have to decide upon the evidence are not bound to believe the whole of the statement. **Nilmoney Singh Deo v Ramanoograh Roy 7 W R 29.**

Goloke Chunder Chowdhry v Magistrate of Chittagong 25 W R Cr 15.

Notes:—Ap: 22 W R 220. Con; 16 W R 257. Ref: 9 W R 290. Fol 12 W R 194.

21.—Plaintiff relying on admission of defendant.

A plaintiff abandoning his own case and falling back on the admissions of the defendant is bound to take these admissions as they stand and in their entirety. **Tarinee Pershad Sein v Dwarkanath Rukheet 15 W R 451.**

22.—Effect of, as to co-defendants.

A defendant's admission, if taken at all, must be taken as a whole; but it cannot bind co-defendants. **Niamutoollah Khadim v Himmut Ali Khadim 22 W R 519.**

23.—Pleadings.—

The rule that when an admission is relied upon by a party to a suit as against his opponent it must be taken in its entirety, does not apply to pleadings. **Brojo Raj Kishoree v Bishonath Dutt W R 1864, 305.**

24.—Admitssions by or against third persons.

—Admission in Settlement record as to plaintiff being non-hereditary cultivator.

Admission-*Contd.*

(1) Admission in Statements and Pleading —*Contd.*

An entry in a settlement record and an admission by the deceased father of the plaintiff that the plaintiff was a non-hereditary cultivator are not conclusive evidence of the plaintiff's status.

Azim v Mane Khan 25 P R 1871.

24. A—Pleadings.

A statement under Act VIII of 1859 is not in the nature of confession and avoidance as in English pleading, where the confession is considered as an admission of the party, and the avoidance has to be proved. The statement of one party, if used as evidence against him by the other, must be taken altogether, and not in part.

Probhoo Doss v Sheonath Roy W. R. 1864 Act X 27.

Sooltan Ali v Chand Bibe 9 W. R 130.

(9) QUALIFIED STATEMENT.

25.—Qualified statement—Written statement.—Per Macpherson J

The opinion of the Full Bench in 9 *W R, 90,* was that if a party makes a qualified statement, that statement cannot be used against him apart from the qualification: not that, if a man makes a series of independent unqualified statements, those statements cannot be used against him. That case goes no further than to lay down that an unfair use is not to be made of a man's written statement by trying to convert into an admission by him that which he never intended to be an admission. **Baikantanath Koomar v Chandramohan Chowdhry 1 B L R A C, 133 =10 W R 190.**

See Pulin Beharee Sen v Watson B L R Sup Vol 904, 9 W R 190.

Sooltan Ali v Chand Bibee 9 W R 130.

Judoonath Roy v Buroda Kant Roy 22 W R 220.

(10) ADMISSION IN PLEADING.

26.—Admission in pleading—Description of plaintiff.—

In an action of contract brought by the assignee of a bankrupt against a debtor, the defendant pleaded that he had not contracted "in the manner the plaintiff assignee as aforesaid stated" *Held* that the form of plea was not an admission of the plaintiff's title as assignee, but was only used in reference to the description the plaintiff had given of himself in the declaration.

Clark v Rouplall Mullick and Clark v Doorgamoney Dossee 2 Moore's I A 263.

27.—Onus of proof.—

In a suit for confirmation of possession of, and declaration of title to, land alleged to have been purchased at a private sale from the wife (S S) of a judgment-debtor who had come into possession of the land by gift from her husband, defendants claimed to be *bona fide* purchasers from S S, to whom, thay alleged, the property really belonged, and who had been all along in possession. The substance of the defence was that, "even granting that any such papers" (as a hubbah and a deed of sale) "were written between the parties, this can avail the plaintiff nothing, as the deeds were fraudulent." *Held* that there was no such admission on the part of the defendants as shifted the burden of proof upon themselves. **Hurish Chunder Paul v Radhanath Sein 11 W R 328.**

(11) AGREEMENT ADMITTED IN PLEADING.

28.—Agreement admitted in pleading—Where, in a suit for specific performance of an agreement, the defendant admitted in his written statement the terms of the agreement and its execution.—*Held* that the plaintiff was not called upon to prove the execution of the agreement or to put it in evidence. **Burjorji Cursetji Panthaki v Muncherji Kuverji 5 Bom 143.**

Notes:—Fol: 24 Cal 20 ; 7 Bom 310. Dist: 20 Bom 553. Ref. 12 Mad 505 , 13 Mad 308 : 21 Bom 704, 22 Bom 788, 13 C W N 326.

(12) ADMISSION OF TITLE IN PLEADING.

29—Admission of title in pleading—Suit for possession of land—Plea of limitation.—

The circumstance that the defendant has in his written answer set up a defence merely of the statute of limitations in a suit for the possession of land does not constitute an admission of the title of the plaintiff so as to dispense with the obligation on the plaintiff to prove his title.

Soonatun Saha v. Ramjoy Saha. Marsh 549.

Admission-*Contd.*

(1) Admission in Statements and Pleading —*Contd.*

(13) ADMISSION IN WRITTEN STATEMENT OF DEFENDANT.

30—Admission in written statement of defendant.

When a defendant admits any one facts contained in the written statement of the plaintiff, and thereby excludes independent evidence thereof, he is not entitled to say that the plaintiff has relied on his statement as evidence, and that the (defendant) is in consequence in a position to claim that the whole of it may be read as evidence in his own favour **Shurfuraz Mollah v Dhunoo** [16 W R 257.

(14) ADMISSION IN WRITTEN STATEMENT

31—Admission in written statement—Validity of deed, proof of—*Onus probandi*.—The plaintiff purchased a house from the defendant under a deed of sale dated 23rd June 1886. In a suit to recover possession of the house, the defendant pleaded that the sale-deed was invalid for want of consideration—*Held* that the mere admission in the defendant's written statement of the execution of the sale-deed did not dispense with the necessity of establishing affirmatively the validity of the deed, which was expressly impugned by the defendant. **Javanmal Jitmal v Muktabai** **14 Bom 516**

Notes—Ref 9 Bom L R 917 F B, 31 Bom 630 F B, 26 Mad 440.

(14 a) ADMISSION IN VARIFIED PETITION.

32—Admission in varified petition.

An admission made in a verified petition by an intervenor in an Act X suit, and repeated in a verified plaint filed by him in a regular suit, was held to be binding in a subsequent suit on the party who made it. **Grish Chunder Lahoree v Shama Churn Sandyal.** **15 W R 437.**

(15) ADMISSION BY NOT TRAVERSING ALLEGATION.

33—Admission by not traversing allegations.

A defendant must be taken to admit all material allegations in the plaint which he does not traverse. **Yeknath Babaji v Gulabchand Kahangi.** **1 B H C 85.**

Ahmehdee Begum v. Dabee Persad. **18 W R 287.**

Admission-*Contd.*

(1) Admission in Statements and Pleading —*Contd.*

(16) NOT TRAVERSING ALLEGATIONS.

34—Not traversing allegations.

The mere fact that an allegation is not traversed does not relieve a plaintiff from the burden of proving his case. **Mulji Bechar v Anupram Bechar.** **7 B H C 136.**

Hameedoollah v Genda Lall **17 W R 171.**

35—In a suit for enhancement of rent a defendant is not bound to traverse a statement made by the plaintiff in the notice of enhancement as to the description of the land in question. The doctrine of admission by non-traverse was not applicable to written statements filed under Act X of 1859. **Shadhoo Singh v Ramanoo graha Lall.** **9 W R 83.**

Notes.—Ap. 21 Cal 986. Fol : 23 Bom 698. Dist. 15 W R 240. Ex: 13 W R 346.

(17) WRITTEN STATEMENT.

36—Written statement—Entire statement.

Where defendant's written statement is referred to as evidence in plaintiff's father the whole of it becomes evidence in the suit, and the Court can, in its discretion, attach thereto, or to any portion thereof, so much value as seems to fit.

Radha Churn Chowdhry v Chunder Monee Shikdar. **9 W R 290.**

Notes:—Con: 16 W R 257.

(18) DISCLAIMER OF TITLE.

37—Disclaimer of title—Pleadings—Admission by one of several defendants—Relinquishment—Disclaimer of title.

R, holding estates in Bengal jointly with his brothers as an undivided Hindu family, died leaving a widow, S, and three unmarried daughters, B, M. and N. On her husband's death, S continued to reside with his brothers, and was supported out of the income of the joint estate. All the daughters married in the lifetime of S, and B became a widow without having had a child. After the death of S, and in the lifetime of M, N also became a childless widow. M died after her mother, leaving a son. R K. R K, on attaining majority, sued to recover, with mesne profits, a 4-anna share of the ancestral estates to which he claim-

Admission-*Contd.*

(1) Admission in Statements and Pleading —*Contd.*

ed to be entitled on his mother's death as heir of R. and from which he alleged he had been dispossessed by the representatives of R's brothers, whom he made defendants in the suit, joining B and N, with them as co-defendants. Some time after the institution of the suit, a petition was filed purporting to proceed from B and N, by which they admitted that the plaintiff was the heir of R, and that they had no defence to offer. Held that, N being the heir of R, R K had not during her lifetime, any right to any part of the estate, and that his position was not altered by the petition purporting to proceed form B and N, such petition not amounting to a conveyance or disclaimer of title in his favour. In the English Common Law Courts, and *a fortiori*, in the Courts of Law in India, where the pleadings are less technical, an admission of a fact on the pleadings by implication is not an admission for any other purpose than that of the particular issue, and is not tanta mount to proof of the fact. An admission or even a confession of judgment by one of several defendants in a suit is no evidence against another defendant- **Amirtolall Bose v. Rojonee Kant Mitter 15 B. L R, 10= 23 W R 214; L R 2 I A 113.**

38—Inheritance—Relinquishment——Admission on pleadings.

A plaintiff, suing two defendants M and L for possession of certain property by right of inheritence, admitted in his plaint the right by inheritence of the defendant M to a moiety of the property, and only made him a defendant because he would not join in bringing the suit. The claim, however was for the entire property. The defendant M filed a written statement setting forth that he had long ago willingly resigned all his rights in favour of the plaintiff, and that the suit had been instituted with his consent. *Held* that, this statement was only an admission by M of the plaintiff's title. which could not be used against the other defendant L so as to entitle the plaintiff to a decree for the entire estate ; that since L did not set up M's title to defeat the plaintiff,he could not be affected by M's disclaimer ; and that the plaintiff could not be allowed in this suit to obtain M's share as his representative, for that would be to decree him the share on a title he never set up. Amirtolall Bose v Rojoneekant Mitter, 15 B L R 10, referred to. **Lachman Singh v Tansukh. 6 All 395.**

Admission-*Contd.*

(1) Admission in Statements and Pleading —*Contd.*

(19) UNTRAVERSED ALLEGATIONS.

39—Untraversed allegations—Suit to set aside sale.

In a suit to set aside a sale in execution of decree on the ground of fraud.—*Held*, applying the principle that pleadings should not be construed too strictly, that the defendants could not be held, by reason of their not having denied it, to have admitted the truth of the plaintiff's allegation as to the date upon which knowledge of the fraud was acquired. **Natha Singh v Jodha Singh. 6 All 406.**

Notes—Dist: 14 All 498. Ref: 5 C L J 385 ; 34 Cal 241.

(20) ADMISSION BY CO-DEFENDANT, EFFECT OF.

40—Admission by co-defendant, Effect of—Suit for possession of land.

In a suit for possession of immoveable property brought by three Mahomedan brothers, their three sisters were impleaded as defendants under s. 32 of the Civil Procedure Code, and two of the latter subsequently filed a written statement in which, after stating that they were on good terms with their brothers, the plaintiffs, and that the suit had been instituted with their knowledge and permission, they prayed that the suit might be decreed, subject to the condition that they would, on some future occasion, "settle with their own brothers as to their right and costs." The third sister did not appear to defend the suit. *Held* that, the Lower Courts were wrong in treating this admission as sufficient to entitle the plaintiffs to a decree for possession, not only of their own share, but also of the shares of their three sisters, it being a fundamental proposition connected with the administration of justice that a plaintiff cannot sue for more than his own right, and that no defendant can, by an admission of consent of this kind, convey the right or delegate the authority to sue for more than his own share in property. Lachman Singh v Tansikh, 6 All 395, referred to. **Azizullah Khan v Ahmad Ali Khan, 7 All 353.**

Notes:—Ap: 16 All 225 Dist: 23 All 432 Fol; 9 Bom L R 188.

Admission-*Contd.*

(1) Admission in Statements and Pleading —*Concld.*

(21) REQUEST TO VERIFY SIGNATURE TO PETITION.

41—Request to verify signature to petition——Evidence of statements made in petition.

Where a party asks others to verify his signature to a petition or to identify him as one of the petitioners, it amounts to an allegation on his party that he made the statements which appear in the petition, and is as effective evidence against the party making the request as if the petition were in fact filed. **Mohun Sahoo v Chutoo Mowar 21 W R 34.**

(22) PETITION, STATEMENT IN.

42—Petition, statement in—Suit to set aside deeds—

Defendant claimed to hold a mokurari tenure under deeds executed by plaintiff, zamindar. The plaintiff denied the authenticity of the deeds, and sued to set them aside. The Lower Courts dismissed his suit as barred by limitation, on the ground that plaintiff had, in a petition before the Collector,admitted that defendant was mokurarridar of the tenure, and that, this being so, limitation run against him from the date of the deeds. *Held*, that the case should have been tried on the merits, as the petition was not a conclusive admission of genuineness of the deeds, and it was not right to infer from it that plaintiff knew of their existence at the time of their professed date. **Prohlad Sen v Run Bahadur Sing. 2B L R, P C, III; 12 W R 6; 11 Moore's I A 289.**

43—S 21 cls (1) and (3) S 32 (5) and S 157—Admission by plaintiff—When admissible in his favour—Statement in previous deposition. When the plaintiffs sought to establish their pedigree by proving *inter alia* that A and B were brothers. *Held*, that a statement to that effect made by one of the plaintiffs, in a deposition given long before the controversy in suit arose, was admissible in evidence. **Jadu Nath v Mahendra Nath 12 C W N 266.**

(2) ADMISSION BY OR AGAINST, THIRD PERSONS.

(1) Admission, effect of, against person not party to suit.

44—Admission, effect of, against person not party to suit—*Held* that the fact of defendants being allowed to appear as co-plaintiffs in a redemption suit, to which plaintiff was no party, cannot be received in evidence as an admission adverse to plaintiff's interest; and the admission made by the plaintiff's brother, and "lumberdar" cannot, merely on account of his being such, be held as binding against the plaintiff, unless it be shown that he was invested by plaintiff with sufficient authority in that behalf. **Bucha v Lulee. 2 Agra, 20.**

45—S. 21—Statement in sale certificate prepared from the information of the party himself—Admissibility against a stranger. A statement in a sale certificate as to the amount of rent payable in respect of the holding in dispute at a sale in execution of a decree obtained by the plaintiff against a former tenant, prepared on information furnished by the party himself can be used on his behalf and against a stranger only if it falls under one of the exceptions to S. 21 of the Evidence Act. **Ramani Pershad Narain Singh v Mahanth Adaiya Gossain. 31 Cal 380.**

(2) Persons without title.

46—Persons without title—Suit for redemption—In a suit for redemption the admission of a person having no title to the estate in question in the suit is not admissible against the mortgagor. **Muthra Dass v Magh Singh. 2 N W 207.**

(3) Guardian, Admission by.

47—Guardian, admission by— Previous transactions—

Although a guardian of two minors may have power to manage or to make a partition of the estate, he has no authority to bind the estate of either of his wards by admission of previous transactions. **Suruj Mookhi Konwar v Bhagwati Konwar. 10 C L R 377.**

(4) Admission by Executors.

48—Admission by executors—The admissions of the executors of a donor are treated as the admissions of the donor. **Dwarkanath Bose v Chundee Churn Mookerjee 1 W R 339.**

Notes—Ex. 6 W R Act X 42 Reversed. 4 B L R P C 8.

Admission-*Contd.*

(2) Admission by or against, third persons—*Contd.*

49—The admission of one executor to a will would not bind another, nor would the admissions of parties other than the executor bind the estate.

Chunder Kant Mitter v Ramnarain Dey Sirkar. 8 W R 63

(5) ADMISSION BY AGENT.

50—Admission by agent—An agent's admission that he purchased as an agent is evidence against his heirs that the purchase was not made by him on his own account. **Goreeboollah Sirkar v Boyd.** 2 W R 190.

(6) ADMISSION BY HUSBAND.

51—Admission by husband—Admission of joint character of property—

An admission by the widow's husband that the lease was the joint property of himself and the plaintiff, though not an estoppel, was held to be good evidence to be rebutted by the widow.

Sreenath Nag Mozoomdar v Monmohinee Dossee. 6 W R 35.

(7) ADMISSION OF VAKIL.

52—Admissions of Vakil—Criminal case—Admissions made by a Vakil cannot bind his client in a Criminal case. **Queen v Kazim Mundle.** 17 W R Cr 49.

(8) ADMISSION BY PLEADER ON BEHALF OF CLIENT.

53—Admission by pleader on behalf of client—Admission made in a statement in a case by a pleader on behalf of his client after full consideration and consultation is admissble as evidence against that client in another case in which he is a party. **Comabutter v Pareshnauth Panday.** 15 W R 135.

(9) ADMISSION OF PLEADER RECORDED IN JUDGMENT.

54—Admission of pleader recored in judgment—The rule of law is that a judgment deliberately recording the admission of a pleader must be taken as correct, unless it is contradicted by an affidavit or the Judge's own admission that the record he made was wrong. **Hur Dyal Singh v Heera Lall.** 16 W R 107.

C. C. 33

Admission-*Contd.*

(2) Admission by or against, third persons—*Contd.*

(10) ADMISSION BY OWNER AFTER SALE OF PROPERTY.

55—Admission by owner after sale of property—An admission subsequently made by a debtor whose property has been sold is not evidence against the purchaser of the property.

Khemunkuree Chowdhrain v Ghoorchunder Mojoomdar. 5 W R 268.

(11) ADMISSION BY JUDGMENT-DEBTOR.

56 — Admission by judgment-debtor — Purchaser.—

A purchaser in execution of a decree of a Civil or Revenue Court is not bound by any admission made by his execution-debtor, nor ordinarily by a decree against such person.

Rungo Monee Debia v. Raj Coomar Bebee, 6 W R 197.

Imrit Kooer v. Lalla Debee Pershad Singh, 18 W R 200.

Notes:—Dist: 15 W R 237. Ex: 10 C L J 150.

(12) ADMISSION BY MORTGAGOR.

57—Admission by mortgagor—Suit by purchaser for cancellation of mokurari lease.—

Suit by a purchaser from a mortgagee against a durmokuraridar for the cancellation of his mokurari lease granted without authority by the mortgagor. In a former suit brought by the mortgagee for possession the mortgagor admitted the mortgage. *Held*, that although that admission was conclusive as between the mortgagor and the mortgagee, the colluding parties, yet that in the present case, brought to avoid the defendant's title on the strength of an alleged collusive mortgage, it was quite competent to him to contest its *bona fide* nature. **Donunjoy Dey v. Dwarkanath Singh,** 5 W R 280.

(13) ADMISSION BY LUMBERDAR.

58—Admission by lumberdar—Signature in patwari's diary as lumberdar.—

Held, that the plaintiff, being an immediate reversioner, might maintain his suit, and that his contributing his share of profit and putting his signature in the patwari's diary as lumberdar were not an admission of defendant's title as purchaser. **Nund Kishore v. Nuthoo Ram,** 1 Agra 223.

Admission-*Contd.*

(2) Admission by or against, third persons—*Contd.*

(14) ADMISSION BY HEIRS.

58A—Admission by heirs—Admission as to relinquishment of title.—

In a suit by the grandchildren of the deceased daughter of a member of a joint Hindu family, who, though not entitled to his property as his heirs, had been long in possession, the surviving daughter, in whom, according to Hindu law, her father's interest would now be legally vested, admitted by a petition filed in the suit that by her gift or relinquishment plaintiffs had a title to her father's share. The admission was held to be evidence that such title existed anterior to the commencement of the suit. **Gour Lall Singh v. Mohesh Narain Ghose,** 14 W R 484.

(15) ADMISSION BY ZAMINDAR OF MOKURARI RIGHT.

59 — Admission by zamindar of mokurari right.—

Where tenants sued for a declaration that their holding was mokurari at a given rent, and the surburakar of their zamindar admitted their right on behalf of the zamindar, who himself filed a petition corroborating his surburakar's statement, it was held that these admissions would bind any subsequent zamindar not being an auction-purchaser at a sale for arrears of Government revenue. **Watson & Co. v. Nobin Mohun Babu,** 10 W R 72.

(16) ADMISSION BY AUCTION-PURCHASER.

60—Admission by auction-purchaser — Admission of title indirectly.—

Where an auction-purchaser in a proceeding before the Collector for the purpose of charging an estate withstands a claim to a mokurari tenure advanced by a tenant, but does not otherwise subsequently legally question the tenant's title, the presumption arises that that title has been allowed by the auction-purchaser. **Choonee Mahtoon v. Chatoo Mahtoon,** 25 W R 231.

(17) ADMISSION OF LESSOR.

61—Admission of lessor—Lessor and lessee.—The admission of a lessor does not bind a lessee in certain cases in which a *bona fide* act might have bound. **Sutrooghun Dutt v. Brojogopal Ghose,** 3 W R 143.

Admission-*Contd.*

(2) Admission by or against, third persons—*Contd.*

(18) ADMISSION OF TENANCY.

62— Admission of tenancy — Evidence of tenancy.—

A mere admission by the defendant of plaintiff having purchased a jote is insufficient to prove that he ever was defendant's tenant. **Bakur Ali Chowdhry v. Ashkur Ali,** 5 W R 156.

(19) ADMISSION BY RAIYAT.

63—Admission by raiyat—Evidence of rate of rent—Similar tenures.—

An admission by one raiyat as to the rate of rent at which he holds is not evidence to prove the rate at which another holds.

Nurrohurry Mohato v. Narainee Dossee, 1 Ind Jur, O S, 9=W R F B 23.

64—Admissions of a respondent are not evidence against the co-respondent in a suit under the Indian Divorce Act.—**Gordon v. Gordon,** P R 58 of 1870.

(20) ADMISSION OF RATE OF RENT.

65—Admission of rate of rent —

In a suit for arrears of rent at enhanced rates, if plaintiff asks for rates admitted by defendant, he must abide by those intended to be admitted; and if he desire to take advantage of the finding of the Lower Court, he must submit to the whole finding taken altogether. **Soorendronath Roy v. Bhyrub Mundul,** 14 W R 462.

(21) RETURN OF AMOUNT OF RENT MADE TO COLLECTOR.

66—Return of amount of rent made to Collector—Rate of rent, Evidence of.—

A return made to a Collector by an occupant of land stating the amount of the rent is an admission as to the amount of rent binding upon the occupant and all who claim under him.

Ajudh Beharee Singh v. Ram Roy Tewari, 18 W R 105.

(22) RATE OF RENT, EVIDENCE.

67—Rate of rent, Evidence of—Presumption from conduct of defendant in not raising objection.—In a suit for a kabuliat at enhanced rates after notice under s. 13, Act X of 1859, where the defendants stood by and, though raising a good many objections on other points, raised no question

Admission-*Contd.*

(2) Admission by or against, third persons—*Concld.*

as to rates, their conduct and pleadings were held to afford a fair presumption of the admission of the plaintiff's claim as to the rates sued for.

Thakoor Dutt Singh v. Gopal Singh, 14 W R 4.

(23) CONSIDERATION FOR SALE.

68—Consideration for sale—Suit for presumption.—The mere admission of the vendor that an old debt of Rs 50 mentioned in the sale deed formed part of the consideration is not conclusive evidence of the allegation as against parties claiming a right of presumption.

Peera v. Shimbhu, 2 Agra 348.

69—Statement in sale certificate prepared from the information of the party himself—Admissibility against a stranger.

A statement in a sale certificate as to the amount of rent payable in respect of the holding in dispute at a sale in execution of a decree obtained by the plaintiff against a former tenant, prepared on information furnished by the party himself can be used on his behalf and against a stranger only if it falls under one of the exceptions to S. 21 of the Evidence Act.

Ramani Pershad Narain Singh v. Mahanth Adaiya Gossain, 31 Cal 380.

70—Admissions by pleader—Party, how far bound.—

A party is not bound, generally speaking, by a pleader's admission in argument on what is a pure question of law amounting to no more than his view that the question is unarguable.

Narayan v. Venkatacharya. 6 Bom L R 434 =28 Bom 408.

Notes:—Ref: 17 M L J 283.

(3) MISCELLANEOUS CASES.

(1) Verbal admissions as to sum due by defendant.

71—Verbal admissions as to sum due by defendant.—It is a very dangerous thing for a Court to decree in favour of a plaintiff merely upon alleged verbal admissions by the defendant of a sum due without the most clear and cogent proof of such admissions, especially when the plaintiff shrinks from bringing his accounts into Court.

Lalla Sheoparshad v. Juggernath, L R 10 I A 74.

Admission-*Contd.*

3 Miscellaneous Cases—*Contd.*

(2) ADMISSION OF RECEIPT OF PURCHASE-MONEY.

72—Admission of receipt of purchase-money—Registration Act, 1866, S. 66, cl. 3.—

An admission before a Registrar of the receipt of purchase-money attested by his endorsement, as required by cl. 3, s. 66, Act XX of 1866, though evidence of the strongest and most reliable description, ought not to be treated as conclusive. In the face of such admission, however, the party seeking to get out of its effects must make out his case by very clear evidence.

Mahomed Haneef Meajee v. Mozhur Ali, 15 W R 280.

(3) ADMISSION IN A MORTGAGE AS TO AMOUNT OF LAND EXCEPTED FROM ITS OPERATION.

73—Mortgage—Admission of land excepted from its operation.—

Debutter land within the limits of a revenue-paying mouzah, had been mortgaged by the defendants to a predecessor in title of the plaintiff. It was exempted from the mortgage. The deed specified the number of bighas making the area of the debutter. Against a plaintiff, who made title to the mortgaged mouzah and claimed possession of all of it that had passed by the mortgage, the mortgagors set up that there was more debutter in the mouzah than the deed had specified, the intention of the parties having been to exempt whatever debutter there actually was:—*Held*, that the statement in the deed as to the quantity of the debutter was a deliberate admission, imposing upon the mortgagors who had made it the burden of proving that it was not true, or that they were not bound by it; also that the judge's finding that the defendants had not given proof sufficient to discharge themselves of this, was correct. **Jarao Kumari v. Lalonmoni, 18 Calc 224=17 I A 145.**

Notes:—Dist: 13 C W N 71; 7 C W N 612; 7 C W N 849.

(4) FALSE STATEMENT AS TO SHARE BEING SEPARATE.

74—False statement as to share being separate—Joint family—Misrepresentation.—

In a suit by a member of a joint family to recover possession of certain property alleged to

Admission-*Contd.*

3 Miscellaneous Cases—*Contd.*

belong to the joint estate, but which had been purchased by the defendant at a sale in execution of a decree passed against the estate of R, one of the members of the family, for his separate debt, the defendant alleged, as showing the property was the separate property of R, that, on one occasion, when R B, the kurta, and a third member of the family, entered into a security bond with the Collector, whereby R pledged the property in suit, and the two others pledged other properties, each of them described the property pledged by him as being in his possession "without the right of any co-sharers". *Held*, that the misrepresentation as to his separate ownership made by R in the security bond given to the Collecter could not be regarded in the present suit as more than an admission inconsistent with the title now asserted by the plaintiff, the defendant not having purchased on the faith of such misrepresentation. **Boodh Singh Dhoodoria v. Gunesh Chunder Sen, 12 B L R, P C, 317= 19 W R 356.**

(5) FALSE STATEMENT BY DEFENDANT.

75—False statement by defendant.—

A plaintiff cannot take advantage of a statement made by a defendant which at most amounts to a piece of evidence, and not to an admission, but which is found to be untrue, unless it be shown that the status of the plaintiff had been affected, or that he had been misled by such statement. **Grish Chunder Ghose v. Issar Chunder Mookerjee, 3 B L R A C 337= 12 W R 226.**

(6) MITIGATION OF EFFECT OF ADMISSION.

76—Mitigation of effect of admission—Showing nature of transaction when made.—

Where a defendant seeks to make use of statements which have been put in evidence and to treat them as admissions by the plaintiff who put them in, it is competent for the plaintiff to show the real nature of the transaction to which they relate and to get rid of the effect of the apparent admissions. **Luteefoonissa v. Goor Surun Dass. Phool Bibee v. Goor Surun Dass, 18 W R 485.**

Notes:—Fol: 20 W R 112; 9 C L R 64 Ref: 23 Cal 460; 27 Cal 231; 23 Bom 406; 29 Cal 740; 27 Bom 452; 33 Cal 967=10 C W N 650=4 C L J 22.

Admission *Contd.*

3 Miscellaneous Cases—*Contd.*

77—Showing real nature of transaction.—

A party claiming under another who has made admissions as to a transaction to which that other was a party, is at liberty to allege and prove that the admissions were made with a fraudulent purpose and were not true, and to show the real nature of the transaction. **Sreenath Roy v. Bindoo Bashinee Debia, 20 W R 112.**

Notes:—Fol: 9 C L R 64 Ref: 23 Cal 460; 27 Cal 231; 33 Cal 967=10 C W N 650 =4 C L J 22.

(7) EFFECT OF ADMISSIONS NOT ACTED ON.

78—Effect of admissions not acted on—Admissions by person who afterwards adopts another.—A party is not concluded by his own representations unless they have been acted upon by the opposite party. If treated merely as admissions not acted upon, it may be shown by the party who made them that they were not true. *Quære*—What is the effect of admissions made by a person who subsequently adopts another in binding the person adopted? **Brojendro Coomar Roy Chowdhry v. Chairman of the Dacca Municipality, 20 W R 223.**

(8) ADMISSION NOT ACTED ON.

79.—Admission not acted on—Decision opposed to admission—*A* mere admission is not conclusive.

It is so only in certain cases,-*e. g.*, where it has been acted upon by the party to whom it was made. Thus a statement made in a former suit, in which the Court, so far from acting upon it, passed a decree opposed to it, cannot be treated as conclusive. An admission made by defendants' ancestor may be evidence of some weight that may be used against them; but it is only evidence upon which the Court which is trying the suit may act or not according as it considers it ought to have effect given to it. **Janan Chowdhry v. Doolar Chowdhry, 18 W R 347.**

Notes:—Dist: 5 Cal 259.

Admission-*Contd.*

3 Miscellaneous Cases—*Contd.*

79 A—Illatom — Two families living together—No illatom or other family arrangement—Rights *inter* se—Equal rights based on custom—Effect of custom —Ignorance of legal rights—Admissions made in—Effect.

There is no custom in the District of Nellore that, when two families live together and there are inter-marriages amongst the members thereof, the two families have equal rights in the properties which they hold and enjoy.

Such a custom may be legal, if it originated in an arrangement of the parties concerned or is otherwise dependent on family arrangements.

A custom, to be effective, must be a territorial custom, and isolated cases are of little value, unless it be proved that the two families living together have been united together on equal terms.

An admission of the defendant in favour of the plaintiff in ignorance of her legal rights will not bind her, if, as a matter of fact, the plaintiff had no legal claims. **Allareddi Subbamma v Adi Lakshmamma 11 M L T 124=(1912) 1 M W N 178**

80— Transaction—Apparent title in one person—Beneficial title in another, how proved—Burden of proof—Acquisition out of funds supplied by alleged beneficiary, necessity to prove—Possession, presumption of title from—Evidence Act, Ss 21, 110—Admission.

Plaintiffs brought this suit to recover a certain coffee garden from their paternal uncle, the defendant. Plaintiffs' father and the defendant had separated and partitioned their ancestral property in 1870 but after their father's death in 1886, the plaintiffs who were young, had lived in the defendant's protection. The plaintiff's case was that the disputed garden had belonged to their father. Previous to the suit, one of the plaintiffs alone, but describing himself as the guardian of his minor brother, had executed a sale deed in favour of the defendant, in which the disputed property was described as having been enjoyed by plaintiffs' father and is belonging to the plaintiffs after his death. It was nobody's case that this was a real sale. The High Court in decreeing the suit in plaintiffs' favour relied *inter alia* on the document as containing an important admission of plaintiffs' title in the property. *Held* —That the High Court was right in so using the document. That in order to displace this apparent title, in the plaintiffs and to establish a beneficial title in himself, it was incumbent upon the defendant to show by satisfactory evidence that the funds out of which the garden was purchased and developed were his own funds. **Puliyampatti Naranier v Kuppier 9 C W N 89 P C**

Admission-*Contd.*

3 Miscellaneous Cases—*Contd.*

81—s. 31 Evidence Act.

Although an admission contained in a deed of sale or made before the registrar, that the consideration has been received by the vendor is *prima facie* evidence against the person making it, it raises only a rebuttable presumption, the weight of which varies with the special circumstances of each case. **Sheo Ratan v Abdul Karim 9 W N 142.**

82—Admission—Admission by minor son.

In a suit for possession of land by A his admission in a possessory suit when he was a minor of its sale to the defendant by an unregistered document which requires registration does not come within the meaning of S. 65 (b) of the Evidence Act: it can only be got in under S.21 of the Evidence Act when not claiming through his mother, similar admissions made by her in such suit are not in any event admissible against him. A's admission as to the effect of the document made in the possessory suit before the Mamlatdar is not sufficient to dispose with proof of the contents of the document under s. 58 of the Evidence Act.

Balaji Vasudev Habbu v Rudrapa P J (1898) 179.

83—Insufficiently stamped promissory note.

In a suit on a promissory note, inadmissible in evidence on account of its having been stamped subsequently to its execution, an admission by the defendant in Court, of its execution and of the receipt of the consideration is sufficient to entitle the plaintiff to a decree. **Bhagvan v Paul 1882 P J 279.**

84—Withdrawal of—A gratuitous admission may be withdrawn unless there is some obligation not to withdraw it. **Jangi Nath v Janki Nath 2 A L J 225.**

Admission-*Concld.*

3 Miscellaneous Cases—*Concld*

85—Admission in the judgment, when a party can question.

It is not open to the party to challenge the accuracy of his admission contained in the judgment, in the court of appeal, if the admission was not as a matter of fact made, or if it was substantially different from that it was taken by the Court to be, the proper course for the party is to apply for a review of judgment.

Mirza Shamsher v Kunj Behari Lall 7 C L J 414 = 12 C W N 273.

86—Pleader—Conduct of suit—Client.

When a pleader in the conduct of a suit makes admissions on behalf of a client is bound by such admissions. **Berkeley v Musammat Chittur Kooer 5 N W P 2.**

(9) PERSONS WITHOUT TITLE.

87 88—Persons without title Suit for redemption In a suit for redemption the admission of a person having no title to the estate in question in the suit is not admissible against the mortgagor. **Muthra Dass v Magh Singh 2 N W 207.**

Admission by agent.

See Admission by or against third persons

Admission by a party.

See Admission.

Admission by auction purchaser.

See Admission by or against third persons

Admission by co-defendant.

See Admission statement and pleading

Admission by defendant.

See Admission

Admission by executors.

See Admission by or against third persons.

Admission by heirs.

See Admission by or against third persons.

Admission by husband.

See Admission by or against third persons.

Admission by Lumberdar.

See Admission by or against third persons.

Admission by mortgagor.

See Admission by or against third persons

Admission by not traversing allegations.

See Admission statement and pleading.

Admission by one defendant relavent against other defendants.

See Admission.

Admissions by or against third persons.

See (1) Admissions.

Admission by pleader on behalf of client.

See Admission by or against third persons.

Admission by raiyat.

See Admission by or against third persons.

Admisson by several joint tenants

See Admission statements in pleading.

Admission by zamindar of mokurari right.

See Admission by or against third persons.

Admission, effect of against person not party to suit.

See Admission by or against third persons.

Admission in a mortgage as to amount of land excepted from its operation.

See Admission.

Admission in pleading.

See Admission statements and pleading

Admission in former suit.

See Admission statement pleading.

Admissions in statements and pleading.

See Admission.

Admission in verified petition.

See Admission statement and pleading.

Admission in written statement of defendant.

See Admission statememt and pleading.

Admission made arguando.

See Admission.

Admission made by one co-sharer

See Admission statements and pleadings

Admission made in former arbitration proceeding.

See Admission statements in pleading.

Admission not acted on.

See Admission.

Admission not amounting to estoppel.

See Admission estoppel

Admission of appeal after time.

See Limitation Act.

Admission of document in evidence; subsequent rejection too late.

See Evidence—Civil cases—Miscellaneous documents.

Admission of Jenmi's title.

See Admission.

Admission of lessor.

See Admission by or against third persons.

Admission of liability contained in a memorandum of appeal in a different suit.

See Admission.

Admission of part of claim.

See Variance between pleading and proof.

Admission of plaint.

See Plaint.

Admission of pleader recorded in judgment.

See Admission by or against third persons.

Admission of rate of rent.

See Admission by or against third persons.

Admission of receipt of purchase-money.

See Admission.

Admission of tenancy.

See Admission by or against third persons.

Admission of tenancy, effect of.

See (1) Landlord & tenant.

(2) Admission.

Admission of title in pleading.

See Admission statement and pleading.

Admission of unstamped in evidence on payment of stamp duty & penalty.

See (1) Stamp Act.

(2) Evidence—Civil cases-Secondary evidence—Unstamped or unregistered documents.

Admission of vakil.

See Admission by or against third persons

Admission on appeal of evidence rejected by lower court.

See Appellate Court Rejection or admission of evidence admitted or rejected by court below

Admission of point of law.

See (1) Estoppel.
(2) Admission
(3) Pleader—Authority of, to bind client

Admission or rejection of evidence

See Special and second appeal

Admission or summary rejection of appeal.

See Special & second appeal.

1-Punjab Tenancy Act XXVIII of 1868, S 5-Admission by occupancy tenant's ancestor prior to Act—Effect of admission against successor—In a suit brought by the plaintiff to establish his right of occupancy under s 5 of the Punjab Tenancy Act (XXVIII of 1868) it was found that his ancestor had made an admission (which was recorded at a settlement prior to the passing of Tenancy Act) to the effect that he was a tenant at will, *Held* that this admission was not necessarily a bar to his suit **Nihalu v Mehtab Khan, 2 P R 1879**

Notes —Dist 24 P R 1883

Admission—General—made unaware of the circumstances—Not binding—See Ben Act VIII Of 1885, ss. 163, 186 A, **9 Ind Cas 806**

Admission General—The express of a party to a suit—Right of party to show that those admissions were mistaken or not true—See Burden of Proof—Possession And Proof Of Title. **4 A L J 102 P C = 11 C W N 321 = 5 C L J 115 = 17 M L J 103 = 2 M L T 109 = 9 Bom L R 267 = 29 All 184.**

Admission-General-*Concld.*

Admission—General—of mortgage debt by minor after becoming major—Ratification—Whether decree can be based on—Guardian-Duties And Powers Of Guardian,

Admission—General—Admission by one defendant how far binding other defendants—Conduct, admission not amounting to-Legitimacy. **I O C Sup 49.**

Admission General—Mortgage **18 Cal 224 = 17 I A 145 P C.**

Admission—General—by mortgagee cannot operate to make mortgage redeemable which by law was irredeemable at the time when the admission was made—Mortgage-Redemption **11 O C 285**

Admission-General—of and decree against, father binding on son Pre-emption **157 P W R 1909**

Admission—General—Effect of admission of defendant in suit based on unregistered document inadmissible in evidence—See Registration Act 1908 S. 17.

Admission—General—Sale of immoveable property by registered deed—Prior sale of same property by unregistered deed-Suit for possession by purchaser under registered deed-Admissibility of—Before registration officer to prove prior sale—See Registration Act, 1908, s 49

Admission General-Statement in plaint unchallenged and made by putnidar after transfer of interest not binding upon transferee—Ben. Reg. VIII of 1819, ss 13, 14, cl. 4,

Admission—General-of transaction effected registrable but unregistered instrument, effect of —Admission on point of law—Estoppel—Sale **3 N L R 72.**

Admission—General—When not binding—Statement made by several persons representing all the proprietors—Effect—See Shamilat

Adna & Ala Malik.

See Ala and Adna Maliks

Adna Malik.

See Custom—Punjab Inheritance.

Adopted son's right to impeach alienation unnecessarily made by his adoptive mother before his adoption.

See Hindu Law—Alienation & Adoption.

Adoption.

See (1) Burmese law
(2) Hindu law (Adoption)
(3) Limitation Act Arts 91 120,141,118,119
(4) Custom (Punjab) Adoption
(5) Declaratory Decrees, suit for-Adoption
(6) Valuation of suits
(7) Evidence Onus of proof
(8) Hindu Law-Custom-Adoption
(9) Hindu Law-Will Construction
(10) Malbar Law-Adoption
(11) Malbar Law Custom
(12) Succession Certificate Act Ss 6 7 and 9
(13) Vested and contingent Interests.
(14) Wajib ul-arz

1—Adoption, suit setting up—Non production of account books connected with the ceremony—Burden of proof

In the suit the allegation of the respondent that he was adopted 20 years before the trial was in issue The parties were all Bohra Brahmins, who followed the business of money lending No effort was shown to have been made by either side to produce the account-books no search for them, or loss of them was proved no explanation given why they were not forth coming

Held, that having regard to the well known and often proved habits of the Indian people with regard to the keeping of accounts recording their most minute transactions, the non production of any book in which anything connected with the ceremony of adoption was entered, covered the respondent's case with suspicion

Held, also, that the burden of proving the alleged adoption rested upon the respondent and that (on the evidence) he had failed to discharge it. **Musammat Lal Kunvar v Chiranji Lal 11 C L J 172=7 M L T 57**

2.—Widow—Adoption—Alienation by the widow before adoption—Right of the adopted son to dispute the alienation

Where a Hindu widow who has inherited her husband's property, adopts a son, the adoption has the effect of divesting her of the property and putting an end to her estate as heir of her husband The adoption has the same effect as her death, with the difference, that, after the adoption, she has a right of maintenance against the adopted son during the rest of her life, where-

Adoption-*Contd.*

as such right ceases on her death But the right of the maintenance, so long as it is not a charge on the estate or any portion of it does not confer on her any right to the estate or entitle her to transfer it by way of sale or mortgage

If the widow, before the adoption, severs a portion of the inheritance therefrom and transfer it to a stranger, without any proper or necessary purpose binding the estate absolutely according to Hindu Law, the transfer, logically speaking must cease to have any effect after the adoption, since it could only operate during the time that the estate was respresented by her as heir, and the result of the adoption is to terminate that estate (11 Bom 909 19 Bom 809 Fol 26 Mad 143 not fol

Ramakrishna Kuppusawmi v Tripurabai Kuppusawmi 10 Bom L R 1029=33 Bom 88

3—Re married mother—Power to give in adoption son by first husband—Hindu Widows Re marriage Act (XV of 1856)—S had a daughter B, who with her husband A and son M plaintiff lived with him

S had a wife P, the step mother of B S intended from the first to adopt the plaintiff, and for three years after his death, B P and A used to live in the family house as before, and P continued to treat the plaintiff as before as the son of S. P then went through a formal adoption ceremony in which plaintiff was given by his mother B who had at this date contracted a re-marriage, A having died some years back The adoption was challenged on the ground that B, owing to her re-marriage had lost the right of giving her son (plaintiff) in adoption.

Held, that the adoption was good, as there was evidence of an express authority from A to B to give the plaintiff in adoption to S

According to Hindu Law, a mother who has contracted a re marriage does not forfeit her right to give in adoption her son by her first husband And the Hindu Widows Re marriage Act, 1856, does not afford any indication that the Legislature intended to deprive her of the right 24 Bom 89=1 Bom L R 543 cons. **Putlabai Sadashiv v Mahadu Sadashiv.**

10 Bom L R 1134=33 Bom 107=1 Ind Cas 659.

Adoption - *Concld.*

4.—Hindu Law—Adoption—Presumption—Conduct of parties.

When a question is raised as to whether an adoption was ever made, and if made whether made under necessary authority and with the usual formalities, a presumption will be made in favour of the adoption only if it is established that there was an initial probability in favour of a valid adoption, and if the conduct of the parties cognisant of the fact has been at least consistent with such practice **Har Sankar Partab Singh v Lal Raghuraj Singh.** **6 C L J 13=4 A L J 497=11 C W N 841=9 Bom L R 757=17 M L J 354=99 All 519 31 I A 125 (P C.)**

5.—Adopted son having a son—The son remains in the family of his birth

When a married Hindu having a son is given in adoption by his natural father he alone passes into the family of his adoptive father His son does not pass and lose his *gotra* and rights of inheritance in the family of his birth **Kalgauda Tavanappa Patil v Somappa Tammangauda Patil.** **11 Bom L R 797—33 Bom 669.**

6 -Authority—Registration Act S 17 and Oral Evidence.—An authority to adopt which is in writing and not contained in a will must be compulsorily registered under Ss 17 and 49 of the Registration Act. Quare — Whether oral evidence is admissible where an authority to adopt compulsorily registrable is not registered **Somasundara Mudali v Duraisami Mudaliar** **13 M L J 283=27 Mad 30.**

See also Cases under —Registration act s 17

Adoption-Suit for declaration that adoption is invalid—Property affected more than 5,000 Rs.—Jurisdiction — Conversion from Hindu Law to Mahomedanism—Presumption as to custom of, in Mahomedan Law **13 Bom L R 251**

Adoption invalid—Possession under—Status not altered by. **21 M L J 500**

Adoption—Suit for declaration that adoption was invalid dismissed as time-barred—Whether plaintiff can get a decree for possession **8 A L J 1101**

Adoption—Suit to set aside will reciting adoption-Will revoked—Suit still maintainable **61 P L R 1909=81 P W R 1909=4 Ind Cas 482.**

Adoption a Condition precedent to the boy taking under the will.

See (1) Hindu law-will.
(2) Inheritance.

Adoption among Brahmans.

See (1) Hindu Law adoption
(2) Requisites for adoption.

Adoption by Daughter-in-law

See Hindu Law-Adoption-Who may or may not adopt

Adoption by Deceased's widow.

See Hindu law-Adoption-Who may or may not adopt

Adoption by elder brother's widow after younger brother's death.

See Hindu law Adoption-Who may Or may not adopt.

Adoption by grand-mother without the consent of her daughter-in law.

See (1) Hindu law-Adoption-Who may or may not adopt
(2) Hindu law—Adoption Second, simultaneous or conditional adoption

Adoption by karnavan for a Marumakk atayam tarwad.

See Malabar law adoption

Adoption by last member of a Nambudri illom.

See Malabar Law—Adoption

Adoption by mother after the death of her son, who has left neither child nor widow

See (1) Hindu Law—Adoption Who may or who may not adopt.
(2) Hindu Law—Adoption second, simultaneous (conditional adoption)

Adoption by mother who has succeeded as heir to her son after the death of his widow.

See Hindu Law—Adoption—Who may or may not adopt.

Adoption by Naikin or dancing girl

See Hindu Law—Adoption—Who may or who not adopt.

Adoption by son's senior widow without consent of junior widow.

See Hindu Law—Adoption—Who may or may not adopt.

Adoption by temple dancing woman.

See (1) Hindu Law Adoption-Who may or may not adopt.
(2) Hindu Law Custom adoption.

Adoption by unmarried man.

See Hindu Law—Adoption-Who may or may not adopt.

Adoption by unlonsured widow.

See (1) Hindu Law-Adoption-Who may or may not adopt.
(2) Hindu Law—Adoption-Requisites for adoption
(3) Hindu Law-Custom-adoption.

Adoption by widow.

See Hindu Law—Adoption-Who may or may not adopt.

Adoption by widow whose husband died while a minor.

See Hindu Law-Adoption Who may or may not adopt.

Adoption by widow relating back to her husband's death.

See Hindu Law-Adoption-Who may or may not adopt.

Adoption by widow with express authority from her husband to adopt.

See (1) Hindu Law-Adoption-Who may or may not adopt.
(2) Hindu Law Adoption-Requisites for adoption.

Adoption by younger widow without consent of elder widow invalid although child selected by both widows.

See (1)Hindu Law-Adoption-Who may or may not adopt.
(2) Hindu Law Adoption—Requisites for adoption.

Adoption by zamindar in conjunction with one of his two wives.

See Hindu Law-Adoption—Who may or may not adopt.

Adoption, caste custom prohibiting.

See Hindu Law-Custom-Adoption.

Adoption directed by will.

See Hindu Law. Will-Construction of wills-Adoption.

Adoption directed to be made not by the testator's widow but by son's widow.

See Hindu law-Will-construction of wills Adoption.

Adoption divesting an estate which had already vested in another persen.

See Hindu Law-Adoption.Effect of adoption.

Adoption during pollution of adoptive purent.

See Hindu law-Adoption-Requisites for adoption.

Adoption during pregnancy of wife.

See Hindu Law-Adoption.

Adoption from corrupt and improper motives.

See Hindu Law-Adoption-Who may or may not adopt.

Adoption in a united family.

See Hindu Law-Adoption.

Adoption in dwya mushyayana form.

See Hindu law-Adoption.

Adoption in Gujrat.

See Hindu Law. Adoption.

Adoption, injunction to restrain.

See (1) Hindu Law-Adoption.-Who may or may not adopt.

(2) Injunction-Special cases.

Adoption made by a widow to defeat the claim of her co-widow to a share in her husband's estate.

See Hindu Law-Adoption—Who may or may not adopt.

Adoption made the day after the adoptive father made his will.

See (1) Hindu Law-Adoption-—who may or may not adopt.

(2) Hindu Law-Adoption-Requisites for Adoption.

Adoption made on under-standing that the Dis-positions of the will be observed

See (1) Hindu Law-Will-Construction of wills-Adoption.

(2) Hindu Law-Adoption-Second simultaneous or conditional adoptions.

Adoption, necessity of, there being gift and acceptance of the adopted child.

See Hindu Law-Adoption-Requisites for adoption.

Adoption of a girl by temple dancing woman.

See Hindu Law-Adoption—Who may or may not be adopted.

Adoption of an adault.

See (1) Hindu Law-Adoption-Who may or may not be adopted.

(2) Malabar Law-Adoption.

Adoption of an only son.

See Hindu Law-Adoption-Who may or may not be adopted.

Adoption of daughter.

See Hindu Law -Adoption-Who may or may not be adopted.

Adoption of Devadasi for illegal purpose.

See Hindu Law—Adoption-Who may or may not be adopted.

Adoption of more than one daughter at a time.

See Hindn Law—Adoption-Who may or may not be adopted.

Adoption of sister's son.

See Hindu Law-Adoption-Who may or may not be adopted.

Adoptions.

See Declaratory Decree.

Adoptive mother under pollution.

See (1) Hindu Law-Who may or may not adopt.

(2) Hindu Law-Adoption-Requisites for adoption.

Adoptive Parents.

See Hindu Law—Guardian—Right of Guardianship.

Adoptive son bound by the will of testator.

See Hindu Law—Will—Construction of wills-adoption.

Adultery.

See

(1) Divorce Act 1869.
(2) Muhammadan Law, Inheritance.
(3) Marriage.
(4) Restitution of conjugal rights.
(5) Husband and Wife.
(6) Hindu Law (Illegitimacy.)
(7) Mahomedan Law (Illegitimacy).
(8) Act IV of 1869.

Adultery -*Concld.*

Adultery—of partner with wife of co-partner.

See Partnership.

1—Divorce—Adultery of petitioner—Divorce, refusal of.

Adultery of petitioner is a legal ground on which the Court can refuse the petition for divorce. **Rufas v Rufas. 2 Bom L R 690**
Meherbal v Hormasji. 10 Bom L R 1019

2—Divorce—Judicial separation—Condoning of adultery, effect of.

The ordinary rule is that no relief should be granted to a party who has himself or herself committed adultery. The fact that the adultery was condoned by the wife is not, of itself, sufficient ground for absolving the husband from the ordinary rule. The ordinary rule may be relaxed in favour of a wife who seeks a judicial separation, but no relief of any sort can be granted to a guilty wife except under very special circumstances. **Mrs A v Mr A, 8 Ind Cas 960.**

3—Attempt to commit adultery—Actionable wrong.

An attempt to commit adultery is not by itself an actionable wrong. **Kathappudayan v Muthappudayan, 10 M L J 230.**

Adultery—Application to cancel order for maintenance of wife—Evidence of adultery—Maintenance. **A W N 1893, 56**

Adultery—Suit for dissolution of marriage on the ground of wife's adultery—Power to order discovery of documents in the possession of petitioner—Civil Procedure Code.
C. P. C. 1908 O VII r 14 and O XI, rr 12,13, 11 P R 1902,

Adultery—Damages—House trespass with intent to commit adultery—Adultery not committed—Right to compensation for house-trespass—Damages—Measure And Assessment. **10 M L J 230.**

Advalorem fee

See (1) **Stamp Act,**
(2) **Court fees Act.**

Advancement.

See (1) English Law.
(2) Parsis.

1—Presumption of—Purchase in wife's name with husband's money—Application of the doctrine to Portuguese in Bombay:

The doctrine of presumption of advancement does not apply where the wife herself purchases with her husband's money in her own name. It can apply only when the husband buys in his wife's name. *Quere*:—Whether the doctrine applies to the Portuguese in Bombay
De Silva v DeSilva 4 Bom L R 849 = 27 Bom 103 at 112

2—Purchase by husband in the name of wife—Presumption of advancement or—Gift to wife.

According to the law as prevailing in the Bombay Presidency, a purchase by a husband in the name of his wife does not raise any presumption of a gift to the wife or of an advancement for her benefit. **Motivahu v Purshotum 6 Bom L R 975 = 29 Bom 306.**

Advancement.—Property acquired by ancestor in the name of his wife after waqf—Whether—Mahomedan Law—Waqf. **26 All 272.**

Advancement out of minor legatee's share for his benefit.

See Succession Act.

Advances by factor on consignment.

See (1) **Principal and agent.**
(2) **Commission agents.**

Advances by mortgagees to original mortgagor on same security.

See Mortgage-Tacking.

Adverse possession.

See (1) Onus of proof—Limitation and Adverse Possession.
(2) Possession—Adverse Possession
(3) Title—Title By Long Possession.
(4) Bhagdari and Narwadari Act ss. 3, 5
(5) Co-sharer, Possession By.
(6) Landlord & Tenant.
(7) Landlord & Tenant—Nature of Tenancy.
(8) Limitation, Mortgage.
(9) Limitation, question of limitation.
(10) Limitation Act Ss. 4, 7 and Arts 134, 139, 141, 144, 145, 147 & 148.

Adverse Possession-*Contd.*

1—Mahomedan Law Imamia school, childless widow right to succeed--Possession in lieu of dower-Whether such right inheritable and transferable.

Transfer of Property Act (IV of 1882) section 6, clause (d)-mortgagee in possession-change of nature of possession-appointment of guardian *adlitem*-inherent powers of Court. A childless widow of a deceased Shia Mahomedan does not inherit the immoveable property left by her husband. The right of a Mahomedan widow in possession of the property in lieu of dower is a right which is assigned to her as a creditor to hold the property until her debt is satisfied, and the transfer of such right is prohibited by section 6, clause (d) of the Transfer of Property Act. Such a right is neither heritable nor transferable (14 M I A 377; 20 All 262 Ref). A mortgagee cannot by an act of his, render his possession adverse to the mortgagor during the continuance of the mortgagee. (32 Cal 312 Fol) In a suit brought against Shia Mahomedan infants, their mother who was a Shia was made a guardian *adlitem*. The property of the minors was sold and purchased by the decree-holder. *Held* that it should be presumed that the mother was appointed guardian of her minor children by the Court which has an inherent power to appoint a guardian *adlitem*. The sale held in execution of the decree binds the minors. (14 M I A 377; 20 All 262 Ref 32 Cal 312 Ref. **Muzaffar Ali Khan v Parbati 4 A L J 521=(1906) A W N 221=29 All 640.**

Notes —Ref 29 All 652.

2—Against mortgagor when adverse to mortgagee. The possession of a person claiming to hold property adversely to the mortgagor does not become adverse to the mortgagee who has purchased the property at a sale in execution of a decree obtained on his mortgage until after the sale when the ownership in, and the beneficial title to, the land for the first time vests in him. 7 App Cas 235 (1882) relied on.

Aimadar Mondul v. Makham Lal Day 10 C W N 904.

3—By mortgagee—Redemption, equity of.

A mortgagee in possession purchased the mortgaged properties through benamidars at certain execution-sales and resisted a suit for redemption on the ground that since the date of these sales no accounts had been demanded by or rendered to the mortgagor and that the mortgagee was in adverse possession of the equity of redemption. *Held*, overruling the plea, that as between mortgagor and mortgagee neither exclusive possession by the mortgagee for any length of time short of the statutory period of sixty years nor any acquiescence by the mortgagor not amounting to a release of the equity of redemption would be a bar or defence to a suit for redemption if the mortgagor be otherwise entitled to redeem. **Khiarajmal v. Daim I C L J 584=2 A L J 71=9 C W N 201=7 Bom L R I=32 Cal 296=32 I A 23; P C.**

Notes:—Dist: 9 C W N 956=2 C L J 384. Ref, 30 Mad 502; 7 Bom L R 816; 2 A L J 356: 27 All 517=2 A L J 210=(1905) W N 80; 5 C L J 385; 696 F B 34 Cal 241, 811 F B, 11 C W N 756 F. B. 1011 F B, 17 M L J 179; 19 M L J 671; 29 All 640; 35 Cal 61 F B, (1908) W N 17 C L J 251: 325 6 C L J 320 F B; 30 Bom 477=8 Bom L R 268. Fol. 28 All 137=(1905) W N 229=2 A L J 615; 11 C W N 1078; 6 C L J 719.

Adverse possession.—Against mortgagor-Suit by mortgagee—Limitation.

9 Ind Cas 990.

4—Adverse possession—Mortgage by trespasser- Mortgagee in possession for over 12 years—Prescriptive title complete.

A, a trespasser in respect of a certain fixed rate holding, mortgaged it to B in 1884. B remained in possession of the property ever since.

Held, that the possession of B was equivalent to the possession of his mortgagor, and as he had been in possession for over 12 years, it must be held that A and B, had acquired a title by adverse possession. **Beni Madho Singh v. Debi Saran Dube. 10 Ind Cas 545.**

See also (1) Co-sharers.

(2) Landlord & tenant.

5—Prescription—Landlord and tenant—Permanent tenancy, acquisition of, by former-Decree for khas possession against tenant who set up permanent title—Continuance of tenant in possession—Presumption that tenant continued to hold as permanent tenant—Limitation—Commencement—Subsoil landlord's right to.

Adverse possession-*Contd.*

In a suit for *khas* possession against B who set up a permanent tenancy, it was decided that B held some of the lands as joledar and the rest as *ijaradar* under the plaintiff and a decree was made in plaintiff's favour for khas possession of lands only as B held as *ijaradar*. But although symbolical possession of the lands decreed was delivered to the plaintiff, B continued to hold possession of all the lands in suit for more than 12 years.

On several occasions during this period, B made assertions of title as permanent tenant, to the knowledge of the plaintiff's agents. Held—That B acquired by prescription a right to hold the lands as a permanent tenant, but that the sub-soil, in respect of which no prescriptive right had been made out by B, remained with landlord. It was to be presumed that after symbolical possession was delivered to the plaintiff B continued to hold the lands as on the title which he had already asserted in the suit, and limitation ran from that date and not from the date or dates on which B subsequently made assertions of permanent title to the knowledge of plaintiff's agents.

A farmer may acquire by prescreption the right of permanent tenant by setting up such higher right adversely to the Zemindar. (5 Cal 584=25 Bom 275=25 Mad 507=10 M J A 438 ref to. **Bagdu Majhi v Rajah Sri Sri Durga Prasad Singha. 9 C W N 292.**

Notes:—Dist: 5 C L J 583 Ref, 34 Cal 753; 12 C W N 193

6.—By stranger against landlord.—Possession during the term of lease cannot be adverse to the Zamindar, at least so long as he does not become entitled to immediate possession. Where the defendant purchased certain plots of land from the lessee, but continued to pay the rent to the Zamindar:—*Held*, that his possession could not become adverse as there was nothing to put the Zamindar on enquiry. I L R 27 All 395 applied. **Thamman Pande v The Maharaja of Vizlanagaram. 4 A L J 726=1907 A W N 185=29 All 593.**

7—Against tenant when adverse to landlord -Tenant holding over,dispossessed-Right of landlord to sue trespasser—Limitation. When there is a current lease, and the tenant is dispossessed by a third party, time does not commence to run

Adverse possession-*Contd.*

against the landlord until the expiration of the lease. 9 Cal 367 (1882); and 13 Cal 101 (1886), followed. But when the lease has expired and the tenant is holding over with the landlord's consent and the possession of such third party is adequate in continuity, in publicity and in extent so as to show that it is possession adverse to the landlord, the latter is not precluded from determining the tenancy and suing the trespasser in ejectment, and his right to sue will be barred after 12 years of such possession. Radha moni Debi v. The Collector of Khulna, 4 C W N 597 (1900), referred to. **Kishwar Nath Sahi Dev v Kali Sankar Sahai 10 C WN 343.**

8.—Permanent lease, grant of—Suit to set aside lease and recover possession—Limitation —Limitation Act (XV of 1877) Sch, 11, Arts 134, 144 and Section 10—Trustee—Notice, by lease of debutter character of property, effect of—Minerals, if included in permanent lease.

A permanent mokurrari lease is an alienation of the proprietary interest *pro tanto*, and if the property is debutter, the alienation by the lessor is beyond his legal competence and the possession of the lessee becomes adverse to the lessor as from the date of the lease, and a suit to recover possession of such property as debutter property is *prima facie* governed by Art 144 of the Second Schedule of the Limitation Act.

The fact that the lessee had notice that the property she was acquiring was debutter property does not preclude the lessee from being regarded as a purchaser within the meaning of article 134, Sch. II of the Limitation Act and an "assign for valuable consideration," within the meaning of Section 10 of the Limitation Act.

Under Section 10 of the Limitation Act, time is no bar to an action against the trustee himself, his representatives or assigns, except an assign for valuable consideration, but as regards the latter the period of 12 years from the date of the purchase is to be the period within which the suit must be brought.

A permanent lease including "all rights of various kinds" with the exception only of the

Adverse possession-*Contd.*

homestead includes the minerals. **Shyama Charan Nundy v Abhiram Goswami. 3 C L J 306=10 C W N 738= 33 Cal 511.**

9—144—Lambardar and co-sharers—Suit for profits—No denial of co-sharer's title—Profits withheld over 12 years—Adverse possession.

The possession of a lambardar will not necessarily be adverse to that of a co-sharer, though the co-sharer does not receive profits for over 12 years. It is only when a lambardar has set up as adverse claim or has repudiated the title of a co-sharer that his possesion can be regarded as adverse. (A W N 1895 : 88 distinguished: A P R No 8 of 1902 followed. S A 1132 of 1902 followed. **Mchinlal v Badri Prashad 2 A L J 107=1905 A W N 36= 27 All 436**

Notes:—Dist W N (1907) 195, Ref: 4 A L J 27 ; 29 All 158: W N (1907) 5.

Adverse Possession—Ejectment—Agricultural village-Site of shop-Defendants not tenants —Second appeal. **8 A L J 877**

Adverse Possession—against life-tenant—Possessory title—True owner. **8 A L J 849.**

Adverse Possession—Tenant's possession when adverse. **13 C L J 660.**

10.—Adverse possession—Tenants-in-common—Ouster—Acts of exclusive occupation.

The question of adverse possession between tenants-in-common depends not on a severance of the tenancy-in-common by partition, but on exclusive occupation by one co-tenant amounting to ouster of the other.

Two brothers G and D owned a property jointly. In execution of a decree against D the property was sold and purchased by V, who, in taking possession of it, was obstructed by G. V sued to remove the obstruction and obtained a partition decree on the 29th November 1886; and subsequently obtained symbolical possession of the property on the 11th December 1895. Meanwhile, on the 4th October 1894, G sold the property to defendant and placed him in possession. The assignee of V then sued the defendant on the 4th October, 1906, to recover possession of the property from him. His claim was resisted by a plea of adverse possession,

Adverse possession-*Contd.*

Held, negativing the contention, (1) that to entitle the defendant to add to the period of his own adverse possession (which was admittedly less than twelve years before the date of suit) the period of G's possession, it must be shown that the latter's possession was also adverse.

(2) That G's possession could not become adverse to V so long as the decree for partition was alive and capable of execution as against G. **Amrita Ravji Rao Shirdhar Narayan Oke. 11 Bom L R 51=33 Bom 317= 1 Ind Cas 322.**

11.—Adverse possession between.

To constitute adverse possession as between tenants-in-common there must be an exclusion or an ouster. Exclusive receipt of profits by one tenant in common continuously for a long period would be sufficient evidence to presume an actual ouster of the other tenant-in-common. **Gangadhar Purasharam. 7 Bom L R 252=29 Bom 300.**

Notes—Ref: 11 Bom L R 51 ; 33 Bom 317.

Adverse Possession—Possession of co-sharers —Absentee—Abandonment-Effect. **38 P L R 1911.**

Adverse Possession. What amounts to, among co-owners—Non receipt of profits-Effect. **9 Ind Cas 425.**

12—Suit for-Defence of limitation—Plaintiff to prove subsisting title—Submerged land—Constructive possession of true owners—Vis major.

When the defendant to a suit for possession of land pleads adverse possession, it lies in the first instance upon the plaintiff to prove that he was in possession at some time within 12 years of the suit. (14 All: 193 Ref:)

Where a party is dispossessed by *vis major*, e. g; floods, the constructive possession of the land, so long as the land remains submerged, is in the true owner (29 Cal 518 Ref:). **Munshi Mazhar Hasan v Behari Singh. 3 A L J 367= A W N (1906), 234=28 All 760.**

Adverse possession—Partition-Land allotted to minor-Adult member remaining in possession—Nature of possession, **9 M. L. T. 387.**

Adverse Possession-*Contd.*

Adverse Possession—Against nearest reversioner not adverse to remoter reversioner—Person having no immediate right to possession-Whether possession can be adverse against him. **9 Ind. Cas 300.**

Adverse possession—Title set up against Crown—Exclusive possession within statutory period—Acts done on particular tracts of land, when evidence of enjoyment of whole. **9 Ind. Cas. 9.**

Adverse Possession—Suit for emoluments of office—Declaratory decree obtained during period of—effect. **8 Ind. Cas. 883.**

13.—Adverse possession, whether there was or was not, mixed question of law and fact—C. P. C. (Act v of 1908), S. 100—Continuity of "possession."

The determination of a Lower Appellate Court whether or not there was adverse possession, is one of mixed law and fact, and it is open to the High Court in second appeal to determine whether or not, on the findings as to possession at which the Lower Appellate Court arrived,it would be correct to hold as a legal conclusion that adverse possession has been established.

There must be continuity of possession so as to make the possession adverse. **Shookoor Mallik v. Behari Lal, 11 Ind. Cas.185.**

14.—Adverse possession by a Hindu widow—Possession of mother to be reckoned as possession on behalf of her son when son incompetent to manage his affairs—Reversioner not entitled to sue for possession during the lifetime of the mother.

One, G, the owner of certain property, died in 1869 leaving a widow S,a son R, and adaughter in-law, R's wife; R. and his wife died in 1874. It was found from the evidence that,after the death of G, S took possession of the property inasmuch as R was a fool and unable to manage his affairs. He was unfit to work and, therefore, lived with his mother and did nothing.

Held, that, under the circumstances, it should be presumed that S intended to hold the property on behalf of her son, and that she could not be considered to have held adversely to her son.

Held, further, that in any case because S, had remained in possession only for five years after

Ad verse Possession-*Contd.*

the death of G, and had subsequently on the death of her son R, come to possess the property as mother, her possession could not be considered adverse to the reversioner, since the reversioner could not sue for the possession of the property as long as she was alive. **Bhagwandas v Ishar Dat 11 Ind Cas 93.**

15.—Art 144—Suitfor profits of Sir land appertaining to an undivided mahal—Adverse possession. Plaintiff, as a co-sharer in an undivided *mahal* sued to recover a share of the profits of some *sir* land, appertaining to the *mahal* and in the occupation of the defendant for more than twelve years. It was found that the plaintiff and his predecessors in title had been respectively in receipt of his and their share of the profits of *mahal*, with the exception of the *sir* land in dispute, for more than twelve years before suit; and the defendant had not any time, repudiated the title of the plaintiff or his predecessors to the enjoyment of the *sir* land, or set up any adverse title. Held, the *mahal* being undivided the defendant's possession of the *sir* land must be regarded as a possession not only on his own account but also on account of his co-sharers, including plaintiff and therefore not hostile; and plaintiff's suit not barred. **Raj Bahadur v Bharat Singh. (1905)A W N 15=27 All 348=2 A L J 110Ft.**

Notes:—Fol: 27 All 436=2 A L J 107=(1905) W N 36.

16.—By father against daughter—Mahomedon Law.—

Held, that there was no adverse possession in the case. **Maulvi Saiyid Mahammad Manawar v Razia Bibi 9 C W N 625 at 636= 27 All 320=32 I A 86; P C.**

(Their Lordships did not discuss the question, but merely expressed that they saw no reason to differ from the view of the High Court.—E D.)

17—Nucleus of ancestral property—Separate estate of co-parcener—Proof—Onus—Adverse possession by co-parcener.

When the question waswhether a certain property was the joint property of a Hindu family or the separate estate of a member and it was proved that the family lived joint in one house and that there was a nucleus of joint property of substantial value, the onus was on the party setting up a case of separate estate. *Held*, on the

Adverse Possession-*Contd.*

evidence, that the property was joint. Whilst on the one hand there were certain instruments by which the grantors purported to deal with it as if it were separate estate, there were on the other hand a series of family books and various contracts and transactions inconsistent with anything but joint property. But over and above this, the tenor of family life proved the use of the property to have been the same after as before the execution of those instruments. A case of adverse possession by a co-parcener cannot be established by mere paper assertions not brought home to the knowledge of the other co-parceners, when there has been no actual exclusion of the latter from use and enjoyment for the period of limitation.

Anandrao Gunputrao v Vasantrao Madhavrao. (P. C.) 11 C W N 478.

18 Adverse possession—Guardian and minor:—Possession is never to be considered adverse if it can be referred to any lawful authority. Where a Hindu mother on her husband's death entered into possession of properties which vested in her minor son and herself had the custody of the minor as his guardian, her possession must be taken to have been one on behalf of the minor-**Sreeramulu Naidu v. Andalammal** (1906) 17 M L J 14=30 Mad 145.

19——Sale of a share——Purchaser's right to eject person in adverse possession for over twelve years before sale—Incumbrance. The purchaser of a share of a revenue-paying estate at a sale for arrears of revenue is entitled to that share, even if a person other than the recorded proprietor has acquired a title by twelve years' adverse possession previously to the sale.

Adverse possession for twelve years does not constitute an incumbrance on the share. It might be an incumbrance on the right of the recorded proprietor, but at a sale under S. 13 of Act XI of 1859, it is not merely the rights of the recorded proprietor that pass, but the share itself. (12 C W N 528, Eol) (28 Cal 244, Dist 7 C L J I. Ref

Rahimuddi Munshi v. Nalini Kanta Lahiri 13 C W N 407=1 Ind Cas 81.

20—Re-grant after forfeiture—Reservation by Government— Parlakimidi, zemindari of—*Maliahs* or hill tracts retained by Government-*Bisoyees*, service tenure-holders under Government—Nature of tenure—*Kattubadi* or quit rent —*Savaras*, inhabitants of hill tracts, position of

Adverse Possession-*Contd.*

-Zemindari charged with payment of *Kattubadi*-Ownership if passed to zemindar—Adverse possession—Acquiescence under mistake—Estoppel-Evidence Act (I of 1872), sec. 115. Prior to the forfeiture by Government of the Parlakimidi zemindari in 1800, the *Maliahs* (certain hill tracts to the north of the zemindari) formed part of the zemindari. The inhabitants of these hill tracts the *Savaras*, were once a turbulent people and in order to control them and to defend the passes to the plains, the country was divided into *Muttas* or forts and each placed under the control of a local chief or *Bisoyee*. The *Bisoyees* held the *Muttas* on a mere service tenure paying an annual sum to the zemindar by way of *Kattubadi* or quit-rent—an arrangement not unlike that which prevails in other hill tracts in India. In 1802, the zemindari of Parlakimidi was re-granted to the zemindar in permanent settlement, but Government advisedly retained possession and control of the " lands held by the *Bissoyees*. " *Held*—That by this and similar expressions were ment the entire *Muttas* which made up the *maliahs* and not merely the lands under the direct cultivation of the *Bisoyees* inasmuch as the benefits enjoyed by them included not only those lands but also fees and other dues received by them from the *Savaras* throughout the whole of ths *Muttas*. *Held further*—That the proprietary right in the *Maliahs* did not pass to the zemindar when the *Maliahs* were again placed under the control of the zemindar in 1823 and the *Bisoyees* required to pay their quit-rent through him, and when again in 1825, in consideration of a grant to the zemindar of certain villages situated outside the *Maliahs*, the zemindari was charged with the tribute payable by the *Bisoyees* to Government. From 1830 to 1890 the zemindari had been managed by the Court of Wards. During the whole or a part of this period the Court of Wards worked the forests of the *Maliahs* for the benefit of the zemindari in the mistaken belief that it belonged to the zemindari, and other Government officials acquiesced therein. The Government officials under the same mistake also encouraged the expenditure of zemindari funds upon the making of roads in the *Maliahs*. But on the first occasion that a claim of ownership was distinctly put forward by the zemindar it was repudiated by Government. *Held*—That the Courts in India were right in holding that the zemindar had failed to make out a title by adverse possession. *Also*—That these

Adverse Possession-*Contd.*

facts did not estop the Government from claiming ownership of the *Maliahs.* **Goura Chandra GaJapati Narayana Deo Maharajulun Garu v The Secretary of State for India in Council 9 C W N 553**

21—Trust—Non-delivery of trust deed—Registsation of the deed—Creation of valid trust—Collection of rents by settlor—Adverse title—Whether amounts to—Tenant not left into possession by landlord—Payment of rent—Denial of title—No estoppel.

Where the settlor intended to pass when the deed was executed and registered :

Held, that, in the absence of delivery of the trust deed, it could not be said that such registration did not convey any title.

The mere collection, by the settlor, of rents of the property conveyed to the trustees, does not, in itself, constitute a setting up of a title adverse to the trustees or amount to an ouster of the trustees.

Where the defendant who was not put into possession by the plaintiff, is found to have paid rent to him, *held*, that the mere payment of rent is only *prima facie* evidence of an attornment, and that, notwithstanding the payment, it is open to the defendant to show that the plaintiff's title was defective. 27 Cal 7 and 28 Mad 124, Dist.; 17 Mad 146, Foll.) **Pullaya Chetti v Yedachalla Pillai. 10 M L T 44.**

22—Trust deed turning out to be invalid—Adverse possession by trustee as against *cestui que trust.*

So long as a trustee occupies the position of a trustee, as soon as the declared trusts, fail and there is a resultant trust in favour of the settlor, the trustee's possession is essentially that of his *cestui que trust* and can only be changed into adverse possession by a conscious and deliberate act. That is to say, he must repudiate all intention of holding for the resultant *cestui que trust* and he must assert his intention of continuing to apply the trust fund to uses which the Court has declared or which are known to him to have failed. In that event his possession becomes adverse to his legal *cestui que trust* and if that person does not take steps within twelve years, he will not be able to avail himself of the provisions of S. 10 of the

Adverse Possession-*Concld.*

Limitation Act, 1908. (1891) A C 297, Fol (1910) 12 Bom L R 341, re-considered.)

Jairajbhoy Peerbhoy v Sir Currimbhoy Ebrahim Bart. 13 Bom L R 717

23—Adverse possession—Ineffective possession—Assertion of title—To the knowledge of the owner.

Where the possession is an ineffective nature, supposing that its character could be improved by an assertion of title, it is necessary for the party so in possession to prove that the owner had knowledge of such assertion.

An "openly avowed claim" means a claim which may be said to have come to the knowlege of the true owner. **Malla Veeranna v Malla Chelamayya, (1912) 1 M W N 68.**

24—Mortgage—Adverse possession—Sale of equity of redemption—Registration—Limitation Act (IX of 1908), Art 144—Registration Act (XVI of 1908), S. 17.

Held that, a person entering into possession of land as a mortgagee is not at liberty to set up adverse possession against the mortgagor, by merely obtaining in his favour mutation of names as owner, until he succeeds in proving actual purchase by him of the equity of redemption.

Held, also that a deed of sale of immoveable property mortgaged by a registered deed is not compulsorily registrable under S. 17 of Act XVI of 1908, if sale consideration minus the mortgage-money is less than Rs. 100. (17 Bom 755 Fol. 16 P R 1892, (F B) Fol.) **Lehna v Santa Singh 9 P W R 1912.**

25—Adverse possession—Property belonging to idol—Manager.

Under Article 144 of the Limitation Act, 1877, possession derived from a manager of endowed property can become adverse against the idol as represented by the next succeeding manager. (4 Bom L R 743, Fol.) **Pandurang Balagi Khandke v Dnyanu Babaji Gurav. 13 Bom L R 1169**

Adverse possession against mortgagee when effectual also as against the mortgagor.

See (1) Limitation Act Art 144—Adverse possession.

(2) Possession-Adverse possession.

Adverse possession against widow

See (1) Limitation Act Art 144-Adverse possession.

(2) Possession—Adverse possession.

Adverse possession against widow for more than twelve years bars the right of a subsequent adopted son.

See (1) Limitation Act Art 144 -Adverse possession.

(2) Possession - Adverse possession.

Adverse possession by sub-mortgagee.

See (1)Limitation Act—Art 144-Adverse possession.

(2) Possession—Adverse possession.

Adverse possession for twelve years by taking fruit.

See (1) Limitation Act Art 144—Adverse possession.

(2) Possession —Adverse possession

Adverse possession of defendant supplemented by previous adverse possession of widow by whom defendant was adopted.

See (1) Limitation Act Art 144-Adverse possession,

(2) Possession-Adverse Possession.

Adverse possession of one member

See (1) Hindu Law-Joint family.

(2) Possession-Adverse possession.

Adverse title.

See Title-Title by long possession.

Advertisements.

See Succession Act 1865 S. 250.

Advocacy.

1—Advocate forcing his opponent to produce his own client to enable him to cross-examine that client.

The species of advocacy tolerated by the Courts of law in India, in which the unworthy effort of the advocate on each side is to force his opponent to produce his own client in order that he himself may have the opportunity of cross-examining that client, is a vicious practice, unworthy of a high-toned or reputable system of advocacy. Such advocacy must embarrass and perplex judicial investigation, and may too often enable fraud, falsehood or chicane to baffle justice. **Mussammat Lal Kunwar v Chiranji Lal. 11 C L J 172.**

Advocacy-*Concld.*

Advocate.

See (1) Barrister.

(2) Counsel.

(3) Stamp-duty.

(4) Witness-Person competent to be witness.

Advocate—Admission by

See Limitation Act, (1908) s. 19-Acknowledgment of debts.

Advocate—Entry as an

See Stamp Act, 1879, sch. II, art. 11.

Advocate.

See also Cases under.

(1) Legal practitioners Act.

(2) Pleader.

(3) Solicitor.

(4) Attorney & client.

1—Right to appear—Criminal Courts—Prosecution—Pleader.—A counsel or pleader is entitled to appear and act on behalf of the prosecution in the Criminal Courts **Chandi Charan Chatterjee v. Chandra Kumar Ghose 5 B L R Ap 70=14 W R Cr 23.**

2—Non intervention of vakeel or attorney—Appeal from mofussil.

An advocate of the High Court may appear at the hearing of an appeal from the mofussil on the direct instruction of a client, and without the intervention of vakeel or attorney. **Gobind Chunder Dutt v. Hendry 14 B L R Ap 12 24 W R 15.**

3—Filing appeal in Registrar's Office.—An advocate of the High Court is entitled to appear and plead on the Appellate Side, but not to file an appeal in the Registrar's Office. **Ram Taruk Barick v. Sidessoree Dassee 13 W R 60.**

Advocate-*Contd.*

4—Right to take instructions directly from the client, and to "act".

An advocate can perform on behalf of a suitor all the duties that may be performed by a pleader, subject to his exemption in the matter of a vakalatnama and to any rules which the High Court may make regarding him. No such rule having been made to the contrary, an advocate may take instructions directly from the client and may "act" on behalf of his client. **Bakhtawar Singh v. Sant Lal. 9 All 617.**

5—C P C O. 9 r.8; O. 17 r. 2 (1882 Ss.102, 157)

"Appearance," meaning of—Application by pleader for adjournment—Refusal—Pleader stating that he had no instructions—Effect—Dismissal under s 157, C P C—Authority to represent client—Barrister and pleader, distinction between—Advocate.

Held, that, where, at any adjourned hearing of the suit, there is no appearance by the plaintiff and there are no materials on record, the appropriate procedure is that laid down by S. 157, C P C 1882, (*Per Crouch, A. J. C.*).

An apperance at an application for adjournment which is refused is not an appearance at the hearing of the suit

An "appearance" is nothing more than physical attendance in the Court. If, therefore, when the hearing commences, the plaintiff or his duly appointed pleader is actually present in Court, there is an appearance of the plaintiff at the hearing. If it be desired that there should be no appearance, the result can, in reality be attained only by the plaintiff and his pleader walking out of the Court when the case is called on for hearing. The usual formula used by pleaders "I am not instructed" or "I have no instructions," is perfectly well understood by most Judges; and where no dissent is expressed, the general opinion seems to be that the pleader is fairly justified in assuming that he is being treated as not present. *Held*, that on the facts of the present case, the presumption that the order of dismissal was under s. 157 C P C 1882, holds good.

The authority of a Barrister or Advocate to represent a party is based on the fact that he has "received instructions" from an Attorney or Solicitor Instructions are not merely the information as to facts, but constitute his authority to represent the client. If, therefore, he states in Court that he has no instructions, that concludes the question of his representation. But a pleader's authority is based on the fact that a (vakalatnama) has been filed. And his authority can be terminated only on a written application by the client and with the consent of the Court 34 Cal 235, Ref. 1 S L R 224; 34 Cal 403 (F B), Ref. 23 Bom 414; 22 All 66; 30 Mad 374 Ref. **Fakir Mahomed v Viran wife of Koji 3 S L R 208.**

6—Advocate forcing his opponent to produce his own client to enable him to cross-examine that client. —**11 C L J 172=12 Bom L R 244=14 C W N 285=20 M L J 182=33 All 104=37 I A 1** also **25 All 358**

7—An advocate in India cannot be proceeded against, civilly or criminally, for words uttered in his office as advocate. **Sullivan v Norton 10 Mad 28**

Notes—Ref 17 Mad 87: 3 M L J 94; 19 Bom 340; 2 Bom L R 3 F B; 26 Mad 780, 9 Bom L R 1287; 29 All 685; 18 M L J 353=31 Mad 400; 19 M L J 217.

8—Right to sue on promissory note given for fees—Recorder's Act XXI of 1863 s. 18.

With reference to s 18 Act XXI of 1863. an advocate cannot sue upon a promissory note given by anticipation for fees not taxed nor can the Court in such suit award to the plaintiff a *quantum meruit* for his services. **Macleod v Mah Mah Yet. 7 W R 390.**

9—Suspension of Advocate—Burma Courts Act VII of 1872 s. 58—Entering into contract contrary to public policy.

In a case in which an acvocate of the the Recorder's Court at Rangoon was suspended by the Recorder under Act VII of 1872, s 58 for having entered into a contract which was contrary to public policy, the High Court though reprobating such a practice as improper and mischievous yet considered that a serious warning was all that was called for under the circumstances, inasmuch as it appeared that the advocate in this instance did that which was done by other advocates, even by persons to whom he might fairly look for an example. **Moung Htoon Oung. 21 W R 297.**

Notes—Ref 4 C L J 259 F B.

Advocate-*Contd.*

10—Advocate and client— Advocate's right to give a substitute when unable to attend himself—Client's consent— Advocate's convenience—Client's rights— Practice

Where defendant, a Barrister, becoming physically unable to conduct the case of his client, appointed a substitute without his client's consent and against his express will.

Held, that, though one Advocate is usually allowed to represent another when the business is of a merely formal character and though such a course is for the advantage and convenience of all concerned, that is a very different matter to an Advocate transferring the whole of a client's case to another Advocate without his consent and even against his express will.

In this case decree for the return of a portion of the fee was confirmed against the Barrister.
Maung Kyaw v Maung Po Thaing 8 Ind. Cas 958.

11—Vakalatnamas—Advocate of Chief Court.

An Advocate of the Chief Court, who is not an Advocate of a Chartered High Court, is bound to file a power of-attorney to enable him to appear in civil cases.—**An Advocate. 103 P R 1890.**

(Note.—Owing to the amendment of Section 39 Civil Procedure Code, 1882, by Act VII of 1895 the above ruling is no longer applicable. Ed. Digest).

12—Advocate and client—Suit for recovery of of sum of money deposited with Advocate to abide certain event—Stakeholder—Privilege of Barrister.

Plaintiff sued on the allegation that he had engaged the services of the defendant, who was an Advocate of the Chief Court, in a certain criminal case and had deposited a sum of money with the defendant on the condition that if the accused in the criminal case were released the defendant should be entitled to retain the deposit, otherwise it should be returned to plaintiff; that the accused had not been released, and the defendant had, nevertheless, retained the deposit. The Judge, Small Cause Court, dismissed his claim on the sole ground that "defendant being an advocate of the Chief Court, the suit would not lie against him."

Advocate-*Contd.*

Held, that no question of the privilege of an Advocate arose in this case, inasmuch as the defendant was sued merely as a stakeholder who was bound to refund the deposit to the depositor if the event upon which alone he was authorized to retain the money had not occurred.

194 *P R* 1883 cited and followed.
Bhup Singh v F. Beechey 52 P R 1894.

13.—Contract—Suit by a barrister, enrolled as an Advocate of the Chief Court, in respect of his fees—Enrolment as Advocate, effect of, upon status of barrister—Ancillary services—"*Quantum meruit*"—Contract Act, 1872, Sections 11, 70.

Plaintiff, who was a Barrister-at-Law and enrolled as an Advocate of the Chief Court and practising in the Punjab as such Advocate, sued in respect of fees for services rendered in his capacity as an Advocate and for services ancillary thereto.

Held, by a majority of the Full Bench (*Frizelle Stogdon* and *Chatterji*, JJ.) that the suit was not maintainable, as the plaintiff was incapacitated from making a contract of hiring as an Advocate by the usage and constitution of his Bar.

Held, per *Roe* and *Rivaz*, JJ., *contra*, that the suit was maintainable, as no such incapacity attached to the plaintiff.

Held, further, *per curiam*, that if the principal service rendered could not be the subject of a contract, no service which was merely ancillary thereto and of no value without the principal service, could be the subject of a contract or give rise to any independent cause of action.
Mr. Arthur Grey v Diwan Luchman Dass. 51 P R 1895 (F B.)

14.—Advocate and client—Advocate's fee—Suit for money deposited with Advocate—Revision—Finding of fact by Small Cause Court.

Plaintiff sued on the allegation that he had retained defendant as counsel for defending a certain appeal in the Chief Court on the terms that he was to be paid Rs 50 as his advance-fee and a similar sum as his back-fee on his winning the case; that subsequently he deposited Rs. 200 with defendant, on the understanding that he was to retain Rs. 150 as his back-fee in the event of success, the remainder being the back-fee for

Advocate-*Contd.*

another counsel on the same terms; that the said case was lost and that defendant refused to return the Rs. 150. Defendant, in answer to the claim, admitted his liability to refund the Rs. 50, but pleaded that as respects the balance of Rs. 150 there was an arrangement between him and plaintiff by which he was allowed to retain it as his advance-fee for filing an application for review of judgment in the case which had been lost; that he was ready and willing to file the said application, but that plaintiff had engaged some one else to do the work. Defendant, therefore, contended that no suit lay for refund of the Rs. 150, as he was a barrister. The Judge of the Small Cause Court found that defendant had failed to prove the argument set up, and decreed the claim less a deduction of Rs. 50, which he allowed the defendant on equitable grounds for the trouble which he might have taken in thinking out the grounds of review, though none had been actually drawn up, and no copy of the judgment of the Chief Court applied for or obtained.

Held, that the award of Rs. 50 must be disallowed, and plaintiff's claim decreed without any deduction. **Kirpa Ram v Sardar Krishna Singh. 32 P R 1897.**

15.—Contempt of Court—Contempt of Court by Advocate and Barrister in his individual and private capacity as a suitor—Dismissal or suspension of such Advocate from practice—Legal Practitioners' Act, 1879, Section 41.

Held, that although any action taken as a private individual in the prosecution of a case or the setting up of a defence would not, under ordinary circumstances, justify a Court in taking notice of such action as a breach of professional good conduct merely because the individual concerned happened to be an Advocate, yet conduct which is in itself indefensible and amounts to gross misconduct in an Advocate is not taken out of the purview of Section 41 of the Legal Practitioners' Act by a mere colourable pretence that it was the conduct of a suitor or accused in that capacity. (L R I P C 385), referred to.

An Advocate. 5 P R 1902 F B.

16.—An advocate cannot sue or be sued in respect of his fees or other matters *ex contractu*; but he is liable to an action for damages at the suit of his client for a *mala fide* breach of duty

Advocate-*Contd.*

or wrong independent of contract—(Per Boulnois and Melvill, JJ, disenting)—Mukdum Shah Ali Mahamad v. Plowden. P. R. 20 of 1874 Civil.) Fol. in. **Van Cortlandt v Skinner. P R 89 of 1875.**

17—Privilege of—Disciplinary powers of High Court—Letters Patent, cl, 10.

Held, by Jenkins, C J., (1) that the privilege of an Advocate as an answer to an action for slander is well established in England and it has been considered that the same measure of licence belongs to an Advocate in the Courts of this country. An Advocate who has made a defamatory statement of another person, which is false, and has been made by reason of malice in the Advocate, but which has been made by him when speaking as an Advocate, and with reference to the case which was being heard by the Court, is not actionable.

(2) The measure of the High Court's disciplinary powers is not the same as the privilege accorded to Advocates at an answer to suits for defamation. There is a distinction between suits or criminal proceedings at the instance of the injured party and the exercise by the Court of its disciplinary powers. If the words spoken are opprobrious or irrelevant to the case, the Court may take notice of them as a contempt and examine on information. The limits of licence do not furnish the standard of professional conduct, and that licence is only tolerable so long as it is not abused.

(3) It is contrary to the administration and practice of the Criminal Law that counsel for prisoners should declare as alleged existing facts, matters which they have been told in their instructions on the authority of the prisoner, but which they do not propose to prove in evidence.

(4) Sections 150 and 152 of the Evidence Act give large powers of control to Judges to keep the exercise of that license within its proper limits.

Held, by candy, J., (1) that a counsel cannot be punished for acting on the instructions given to him when he did not and could not know that they were false.

(2) That a counsel is justified in stating in open Court what the effect of his instructions was without supporting it by substantial evidence, otherwise he would be put in a most serious difficulty and the conduct of his case unduly hamper,

Advocate-*Contd.*

ed. It is for the counsel to decide in the exercise of his discretion whether or not he should call witnesses for the defence to prove the allegations and thus give the prosecution a right of reply.

Held, by Tyabji, J. (1) that an Advocate has the fullest liberty of speech in the course of a trial before judicial tribunal so long as his language is justified by his instructions, or by the evidence, or by the proceedings on the record. The mere fact that his words are defamatory, or that they are calculated to hurt the feelings of another, or that they ultimately turn out to be absolutely devoid of all solid foundation, would not make him responsible nor render him liable in any Civil or Criminal proceeding.

(2) If an offending counsel is protected from liability in a Civil action or Criminal prosecution by reason of the privileges which he enjoys as an Advocate, it by no means follows that he should not be held responsible by the High Court under cl. 10 of the Letters Patent if express malice, or wanton disregard of facts is proved, or if it is shown that reckless and scandalous charges were made by him absolutely without justification and without any instruction.

Bhaishanker v L M. Wadia. 2 Bom L R 3.

18.—Court—Suspension without trial—Disciplinary authority of High Court Counsel guilty of contempt.

By Ss 7 and 8 of the Letters Patent, the Allahabad High Court is authorised and empowered to approve, admit and enrol as many advocates as it thinks fit and to suspend any advocate on reasonable ground. A barrister of England or Ireland may be admitted under rules 180 and 181 of the Rules of High Court as an advocate and when he is so admitted he becomes subject to the disciplinary jurisdiction of the Court.

Rule 197 of the rules of Court provides for cases in which the Chief Justice and Judges may for good cause, and without charge or trial, suspend or remove from the rolls of the Court any advocate of the Court. An advocate may therefore be tried by three Judges under rule 20.

The intention of the Crown was to give a wide discretion to the High Courts in India in regard to the exercise of their disciplinary authority. The rules of Court indicate the precaution taken by the Court itself to secure that the powers shall not be exercised capriciously or oppressively, and there is no reason to apprehend that the just independance of the Bar runs any risk of being impaired by its exercise. On the other hand, it is essential to the proper administration of justice that unwarrantable attacks should not be made with impurity upon the Judges in their public capacity.

Advocate-*Contd.*

Where a Counsel is guilty of contempt in the attempt to vindicate his professional conduct in a publication of which he is an editor, *held* that the libel constitutes 'reasonable cause' for which he may be suspended from practice to. (L R I P C 283 Dist:) **S B Sarbadhikary 9 Bom L R 9 (P C)=17 M L J 74= 11 C W N 273=5 C L J 130= 2 M L T 1=5 Cr L J 152= 29 All 95=4 A L J 34.**

19.—Advocate—Unprofessional conduct—— Solicitor, acceptance of case without intervention of.—

An advocate who makes an arrangement with his client without the intervention of any solicitor to do work at a fee of half of that, which is the usual charge, is guilty of unprofessional conduct.

Where an advocate, who has settled a plaint in a case, wrote to his client that he would take the case against her, unless he was paid five times the ordinary fee, he is guilty of unprofessional conduct. **S K H an Advocate 6 C L J 55 (F B)=6 Cr L J 16=34 Cal 729 =2 M L T 492.**

20.—Advocate—Misconduct—Publication of articles in a newspaper by the Advocate defaming judges—Rules 180, 182, 183 and 197 of the Rules of the Court—S 8 of the Letters Patent.

The right of any barrister to appear in the N. W. P High Court rests upon his being admitted to the Roll of Advocates to the Court and not upon his being called to the Bar.

Section 8 of the Letters Patent gives the Court power to make rules for the qualification and admission of proper persons and empowers the Court to remove or suspend from practice on reasonable cause Advocates so enrolled. The High Court can on reasonable cause remove or suspend

Advocate-*Contd.*

from practice not only an Advocate who had been enrolled as such under Rule 185 of the Rules of the Court but also any other Advocate who has been enrolled under any other rule of the Rules of the Court.

Under Rule 2 of the Rules of the Court, a Bench of three judges is empowered to hear and decide all charges against Advocates in respect of professional or other misconduct for which an Advocate may be removed or suspended from practice. Rule 197 provides for cases in which the Chief Justice and judges may for good cause and without charge or trial suspend or remove from the roll of Court any Advocate of the Court.

Any act which tends to discredit or bring into contempt the order of Advocates of the Court amounts to misconduct of which the High Court can take notice. Acts which on the part of a private individual offend against the dignity of the Court or are calculated to prejudice the course of justice and are in his case contempts of Court do not cease to be acts of misconduct because they are committed by an Advocate. Rather are they aggravated inasmuch as the Advocate is bound to uphold and maintain the dignity of the Court. Acts which scandalize the Court as libels on its integrity or the integrity of its judges, officers and proceedings are all (1900 A W N 221) instances of such misconduct. 2 Q B D 439, Ex-parte Turner 3 Mont D and D 525, Reg. V, Castro L R 9 Q B 219. 2 Myl and r 316 referred to.

Hence when an Advocate published in a paper published by him articles throwing discredit upon the Judges of the Court in various ways, and his defence *inter alia* was that he had done so in his capacity of Editor and not in his capacity of Advocate of the Court, *held*—that he was guilty of professional misconduct and the High Court had power to deal with him under S 8 of the Letters Patent and Rule 2 of the Rules of the Court. **Mr. Sarvadhicary, an Advocate 3 A L J 592 F B=1 M L T 252=1906 W N 226.**

21.—Advocate and Pleader——Professional misconduct—Legal Practitioner's Act (XVIII of 1879)—Champerty, agreement by way of—Relation of pleader and client.

It is highly improper and grossly unprofessional conduct, on the part of an Advocate or of a Vakil, to enter into an agreement with a client, to furnish him with funds for a litigation, in consideration of his assigning over a part of the property in litigation, if recovered, to such Advocate or Vakil.

When a Vakil takes an active interest in a case during its pendency in the lower Court, and there is an understanding that he will be engaged as Vakil when the case comes up to the High Court, it cannot be said, that no relationship of pleader and client existed between himself and the client before the actual execution and acceptance of the vakalutnama. **An Advocate, a Vakil a Pleader 4 C L J 262.**

22—Discovery by Advocate-General-Advocate General—Discovery upon oath—Practice.

The Advocate-General cannot be called upon to make discovery upon oath, in a suit filed by him at the instance of relators under the provisions of S 539 of the Civil Procedure Code 1882.

Advocate General v Adamji 8 Bom L R 565=30 Bom 474.

23—Advocate—Absence of—Return of brief—Practice.—

If there is a chance of neither of the two counsels briefed in a case being able to attend when the case is called on, one of them must return his brief in good time. In a case of dispute it is the duty of the junior to return the brief or to make arrangements for some other counsel to attend till he can come in.

Esmail Ebrahim v. Haji Jan Mahomed, 10 Bom L R 1172=33 Bom 475.

24—Advocate—Professional misconduct—advising clients—execution of agreements admissions at argument—Evidence in one case — admissibility of, in the other case—Practice.—

When evidence has been given in one case upon the issues raised in that case, nothing can be more dangerous than to take that evidence and apply it in another case in which other issues arise. Inferences drawn from that evidence cannot but be regarded with much misgiving.

A professional man, in allowing his clients to execute certain documents, which, he thought were invalid, is not guilty of such professional misconduct as justly to call for punishment though such conduct may be open to disapprobation.

Advocate-*Contd.*

Where the dispute was between members of a Hindu family and the question was whether the family was joint or separate, and the matter was settled in advocate who was not shown to have had any knowledge or means of knowledge that his client did not possess and who allowed his client to effect a compromise, is not guilty of professional misconduct.

Henry Lewis Lubeck, 1 M L T 17

25—Advocate Capacity of Advocate to sue or be sued for professional services—Bar a Law

A Barrister, as a barrister, has no right to practice in India He asks for permission to practice as an Advocate. He, on admission, subjects himself to a disciplinary authority, to which he is not subject as a barrister. He is liable as other Advocates of the Court to which he is subject are liable to; and he acquires the same rights as other Advocates have. His professional status in India is that of an Advocate, and the Law applicable to him is the Law of Advocates in India, applicable to an Advocate of the Court in which he practises. Hence he can sue for his fees for professional services rendered, and can be sued for negligence 25, W R 32, 1 I A C 745; 25 All 509, (1863) 13 C P N S 607, Ref. (1895) P R 219, Diss.

Pennell v. Harrison, 4 L B R 55 (F B)

26—Professional misconduct — Evidence, admissibility of—Admission — Probabilities —Indian Evidence Act, Sec. 155, cl. (3)

C, an advocate, was called upon to shew cause why he should not be dismissed or suspended for gross professional misconduct, the allegation against him being that he had advised his client to attempt to bribe a witness. The client was examined as a witness, but no admission was elicited from him, that the advocate had advised him to bribe any witness, and in fact, he explicitly denied it; two other witnesses were examined, and they were allowed to state the particulars of conversations which took place between themselves and the said client on different occasions, and the Chief Court, relying upon the admissions made by the client during such conversations, dismissed the advocate from his office

Held, that the evidence given by the two witnesses was inadmissible for the purpose for which it was used, or as against the advocate. Even if it was admissible for the purpose of impeaching the credit of the client, witness under section 155, clause (3) of the Indian Evidence Act, it might prove that the said client was an unreliable witness who said one thing one day and another thing another day, and tend to discredit his sworn statement, but it would not prove the truth of his unsworn statement or make it evidence against a third person.

Romarjee Cowasjee v The Chief Judge and Judges of the Chief Court of Lower Burma. 5 C L J 123=9 Bom L R 5 P C=34 Cal 129 =11 C W N 870=17 M L J 67=2 M L T 96 =5 Cr L J 50=4 L B R 27.

27—Pleader and client — Professional misconduct— Advising clients.

Their Lordships of the Judicial Committee of the Privy Council expressed disapproval of the view that a professional man acting for clients, and taking part in connection with the execution of a compromise directly arising out of the matter in which he is employed, is not bound to warn his clients if they are acting in ignorance of the nature of what they are doing while he is in a position to inform them, or under a mistake as to their rights which he could correct, unless expressly asked by them on the subject.

The appellant, an Advocate, was charged with professional misconduct on two counts, and having been found guilty was suspended from practice for a period of four months. The charges were.—

(1) That you being at the time the legal adviser of B. A. and other persons, and knowing and believing at the time of the execution of the document (Ex G) that it was worthless and valueless, did either wrongfully advise and induce the execution thereof by the said parties, or when you should have advised them as to what their legal rights and position would be after they had executed the said (Ex G), did allow them to remain under the belief that the said document was legal and valid, in that you at their request attested the same yourself.

(2) That you being the legal adviser of B. A. and others, and being in the discharge of your professional duties, as such bound to advise them as to the effect upon their rights to the property of the deceased of the execution of a document (Ex X), did not give them the advice they were entitled to expect, and did thereby allow them

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to execute the said document, which you at the time, according to your admission aforesaid, knew and believed to be worthless as a legally binding agreement. Further that you, by attesting the said document, induced your clients to believe that it was legal and binding.

Held, reversing the order (as to the first aspect of the charge), that in allowing his clients to execute the documents under the circumstances, the appellant was not guilty of such professional misconduct as justly to call for punishment.

Held, also (as to the second aspect of the charge), that there was a decided opinion in the case that the actual legal rights of the parties were quite well known before (Exhibit G) or (Exhibit K) was executed; and that, therefore there was nothing to show that the appellant had any knowledge or means of knowledge which his clients did not possess.

Lubec K., 7 Bom L R 894 = 10 C W N 57 = 15 M L J 442 = 32 I A 217 P C = 33 Cal. 151.

28-Suit for money deposited with advocate to be paid over to him if the result of the case is successful—Stake-holder—Privilege as Barrister.

In a suit against the defendant, a Barrister to recover from him a sum of money alleged to have been deposited by the plaintiff, his client, under an agreement that the defendant should only retain the money in the event of his winning the plaintiff's case, which as plaintiff alleged had not happened, the Lower Court held the suit not to be maintainable against the defendant by reason of his privilege as a Barrister.

Held, that the plaintiff was entitled to a decision on the merits of the case: that the claim was one to recover back from a stake-holder money deposited with him to be paid over on the happening of a contingency which, according to the plaintiff, had never occurred; and that it was immaterial that in the present case the defendant was the plaintiff's Advocate as well as the stake-holder, as if he had in the latter capacity, without the occurrence of the contingency specified, handed over to himself in the capacity of the advocate money which *ex-hypothesi* he should have returned to the plaintiff, he could not set up as a sufficient answer to the

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plaintiff's claim his character of advocate, and the receipt by him of the money in that capacity.

Muhammad Bakhsh v. Morton P R 194 of 1883, Civl

Advocate-General.

See Parties—Parties to Suits—Advocate-General.

—Case certified by.

See (1) Cases under Letters Patent, High Courts, cl. 26.

(2) Merchant Shipping Act, 1854, s. 267.

(3) Trust.

—Sanction by, to suit.

See Right of suit—Charities.

—Sanction of when necessary to bring suit.

See (1) Civil Procedure Code S. 539.

(2) Practice.

Advocate-General—Suit by—See C. P. C. (S. 92) (O. C 539).

Advocate General—Sanction—See C. P. C. (S. 92) (O. C. 539).

Advocate-General—See also cases under: —Injunction (Mandatory).

1—Right to appeal—Suit relating to charitable fund—Statute 53 Geo. III c. 155, s. 111.—By the 53 Geo III, Cap, 155, s. 111, the Advocate General is entitled to appear and represent the Crown in informations for the administration of charitable funds. **Attorney General v Brodie 4 Moore's I A, 190.**

2 Officiating Advocate General—Right to precedence.

The Officiating Advocate General having claimed pre-audience, the claim was questioned by a senior member of the Bar, but was allowed, Held that, down to the transfer of the Government of India to Her Majesty, the Advocate General of the East India Company was not entitled as such to pre-audience in the Courts without a patent of precedence: that the attorney General and Solicitor General in England enjoy precedence as representing the Sovereign, and not by patent and that the Advocate General and officiating Advocate General for the time being are entitled to similar pre-audience as the attorney General in England. **Advocate General Officiating claim of Bourke, O C 224 = A O C 110.**

Advocate General-*Contd.*

3—Advocate-General, appeal in a suit brought by.—

Where a suit is filed, under S. 539 of the Civil Procedure Code. 1882 by the Advocate-General at the instance of the relators is dismissed and Advocate General does not think fit to appeal, it is not to competent to the relator, to file an appeal on their own account against the dismissal. **Jan Mahomed v. Syed Nurudin 9 Bom L R 996=32 Bom 155.**

4—Discovery by Advocate General - Advocate General—Discovery upon oath—Practice.

The Advocate General cannot be called upon to make discovery upon oath, in a suit filed by him at the instance of relators under the Provision of S. 539 of the Civil Procedure Code 1882. **Advocate General v Adamji 8 Bom L R 565=30 Bom 474.**

5—Power of Local Government to make temporary appointment—Right of de facto Advocate General.

The Local Government has power to make a temporary appointment to the office of Advocate-General. The Government is not restricted, in the choice of the person for the appointment of Advocate General, to the class of barristers. A de *facto* Advocate-General can apply for directions as regards repairs. &c. **The Royapuram Church Case, 7 M L J 57.**

Advocate-General—suit by some members of a section of the Chinese community at Calcutta against secretary and Trustee of a Chinese temple and cemetery for declaration of right of plaintiffs and their section to worship in the temple and make use of cemetery—Sanction of, obtained to institute suit—Maintainability of suit—Civ Pro Code 1908. O 1 r. 8 (1) ss. 92, 93 **9 C W N 594.**

Advocate General barred by decree in prior suit brought by trustees of charity.

See (1) Advocate general.
(2) Right of suit—charities & trusts.
(3) C P C Ss. 92, 93.

Advocate General — Inherently invalid—Need not be independently impugned-Limitation Act, art. 118—Mahomedan Law-inheretance. **56 P W R 1908=71 P R 1908.**

Advocate General-*Concld.*

Advocate General—See Mahomedan Law-Custom, **3 P R 1905=87 P L R 1905.**

Advocate General—Powers of, to interfere in cases of public nuisance—Bom. Act III of 1888, ss. 349. A, 349 B. **12 Bom L R 274=5 Ind Cas 213.**

Advocate General.—Added as party to administration suit-His right to question validity of legacies—Administration, **29 Bom 133.**

Advocate-General—Suit against Mohunt—Advocate-General cannot sue to dismiss a Mohunt in absence of misconduct-Mohunt. **1 Bom L R 743**

Advocate-General—consent of, to a suit under s 539 of the Civ Pro Code, cannot relate back-Civ Pro Code 1908, ss. 92 and 93. **9 Bom L R 901.**

Advocate-General's Powers Act.

See Act X of 1875.

Affidavit.

See (1) Execution of Decree-Stay of Execution
(2) Power of attorney.

Affidavit of Documents.

See (1) Inspection of Documents.
(2) Practice—Civil Cases—Affidavits.
(3) Practice—Civil Cases-Commission for taking Accounts.
(4) Practice—Civil Cases Inspection and Production of Documents.
(5) Stamp Act, 1879, sch. II, cl. (*b*).

Affidavit-Contents of.

See (1) Company—Winding up liability of officers.

Affidavit-Right to use.

See (1) Certiorari, writ of.

Affidavit Sufficieney of.

See (1) Rule to show cause.
(2) Summons, Service of.

Affidavit—Contradictory,

See Injunction—Injunction under Civil Procedure code.

Affidavit-*Contd.*

Affidavit.

Affidavit—What it is—Before whom to be made. **4 S L R 88.**

Affidavits.

—and counter affidavits—Practice as to their filing. Civ. Pro. Code (1908) **15 C W N 475.**

1—Scandalous matter—Dishonest conduct—Procedure—Civil Procedure Code (Act V of 1908 O 19, R 3—Grounds for belief to be stated.—Under Order XIX Rule 3 of the Code of Civil Procedure, the grounds for the belief of the deponent should be stated.

Scandalous matter should be avoided in pleadings: and any proceedings before the Court may be objected to for scandal and the scandalous matter ordered to be expunged. If a statement of this character is inserted in an affidavit, it may be ordered to be taken off the file or the particular passage may be directed to be expunged. The Court may take action of its own motion or upon the application of the aggrieved party.

Allegations of dishonesty are scandalous; but they cannot be treated as such if they are relevant to the issue.

Allegations of dishonest conduct should never be made in pleadings if no relief is sought on that ground. **Gobinda Mohan Das v Kunja Behari Das. 10 C L J 414**

2—Affidavit.—If necessary—Facts stated in Judgment per Mookerjee J.—

Where the facts in a petition to the High Court appear sufficiently from the judgements of the lower Courts, no affidavit need be filed.

Mussamut Kariman v A. H Forbes 8 C L J 308.

3—Civ. Pro. Code 1882, s.196-Affidavits in interlocutory applications—Affidavits produced in a case should comply with the terms of s 196 of the Civ. Pro. Code. in cases of interlocutory applications, the statements of the declarant's belief are admissible, but the belief must be stated and reasonable grounds thereof set forth.

Damodar v. Panalal, 9 Bom. L R. 540

4—Preparation of—Inferences from facts, liberty to state:—

A party professing to state facts in court has no right to give his own inference as facts, but ought to disclose the real facts and leave the court to make its own inferences.

Surajmal v Manekchand. 6 Bom L R 704.

Affidavit-*Concl.*

Notes.—Dist, W N (1907) 794; 4 A L J 548; 29 All 610 Ref:14 CWN 96; 10 C L J 226

Affidavit—Cost—As to payment of fees of respondent's counsel not filed before delivery of Judgement—order allowing counsel's fees for special cause-Rules—Rules of High Courts and Supreme courts—N. W. P. **A W N 1899, 216.**

Affidavit—Not accompanying an application for restoration or suit dismissed for default, is no ground for dismissing the application—Practice and Procedure. **3 Bom L R 130.**

Affidavit—Statement made in-if privileged-Defamation **8 C W N 292.**

Affidavit—Application to District Court for declaring certain persons as touts—Disposal of affidavits-Validity-Examination of witnesses-Jurisdiction of District Judge—ACT XVIII of 1879, s. 56. **26 Mad 596.**

Affidavit—Before whom to be sworn Civ. pro, Code, 1908 s.139 and O. 1X, r. 5. **5 Ind Cas 537**

Affidavit—Where the facts in a petition to High Court appear sufficiently from the Judgment of lower Courts, no affidavit need be filed Civ.Pro. Code, 1908, s. 105, O. 1X, r. 13, **8 C L J 308.**

Affidavit of documents.

See (1) Inspection of documents.

(2) Practice—Civil case-Production and inspection of documents.

Affidavit of documents when there are several Plaintiffs some of whom are in England.

See Inspection of documents.

Affiliation.

See Mahomedan Law-Acknowledgment.

Affiliation of son.

See Hindu Law-Custom.

Affirmative Commands & negative prohibitions, Distinction between.

See Statute construction of.

After acquired property of insolvent.

See Insolvent Act.

Agakhan.

1—The Aga Khan has absolute property over the offerings made to him—Members of the Aga Khan's family not jointly entitled to such offerings—Succession to the estate of the Aga Khan is not joint—Khojas are Shiah Imami Ismailis and not Asnasharis—History of the Aga Khan family—History of Shia Imami Ismailis—Judge entitled to exclude the public from the Court or to decline to let the evidence likely to arouse religious or political disquietude be published.

The offerings made to the Aga Khan for the time being by his followers, are intended by them to be for his own personal use and benefit and are his absolute property, and such offerings are made to him from a feeling of veneration and reverence, the object of them being that, while, on the one hand, he is to take them for himself, they, on the other are to reap the benefit of them, whether it be of a temporal or a spiritual character. They are not made for the benefit of the members of the Aga Khan's family. The members of the family have no right to be maintained by the Aga Khan, nor are they in any way entitled to the offerings received by the Aga Khan for the time being.

There is no joint succession to the estate of the Aga Khan.

The ancestors of the Khojas of Bombay were originally converted to the Shiah Imami Ismaili faith by Pir Sadrudin, a missionary of the time of Imam Salmshah, and the Aga Khan is not an Asnashari, but is the hereditary chief and the Hazar Imam of the Shiah Imami Ismailis. The faith of the Khojas who followed the Aga Khan is and always has been the Shiah Imami Ismailis faith. They are not and never were Asnasharis.

In determining whether the performance of any particular right promotes any particular religion, and benefits the members of the denomination or body who profess it, the secular Court must act upon the evidence of the belief of the members of the community concerned.

History of the belief of the Shia Imami Ismailis traced.

History of the Aga Khan's family narrated.

When the evidence in any case, if published in the daily papers, is likely to arouse religious or political disquietude, the Judge is entitled to exclude the general body of the public and to decline to let the evidence be published.

Haji Bibi v H H. Sir Sultan Mahomed Shah. The Aga Khan.

11 Bom L R 409=2 Ind Cas 874.

Agarwal Banias of Ludhina City.

—Agarwal Banias—Suit for a declaration by collaterals that a deed of adoption by a widow in favour of her daughter's son did not affect their reversionary rights decreed.

The Court refused to bind down the plaintiffs to a vague allegation in the case made by them, that they were governed by Hindu Law in matters of succession. **Champat Rai v Daulat Ram 1 P L R 1909=68 P R 1909 =58 P W R 1909=2 Ind Cas 975.**

Age.

—False representations as to.

See (1) Minor—Liability of Minors on, and Right to enforce, Contracts.
(2) Estoppel—Estoppel by conduct,

—Proof of—

See Evidence Act, Section 32.

Age—of ward—Entry in Administration report of Court of Wards—Value.

9 M L T. 142.

Age—Proof of son's age—Admissibility of father's statement made before public officer.

9 Ind Cas 324.

Age—Statement of deceased relative as to age of a person—Admissibility—Hind Law Will.

(1911) 2 M W N 383.

Age—Statement of date of birth in a register of baptism how far evidence of—Attestation of sale-deed, when operates as estoppel.—Evidence—Miscellaneous Documents.

2 N L R 34.

Age—Proof and evidence as to—Guardian—General. **86 P W R 1910=7 Ind Cas 505; 213 P L R 1910.**

Age—Life insurance-Declaration as to age untrue-Its effect in rendering policy void—Return of premium.—Policy of Insurance.

25 Mad 183=11 M L J 379.

Age of assured.

See Insurance--Life Insurance.

Age of ceremonial competence.

See Hindu Law-Adoption Requisites for adoption.

Age of majority.

See (1) Majority, Age.
(3) Minor.

Age of minority, majority.

See **Majority Act.**

Agency.

See (1) Power-of-Attorney
(2) Companies Act, Section 4.

1.—Agency—Place of performance of a contract by a pakka adatia—Jurisdiction.

In the case of *pakki adat* agency the place of payment is the place where the constituent resides unless he has chosen to fix another place by express direction. **Kedarmal v Surajmal 10 Bom L R 1230.**

See also cases under:-

(1) Principal and Agent.
(2) Power of Attorney.
(3) Contract Act Ss. 208-235.
(4) Master and Servant.

2.—Public agents—Difference between public and private agents—Scope of their authority.

In the case of a private agent, the principal is bound by his agent's acts and declarations, even where they are not authorized by the principal, as the latter is liable to the extent of the power he has apparently given to his agent. But in the case of public agents the Government is liable only to the extent of the power it has *actually* given to its officers (the agents) 8 M I A 529 ref to. **The Secretary of State v Kasturi Reddi 12 M L J 453=26 Mad 268**

3.—Contract of agency—Burden of proof.

The burden of proof is on the person dealing with any one as an agent, through whom he seeks to charge another as principal. He must show that agency did exist, and that the agent had the authority he assumed to exercise or otherwise, that the principal is estopped from disputing it. **Assaram Brindawan v Mathura Dass. U B R 1892-1896 Vol 11.**

Agency—Elements necessary to constitute —Whether mere giving advice in matters of business constitutes agency.——Legal Practitioner Pleaders and Client. **12 C W N,28=6 C L J 580**

Agency—Requisites of delegation of-Power of Attorney. **13 C W N 1190= 3 Ind Cas 859.**

Agency-*Concld.*

Agency—Contracts by managing Agents of a Company, binding nature of—See Act VI of 1882, s. 242, **10 P R 1905= 100 P L R 1905.**

Agency—Decision by an, how far, *res judicata* in British Courts—See *Res judicata*—Competency of Courts, **6 Bom L R 98.**

Agency Rules.

See (1) Guardians and Wards act, 1890, s. 1.
(2) Transfer of civil case—General Case.

—Appeal under.

See (1) Valuation of suit—Appeals.
(2) Rules made under Acts.

Agency Rules.

See also cases under-
Ganjam and VizagaPatam agency rules.

1-Agency rule 22 of 1840 mad under Act XXIV of 1839 for Ganjam and Vizagapatam.—Agency rule No. XXII made in 1840, under the powers conferred by act XXIV of 1839, is a valid rule. **Maharajah of Jeypore v. Papayyamma I L R 23 Mad., 329.**

Agency Rules, Godavari—Transfer of execution application to wrong court in violation of—Fresh application for execution. **2 M W N 362**

Agency to sell, coupled with interest.

See **Principal and Agent.**

Agency tract.

See (1) **Guardians and Wards Act (1890) S 1 cl 2.**
(2) **High Court, jurisdiction of Madras-Civil.**

Agent.

See (1) Attorney and client.
(2) Bengal Rent Act (1859), S 30.
(3) Bill of Lading.
(4) Bengal Rent Act (1869) s 30.
(5) Broker.
(6) Civil Procedure Code, (1908) O 3 r. 23.
(7) Contract.
(8) Contract Act (IX of 1872).
(9) Husband and Wife.
(10) Inspection of Documents.

Agent *Contd.*

(11) Limitation Act, Sch II Art 89
(12) Mahomedan Law—Pre emption—Ceremonies.
(13) Oaths Act. s 9
(14) Principal and Agent
(15) Probate
(16) Summons, Service of.

—Acknowledgment of debt by

See Limitation Act 1877.
S 19—Acknowledgment of debts.

—Acknowledgment of title by

See Limitation Act 1877, s. 19—Acknowledgment of other Rights

Agent Authority of.—

See (1) Cases under Principal and Agent—Authority of Agent
(2) Limitation Act 1877 S 20

Agent

—Liability of sons and grandsons

See Act XV of 1877 Sch II Art 57

Agent of Company

See Income-Tax Act (II of 1886)

Agent of Court of Wards Suit against —

See Oudh Land Revenue Act ss 175 176

1 Court of Agent Jurisdiction of—Act XV of 1840 Bom Regs XXIX of 1827 and XIII of 1830

A sanad issued to an Agent of H H Holkar, under Act XV of 1840 and Regulation XIII of 1830, was held not to be invalidated by the omission to enter the Agent's name in any list of exempted or empowered persons under Regulations XXIX of 1827 and XIII of 1830 The omission to secure the agent any specific jurisdiction under Regulations XIII of 1830 was held to disentitle him from exercising any but the most ordinary jurisdiction which could be exercised under that law. **Sabharam bin Vithji v Sadashiv Bin Sayaji 1 B H C 96.**

Agent

—Of Governor of Madras

See (1) Revision—Civil cases
(2) Transfer of Civil case—general cases

Agent.

Agent mixing his own property with that of minor—Effect—*Onus* of proof **10 Ind Cas 57.**

Agent—*Concld.*

2 Agency of Ganjam and Vizagapatam-Agent's Court at Vizagapatam, Jurisdiction of—Ganjam and Vizagapatam Agency Court's Act (XXIV of 1839) —

The Agent to the Governor at Vizagapatam has jurisdiction over all suits of a civil nature arising in the Agency The rule regarding the institution of suits of a lesser pecuniary value than R 5,000 in the Divisional Assistant's Court is like the analogous rule contained in s 15 of the Code of Civil Procedure, one of procedure, and not of jurisdiction. Where, therefore a suit which might have been instituted in the Court of the Divisional Assistant was brought in the Agent's Court — *Held* that the Agent had jurisdiction to entertain it. 7 All 230, 17 Cal, 155, 14 Mad 183, 15 Mad 241, followed. 13 Mad 273 considered **Gourachandra Patnaikudu v Vikrama Deo I L R 23 Mad, 367.**

Agent of Manger of railway.

See Railway Act, 1890 s 77.

Agent of Sirdars in Dekhan.

See Pensions Act, s 4

Agent

Person who is an avowed agent for another in a transaction—Not a necessary party to a suit in respect of such transaction **10 Ind Cas 779.**

Agent

Description in pronote of the payee as agent of another Effect. **10 M L T 328**

Agent & sub-Agent.

See Principal & Agent

Agent authority of to make payment.

See Principal & Agent—Authority of agent.

Agent duly authorised.

See (1) Limitation Act (1908) S 19. 20
(2) Principal & Agent

Agent holding a power of attorney authorising him to act & appear for a party to a suit.

See Principal and Agent Authority of agent.

Agent of a company not resident in India.

See Principal & Agent.

Agents, Pleader's Mukhtars & Revenue Act.

See (1) Mooktear & Pleader.

(2) Costs summary suit for possession.

Agent's right to execute decree obtained as Agent.

See Principal & Agent—Authority of Agent.

Agent of minor.

See (1) Minor.

(2) Guardian.

Agent duly authorised.

See Limitation Act, 1908, ss. 19, 20,

Agents.

See Parties.

Principal & Agent

Master & servant.

Agra, Bengal & Assam Civil Courts Act.

See Act XII of 1887.

Agra Land Revnue Act.

See North West Province Land Revenue Act.

Agra Local Rates Act.

See U P Act III of 1878

Agra Rent Act.

See North West Provinces Rent Act.

C. C. 37

Agraharam.

See Hindu Law—Gift

Agra Tenancy Act.

1—Occupancy holding—Redemption—Sub-mortgage—Occupancy—holding-Transfer before the Agra Tenancy Act came into force—Right of mortgages to redeem—General Clauses Act (1 of 1904, local) S 6

Rights which accrued before the Agra Tenancy Act came into force are not prejudiced by that enactment A mortgage of an occupancy tenancy, executed prior to the coming into operation of the Agra Tenancy Act, is valid. Such a mortgagee has all the rights of a mortgagee,—including a right to transfer his mortgage and also a right to sub mortgage. A mortgagee of an occupancy holding and a transferee from him have a power to redeem the mortgage (1901) 26 A W N 302, Dist) **Ram Pargas Upadhia v Sobba Upadhia, 7 A L J 755= 6 Ind Cas 837.**

See also cases under.—

Mortgage of Occupancy Holding

2—Civil and Revenue Courts—Occupancy holding, mortgage of—Sub-tenant—Ejectment proceedings

In a suit instituted in the Civil Court by the mortgagee of an occupancy holding for recovery of possession, the District Judge held that (1) the suit was not maintainable in the Civil Court and (2) the decision of the Revenue Court in a former ejectment proceeding was conclusive against the plaintiff.

Per Banerji, J —The dispossession of the plaintiff's sub tenant amounted to his dispossession and his own dispossession to that of the occupancy tenant whose mortgagee he was As the occupancy tenant took no steps to recover possession of the holding within the six months his right had determined, and the plaintiff deriving his title from the former, had, consequently, lost his title.

Agra Tenancy Act-*Contd.*

Per Richards J —The policy of the law, as gatherable from the Rent Act of 1881 and the Tenancy Act of 1901, is that occupancy tenants shall not have any right to transfer their occupancy interest. The policy of the law, also, as to the Court in which all rights and questions between landlords and tenants of this class are to be decided is equally clear, namely, that the Revenue Court, and not the Civil Court, should try such questions. A mortgagee of a tenant's interest has always a frail security, for the moment the tenancy is determined, his security is gone. Consequently, where the original tenant cannot bring a suit for possession a person claiming through and under him cannot have rights, which he has not. Any person who, in spite of the clear policy of the law, lends money on his security of an occupancy-holding, takes a security which is only of any value, so long as he is permitted to remain in actual occupation. He cannot complain if he finds it difficult or impossible to enforce rights, which are against the policy of the law. (15 All 219 (F B), Exp) **Pahalwan Singh v Satrupa Kuar.** **2 A L J 471= A W N (1905) 178.**

3.—Practice—Certificate—Lease to appeal to Privy Council—Order for certificate—Property of granting leave—Certificate and not order to be considered:—

The certificate granting leave to appeal to Privy Council and not the order directing it to issue should be considered and acted upon in determining the propriety of the grant of leave.

Radhakishan v Raikrishan **23 All 415 =28 I A 182=3 Bom L R 459= 5 C W N 689 ; P C**

Notes —Ref· 24 All 236.

4—Tenancy Act—Co-sharer—Position of, in relation Sir—Proper rent-Farzi rate:

A co-sharer cultivating a portion of land in the village of his *sir* cannot be regarded as a tenant of a co-parcenary body, but he holds the land at a proper rate of rent & when accounts are taken between the parties they should not be taken with reference to a Farzi rate of rent.

Gendan Lal v Rustum Singh. **7 A L J 90=5 Ind Cas 695**

5—C. P. C. Ss. 562, 588—Remand Appeal·—

There is no appeal from an order of remand passed under S. 562 of the Code of Civil Procedure in a suit or proceeding under the Agra Tenancy Act, 1901. **Vilayat Husen v Maharaja Mahendra Chandra Nandy.** **1905 A W N 198=28 All 88.**

Notes.—Ref· 28 All 283=(1906) W N 5.

6—Ss 4, 19, 21, 23, 24, 25—Thekadar—Meaning of—Sub-lease granted by Thekadar—Not void.

A tenant under s. 4 (5), Tenancy Act, includes a *thekadar* and within the meaning of the Act a *thekadar* is a non-occupancy tenant.

A *Thekadar*, therefore, is competent to grant a sub-lease of his holding for a term of one year under s. 25. **Natha v Mian Khan.** **6 A L J 649=2 Ind Cas 552**

7—S. 4—Tenant——Licensee to cut grass from embankments of a Railway line—*Profits a prendre*—Jurisdiction of Civil Court,—

A person authorised by a Railway Company, to cut grass from the embankments is not a tenant within the meaning of s. 4, Tenancy Act, and the payment which he agrees to make is not rent. The right which he obtains under the agreement, is in the nature of *profits a prendre*. A suit for recovery of the amount agreed upon lies in the Civil Court.

B and N. W. Railway v Bandhu Singh **6 A L J 400=31 All 342**

8.—Ss. 4 (b), and 32 (2), Chap. III—Partition of rent-free holding—Suit maintainable.

S. 32 (2) does not apply to a rent-free grantee but falls within Chap. III which deals with division, devolution and transfer of tenancies. A tenant does include a rent-free grantee. A suit for partition of a rent-free holding is maintainable in the Civil Court. (A W N (1908), 197 Appr.) **Sagar Mal v. Makhan Lal,** **5 A L J 734= 31 All 49=A W N (1908), 279= 1 Ind Cas 705.**

9—Ss. 4, 19, 21, 23, 24, 25 — Thekadar—Meaning of — Sub-lease granted by thekadar—Not void:—

A tenant under 4 (5), includes a *thekadar* and within the meaning of the Act a thekadar is a non-occupancy tenant. A *takadar*, therefore, is competent to grant a sub-lease of his holding for a term of one year under S. 25.

Natha v. Mainkhan, **6 C L J 649**

Agra Tenancy Act-*Contd.*

10—S. 4 (12)—Landlord and tenant—Plot in *abadi*——Right of an agriculturist tenant to build upon—Improvement.—

An agriculturist tenant has no right to build a shed upon a plot of land in the *abadi*, without the permission of the zamindar, although he has been throwing rubbish over it for a long time. A structure built on a plot of land within the *abadi* is not an improvement within the definition of the word in s. 4 (12) of the Tenancy Act.

Jagannath v. Gurdiyal Singh, 10 Ind Cas 284.

11—Ss. 5, 18, 20, 57—Fixed rate tenant—Escheat to Crown:—

A fixed rate tenancy is but a limited interest which cannot be the subject of escheat to the Crown. Such a tenancy is carried out of the landholder's interest in the land to which it relates and a fixed rate tenant has no absolute interest in it. If the tenancy comes to an end, it necessary goes back to the estate which it was carried out of, and lapses to the landholder. (30 All 488 Overr.). **Fulshi Ram v. Gurdial Singh, 7 A L J 1011 (F B)=7 Ind Cas 231.**

12—S. 7—Applicability of, to mortgage executed in 1894—Mortgage of sir—Whether mortgagor obtains ex-proprietary rights —

R in 1894 made a usufructuary mortgage of his *sir* land to the plaintiff. S, the son of R, on the following day executed a *kabuliat* promising to pay rent in respect of that land to the mortgagee. The lower appellate Court and a single Judge of the High Court *held* that S was joint with his father at the time of the mortgage and became an ex-proprietary tenant and was not liable to pay more rent than such tenants were liable to pay. *Held*, that the mortgage having been made in 1894, provisions of Agra Tenancy Act of 1901 did not apply, and the mortgagor acquired no ex-proprietary rights in respect of the *sir*. S was therefore liable to pay rent at the rate mentioned in the *kabuliat*. 16 All 337 Fol:

Sheo Lal Singh v. Sukhdeo Singh, 6 A L J 437=31 All 368=2 Ind Cas 462.

13—Ss. 8 and 22—Tenant at fixed rate—Occupancy Tenant—Transfer by deed—Succession to such land—Sister no heir.—

A tenant at fixed rates is a tenant, described in S. 8 of the Act, and not a tenant who, under a contract with the Zamindar, holds at a fixed rate of rent.

Hence, where a Zamindar transfers land under a deed to a tenant, conferring on him the right to occupy at a fixed rate of rent, the transferee becomes only an occupancy tenant and not a tenant at fixed rates as defined by S. 8 of the Act.

The sister of such a transferee, not being mentioned in the list of heirs given in S. 22 of the Tenancy Act, is not entitled to inherit.

Bachchi alias Bachia v Bachchi, 3 A L J 513 =A W N (1906), 219=28 All 747.

14—Ss 8, 20, 22—Transfer—Succession—Claim of sister to inherit:—

A transferee from a zemindar under a deed which purports to confer all the rights of a tenant at fixed rates acquires only the rights of an occupancy tenant and not those of a fixed rate tenant as defined in S. 8 of the Tenancy Act. The fixed rate tenant referred to in s 20 of Tenancy Act is a tenant described in S. 8 of that Act and not a tenant who under a contract with the zemindar holds at a fixed rate of rent. The interest of such transferee cannot under S. 22 of the Tenancy Act devolve upon his sister. **Bachchi v. Bachchi, 3 A L J 13=1906 A W N 219.**

15—Agra Tenancy Act (II of 1901) Local 9—fixed rate tenant—record at last revision—conclusive proof.—

When at the last revision of settlement a person is recorded as a fixed rate tenant, it shall be conclusive proof of his being such a tenant. A court cannot enquire whether his name was recorded with the consent of another tenant.

Mulai Singh v. Rajwant Singh, 3 A L J 842=(1906) A W N 68.

16—S. 9—Fixed rate tenancy—Evidence—Revision of settlement—Plea of entry of name with consent of the fixed rate tenant:—

Held, that the provisions of S. 9 of the Agra Tenancy Act 1901, are clear and imperative and bar a court from inquiring whether a person's name has been entered at the last revision of settlement as a fixed rate tenant merely with the consent of the real tenant. **Mulai Singh v. Rajwant Singh, 1906 A W N 68=3 A L J 428.**

17—Tenancy Act (Agra) Ss. 10, 20—Usufructuary mortgage of *sir* lands—Possession not

Agra Tenancy Act-*Contd.*

delivered to mortgagee—Suit to recover possession not maintainable -*In pari delicto potior est conditio defendentis*—Indian Contract Act (IV of 1872), S. 65.

A usufructuary mortgage of *sir* lands was made to the plaintiff. Possession was not delivered to him. He sued by his suit to recover possession or to recover the mortgage-money and damages by sale of the property.

Held, that the plaintiff was not entitled either to recover physical possession of the property or to get a refund of the money he had paid, but that he could get rent assessed on the expropriatary tenure. Ref: 32 All 205, Fol: 11 Bom L R 693 Dist: **Depan Rai v. Ram Khelwan Rai, 7 A L J 330=5 Ind Cas 557.**

Notes:—Dist: 7 Ind Cas 738.

18—Ss 10, 202—Suit for possession in Civil Court—Agricultural land — Defendant pleading tenancy—exchange—Ex-proprietary tenant—

The rights of an ex-proprietary tenant do not arise, when there is an exchange of zemindari between co-sharers. In a suit for possession relating to agricultural land the defendant pleaded that he was a tenant; *held*, that the Court of first instance was bound to follow the procedure laid down in S. 202 of the Agra Tenancy Act.
Kura Singh v. Chhallu, 8 A L J 329.

19—Ss. 10 20, 83—Sale of sir lands — Agreement to surrender ex proprietary rights — Possession not delivered—Suit for damages for breach of contract—Contract Act (IX of 1872), S. 65.—

The defendants executed a sale-deed in favour of the plaintiffs, whereby they purported to sell their *zamindari* property, together with *sir* and *khudkasht* lands and covenanted to execute a deed of relinquishment in respect of the latter and to surrender their ex-proprietary holding by filing an application in the Revenue Court. Three days later a deed of relinquishment was executed in accordance with the stipulation in the sale-deed, but no application was made to the Revenue Court surrendering the holding, and possession of the *sir* and *khudkasht* lands was not delivered to the purchasers. The sale-deed contained a stipulation that, in the event of delay in delivery of possession or objection to the surrender of their ex-proprietary rights by filing a formal application, the vendors shall pay damages at the rate of Rs. 16 per *bigha*. Upon a suit being filed for recovery of damages for breach of the aforesaid agreement, *held*, that, whether the transaction was regarded as an attempted sale of ex-proprietary rights or an agreement to relinquish those rights when they arose, it was unlawful, and therefore the claim to damages for failure to deliver possession of the *sir* and *khudkasht* lands was not maintainable. **Ikram Ullah Khan v. Moti Chand, 8 A L J 826.**

20—Agra Tenancy Act Ss 11, 34—Holding of tenancy for over twelve years without payment of rent with consent of—Zemindar-Acquisition of occupancy—right.

A tenant who has been in possession of a holding for over twelve years with the consent of the *Zemindar* can acquire an occupancy right in the holding notwithstanding the fact that he has been paying no rent to the *zemindar*, S. 34 of the Agra Tenancy act, 1901, does not apply to such a case.
Khushi Ram v. Mahasingh. 10 Ind Cas 112

21—s 60—Agra Tenancy Act (11 of 1908) Ss 11, 18, 20—Fixed-rate tenant—Mortgage—Covenant that the mortgagee will remain always in possession of property after redemption-Clog on redemption: S. 18 of the Agra Tenancy Act, 1901, relates to the right of occupancy referred to in S. 11 of the Act and does not apply to the case of a tenant at fixed rates whose interests are under S. 20 heritable and transferable.

A stipulation in the mortgage-deed, by which on the payment of the principal, interest and costs, the mortgagor is not to recover possesion, but is bound to allow the mortgagee to continue in possession apparently in perpetuity upon payment of a fixed rent, prevents the mortgagor from getting the property unfettered, and is thus a clog on equity of redemption. (1903) A C 235; 88 L T 634: 51 W R 636; 72 L J K B 471 9 Bom 524, Fol; 22 All 238 Dist.
Shoe Singh v Birabahadur Singh. 6 Ind Cas 707.

22 Tenancy Act (Agra) Ss.20, 83—Relinquishment—Ex-proprietary tenancy—Agreement to surrender.—An agreement to relinquish expropriatary rights in *sir* land is not an agreement which could be enforced by either a Civil or a Revenue Court.

A judgment-debtor entered into an agreement with the decree-holder to relinquish a part of

Agra Tenancy Act-*Contd.*

the *sir* lands in his favour, while the decree holder agreed to give up a part of the decretal amount; *Held*, that the transaction did not amount to surrender of tenancy. **Reghubans Sahai v. Brijnandan Lal. 6 A L J 477= 1 Ind Cas 731.**

23—S. 20—Occupancy right sold—Purchaser of such rights acquires nothing—Right of occupancy tenant to relinquish after assignment;—

It is of the utmost-importance that occupancy holdings should not be subject to prolonged litigations. When such holdings are sold in execution of a decree contrary to the provisions of S. 20 of the Tenancy Act the purchaser acquires nothing. The act renders it illegal to sell an occupancy holding in execution of a decree. *Semble*;—An occupancy tenant after assigning his rights or subletting can relinquish his occupancy rights to the prejudice of his assignee or sub-lessee. **Madan Lal v. Syed Mahamad ali Nasir. 1906 A W N 182=3 A L J 116=28 All 696.**

Notes.—Fol: W N (1907) 76; 29 All 327, 3 A L J 731=4 A L J 306=(1906) W N 300. Appr: 29 All 129.

24—S.20-Occupancy interest, mortgage of—Interpretation Bond—executed while act XII of 1881 in force—Default after 1902:—

Where certain debtors executed a bond covenanting to place the creditor in possession of the 'land mortgaged' upon default in payment of interest and stipulating that 'the land mortgaged shall remain hypothecated and pledged in lieu of the amount of debt so long as it is not paid off:' *Held* that 'the land mortgaged' meant 'the land when mortgaged' and the bond was not intended to and did not operate as a deed of usufructuary mortgage until the date on which the default was made. Where the money was borrowed when Act XII of 1881 was in force and default in payment of interest accrued after Act II of 1901 came in force. *Held* that the latter act could govern the case. Proprietors whose proprietary rights are mortgaged under a deed of usufructuary mortgage become tenants with rights of occupancy and those rights cannot be mortgaged. **Harnanda Rai v. Nakchhedi Rai 3 A L J 691=(1906) A W N 302.**

Notes:—Fol: 4 A L J 306=29 all 327=A W N (1907) 76.

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25—S.20—Occupancy holding-Usufructuary mortgage prior to the passing of the act—mortgagee not getting Possession-Suit for possession after passing of the Act- Retrospective effect of the act—.

B executed a deed not usufructuary mortgage for a term of twenty years, in respect of his occupancy holding in 1896. in favour of O. O sued for recovery of possession as usufructuary mortgagee after the passing of the agra Tenancy Act, 1901: *held*, that O's claim should succeed; that Act II of 1901 did not affect retrospectively, that if what the tenant did was valid under the law in force at the time when the mortgage was made, and that, if the mortgagee was entitled to enforce his mortgage before the passing of the new act, he would be equally entitled to do so after the passing of that Act. (3 A L J 40; A W N (1906) 28; 15 All 219, 26 All 78 Fol.)

Bhikha v. Umrao Singh 5 Ind Cas 82.

26—S.20—Mortgage of occupancy holding—Redemption of a prior valid mortgage-Rights of mortgagees,—

A usufructuary mortgage of an occupancy holding was executed after the passing of North-Western Provinces Tenancy Act. The mortgage sued to redeem a prior mortgagee of same holding whose mortgage was executed before the passing of the act. *Held* that the mortgage under which the plaintiff claimed was invalid and unlawful, that the plaintiff had acquired no right under his mortgage and was not entitled to redeem the prior mortgagee whose mortgage was valid under the law. (26 A W N (1906). 182=3 A L J 476. Fol 15 All 219, 26 All 78 Ref:) **Banmale Pande v. Bisheshar Singh 1906 A W N 300 3 A L J 731--29 All 129.**

27—Agra Tenancy act (II of 1901 Local) s. 20 21 31-Occupancy holding, unsufructuary mortgage of-void, not voidable-Indian Contract Act (XI of 1872) section 23.

A transfer by an occupancy tenant of his interests in his holding is absolutely forbidden. A usufructuary mortgage of an occupancy holding, therefore, if permitted, would defeat the provisions of the Agra Tenancy Act, it is unlawful within the meaning of section 23 of the Contract Act, and is void.

The word " voidable " in section 31, Agra Tenancy Act, is not used in contra-distinction to " void " but means that the transfer made in contravention of the provisions of section 22

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may be avoided by the landholder in the manner provided in the section. Sections 20 and 21 were enacted in the interest as much of the tenant as of the landholder.

An occupancy tenant mortgaged his holding with possession to a person, who subsequently re-let the land to the mortgagor and sued him for arrears of rent. *Held* that the plaintiff was really asking the assistance of the Court to enforce an agreement, the consideration of which was unlawful and which was therefore void. (3 A L J 691, idem 731 idem 476 follo=2 A L J 156 referd to) **Ram Sarup v. Kishen Lal. 4 A L J 306=1907 A W N 76=29 all 327.**

28—S.20-A sufructuary mortgage-Sir-Sir sold after the passing of Agra Tenancy Act-Position of mortgagee—Ex-proprietary tenancy-Transfer of holding—Ejectment.—One M mortgaged his *zemindari* and *sir* to the plaintiff by way of simple mortgage in 1890. M subsequently usufructuarily mortgaged the same share and *sir* to the defendant in 1897. In 1905, the plaintiff brought a suit on his mortgage of 1890, obtained a decree, and purchased the mortgaged property in execution thereof: *Held*, that the defendant, who was in possession of the *sir* ever since his mortgage of 1897, could not continue to hold the property as mortgagee of the ex-proprietary tenancy which accrued in favour of his mortgagor on the purchase of the sir in 1905 by the plaintiff, and that the defendant was liable to be ejected from the holding at the instance of the plaintiff in an action of ejectment. 21 All 538 Dist. **Dwarka Chand v Sheikh Khadim Husain. 9 Ind Cas 553**

29—Agra Tenancy Act—S. 20—" Shall presume —Meaning of-Evidence -Presumption—Record of-plaintiff's name as co-sharers-Evidence Act s 4.—

Held, by Richards, C J Banerji, Karamat Husam, Tudball, Chamier and Piggott J J (Kno J disssenting), that the context of s 201 of the Agra Tenancy Act clearly shows that it was the intention of the Legislature that the Revenue Court, in the case of a recorded co-sharer, in the class of suits specified in the section, should, dispose of the suit on the assumption that the plaintiff has the proprietary title in respect of of which he is recorded: the proviso to the section itself shows the limitation of the presumption. It can only be rebutted by a separate suit in the

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Civil Court, but so far as the Revenue Court is concerned, it cannot go behind the entry in the revenue papers, receive evidence and itself try the proprietary question. (30 A 447, F; 32 A 427 *Overruled*) *Per Richards C J*—The policy of Agra Tenancy Act and Land Revenue Act is to make records as valuable as possible, and to put a premium on persons, who were entitled to have their names recorded, taking the necessary steps to have the record of their title made. *Per Knox J*—The words " shall presume " in s. 201 of the Agra Tenancy Act connote a rebuttable presumption. **Durga Prasad v Hazari Singh. 8 A L J 1025 F B.**

30—S. 20—U P Rent Act S 9—Occupancy tenant—Usufructuary mortgage—Tenancy determined—New lease to mortgagees by landlord—Whether such interest transferable.—Where an occupancy tenant had made a usufructuary mortgage of a portion of his holding, there being an arrangement between himself and the mortgagees as to payment of the rent and the rent fell into arrears in consequence of which the landlord ejected the tenant and determined the tenancy and granted a new lease to the mortgagees.—*Held*, that having regard to the nature of the property, a suit for redemption of the usufructuary mortgage by the evicted tenants would not lie. S 9 of the Act No XII of 1881 and S 20 of the Tenancy Act of 1901 forbid a transfer of the interests created by the lease. The tenancy having been duly and legally determined, the landlord who was party to the suit for redemption was entitled to retain the present lessees as his tenants. **Kehar v Hasan Ali Khan. 2 A L J 583.**

31—S. 21—Occupancy tenant-Usufructuary mortgage executed before the Tenancy Act came into force:—*Held*, also that a usufructuary mortgage of his holding made by an occupancy tenant before the coming into force of the Agra Tenancy Act is not rendered invalid by S 21 of the Act, even if S 21 does prohibit an occupancy tenant from parting with the possession of his occupancy holding by making a usufructuary mortgage. 15 All 219; 26 All 78 ref. to. **Babu Lal v Ram Lal. 1906 A W N 28=3 A L J 40.**

Notes—Fol. 30 All 479 F B=A W N (1908) 195=5 A L J 447; Ref. 6 A L J 989.

32—Agra Tenancy Act—s. 21—Mortgage of occupancy holding—Suit by mortgagor to recover possession—Illegal contract—Restitution of

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benefit.—Under the Agra Tenancy Act, the mortgage of a cultivatory holding, is void but the person who made the mortgage cannot, on principles of equity, be allowed to take back the property, unless he put the mortgagee into the position in which he was before the mortgage, and restore to him the money which he received from him. A W N (1888) 128 Fol:

Bahoran Upadhya v Uttamgir 8 A L J 931.

33—S. 22—Pleadings—Sufficient findings—Remission of issues unnecessary—Agra Tenancy Act (11 of 1901) S 22—Succession of collaterals-Joint cultivation—Burden of proof on collateral.

Where a man sets up his succession to occupancy or non-occupancy holdings, recorded in the name of his deceased relative, he is bound to show that he shared in the cultivation of the holdings at the time of his death.

Where the findings of the Court below are sufficient to dispose of the case, it is un-necessary to remit issues to the lower Court.

Sarwan Singh v Ramsarup Singh. 6 Ind Cas 499.

34—S. 22--Male lineal descendant—Adopted son—Hindu Law.

A son duly adopted according to the Hindu Law must be treated as a male lineal descendant within the meaning of S. 22 of the Agra Tenancy Act 1901 (S D 5 No of 1904 approved of: 5 A L J 77; A W N (1908) 37; 30 All 128 Ref; 40 P R 1894; 43 P R 1895 Dist.) **Kallian v Cheedu Singh. 8 Ind Cas 228.**

35—S. 22—Right of succession to occupancy holding—Right of succession opening out before the Tenancy Act—Indigent daughter—Right of affluent daughter postponed—Hindu Law. Where an occupancy tenant died before the coming into operation of the Tenancy Act leaving two daughters, one indigent and other rich, and was succeeded by the former. *Held*, that the rich daughter was entitled to inherit the holding upon the death of the indigent daughter in preferance to the latter's son; the right having been acquired on the death of the father, was merely postponed during the lifetime of the poor daughter. **Dulari v Mul Chand. 5 Ind Cas 384=32 All 314=7 A L J 293.**

36—S. 22—Male lineal descendant—Illegitimate son of a Sudra.

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An illigitimate son of a sudra by a continuous concubine is entitled, in the absence of a legitimate son, to the occupancy holding of his father as a male lineal descendant. (13 M I A 141, 2 All 134; 6 All 329 Ref.) **Ram Kali v Jamuna 5 A L J 629=A W N (1908) 229= 30 All 508.**

37—S 22—Agreement dividing holdings-Suit for possession of a moiety barred. A suit for possession of a moiety of cultivatory holdings is a suit for division of those holdings, inasmuch as the Court is asked to declare that the plaintiff is entitled to an undivided share of the holdings and to put him in possession of that share.

If the owners of an occupancy holding enter into an agreement and divide the holding, the division would not be binding, on the landlord.

A suit for possession of a share in such holding under the agreement is barred by the provisions of S 32 of the Act. **Achhey Lal v Janki Prasad 3 A L J 735=A W N (1906) 274= 29 All 166.**

Notes—Over 31 All 348 F B; 6 A L J 343= 1 Ind Cas 594 Dist. 4 A L J 769=1908 A W N 3.

38—Agra Tenancy Act II of 1901), section 22 (1)—male lineal descendants——Mahommedan Law of succession not applicable.

The new Tenancy Act has completely altered the rule of devolution in the case of an occupancy tenancy upon the death of the tenant. The tenancy no longer devolves "as if it were land" (as in Act XII of 1881) but on the lineal male descendants of the last tenant. The Mahomedan Law of Succession does not apply.

Hence, where a Mahomedan occupancy tenant died leaving a son and grandson, held that they would share the occupancy holding equally. **Bhura v. Sahab-ud-din. 5 A L J 77= A W N (1908) 37=30 All 128.**

39—Ss 22, 32—Occupancy rights acquired by widow before the passing of Act—Devolution on brother--Jurisdiction—Civil and Revenue Courts. Y and M two Mahomedan brothers, jointly held an occupancy holding. M died before the passing of the new Tenancy Act leaving a widow. His share in the holding was recorded in the widow's name. The widow of M died leaving a brother. The Revenue Courts entered the name of Y's son in place of M's widow. The widow's brother brought this suit for joint pos-

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session. *Held*, that the suit was not obnoxious to the bar of S; 32 (3), Tenancy Act, as it was not a suit for actual division of the occupancy holding, *Held*, further that M having died before the passing of the Tenancy Act his widow inherited his property absolutely and had absolute right to be considered an occupancy tenant and that after her death which took place after the passing of the Act, her brother was entitled to succeed as provided in S. 22 (c). **Ayab Ali Khan v. Moshuq Ali Khan 1908 A W N 281=5 A L J 738=31 All 51= 1 Ind Cas 593.**

40—Agra Tenancy Act Ss. 22, 82—Occupancy holding-widow succeeding to her husband-Relinquishment by widow to the prejudice of the riversioner.

The interest of Muhammadan widow succeeding to the occupancy—holding of her husband is a limited one, and is liable to come to an end at any moment she dies or remarries. She therefore cannot relinquish her limited rights in the holding, to the prejudice of the person, who will succeed in the event of her remarriage or death (27 All 82 Ref). **Jhabbar Musalman v. Suraj Prashad 9 Ind Cas 894.**

41—S. 22—Widow acquiring right in occurancy holding before the Act—Effect of remarriage—Contract Act (IX of 1872) S. 21—Mistake of Law. A widow, who succeeded to the rights of her husband in any occupancy holding, before the new Tenancy Act came into force, could not lose it after the passing of the new act on account of her re-marriage.

When the parties honestly believed that the plaintiff had lost her right to the occupancy right of her husband, by reason of her second marriage, and there was no fraud or misrepresentation by the defendant Zamindar, and the plaintiff agreed to take the land on an increased rate of rent under a lease, *held*, that the lease could not be set aside as it was a contract entered into between the parties by reason of an innocent mistake on a point of law shared by all the parties (17 Cal 291 Distgd.) **Sahiban Bibi v Madholal 4 A L J 475= A W N (1907) 197.**

42Agra Tenancy Act S. 22—Occupancy holding—Succession—Illegitimate—sons-Chela.

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S. 22 cl. (a) of the Agra Tenancy Act, clearly contemplates legitimate lineal descent. *Held*, therefore that the defendants, who were found to be the illegitimate sons of an occupancy—tenant, who was not a *Sudra* and who also alleged that they were his *chelas*, were not entitled to succeed in either capacity. **Jageshar Jati v. Bindeshri Prasad 8 A L J 731.**

43—Ss. 25, 31—Rent Act XII of 1881—Sub-lease by occupancy tenant for more than five years under old Act-Validity of such lease under thisAct—-Voidable, not void—Sub-lessees' suit for possession.—

The occupancy tenants of some lands granted a lease in favour of planttiff for a term of 25 years and put plaintifi in possession of some portion of the lands. The remaining portion was in the occcupation of the defendants under a lease, which was to expire one year after the lease in plaintiffs'favour. Just before the expiry of the lease in favour of the defendants, the lessors of the plaintiffs granted another lease in favour of the defendants ignoring the lease in favour of plaintiffs, for another term of five years, and hence, the defendants continued in possession. The land-holder then sued the plaintiffs for a cancellation of the sub-lease in their favour: but that suit was dismissed by the Revenue Court on the ground, *inter alia*, that the sub-lease having been granted before the Tenancy Act of 1901 was valid. Plaintiffs now sued for possession of the portion of the lands not delivered to them. The defence was that sub-lease in plaintiff's favour was invalid, the same being for more than five years and, as such, opposed to s. 25 of the Tenancy Act of 1901. It was also contended that, the lessors of plaintiffs not being in possession when the lease was granted to plaintiff, the agreement was one for a grant of the lease in the future and as such the plaintiffs had no vested rights to sue for possession. *Held*, (1) that the lease, having been granted when the old Tenancy Act was in force, was perfectly valid and it was not affected by the Act of 1901, the former Act not having contained any limitation as to the period of a sub lease; (2) that the agreement was not merely an agreement to grant a lease in the future, but a perfected present lease giving the plaintiffs a right to sue for possession on the expiry of the then lease in favour of defendants (A W N 1901. 11, D); (3) that assuming that the lease in favour of plaintiffs

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was governed by the new Tenancy Act s. 31 of the Act makes sub leases granted by tenants in contravention of S. 25 voidable at the option of the landlord and not void; that the landlord's suit, in this case, having been dismissed and the decision having become final, the sub-lease in favour of plaintiffs was valid; and (4) that the lessors of the plaintiffs having in consequence of the lease in favour of plaintiffs, deprived themselves of all rights to grant another lease in favour of anybody else, the lease in favour of defendants even though they might have taken the same in ignorance of that in favour of plaintiffs, could not prevail over that in favour of the latter.

Lalu Ram v. Thakurdas
A W N 1905 53=2 A L J 156.

44.—Ss. 31, 57, 179, 199 —Ejectment of tenant and sub-lessee—Appeal to the Commissioner—Tenant setting up custom of transfer—proprietary title. If a suit for ejectment on the ground of an act or omission detrimental to the land in a holding or inconsistent with the purpose for which it was let, is brought against a tenant alone, an appeal lies to the District Judge from the decision of the court of first instance. If the suit is for ejectment of the tenant and his transferee on the grouud mentioned in clause(d) of s. 57, it is a suit under the second clause of s. 31 and is a suit mentioned in group C Sch IV and an apppel in such a case lies to the Commissioner. A suit for ejectment was brought against the defendant on the ground that he had let the land for building purposes and that that was inconsistent with the purpose for which the land had been let to him. Defendant pleaded that there was a custom in the village by which the tenants were competent to sublet. The suit was partly decreed. *Held*, an appeal lay to the Commissioner. Held further, that question of propritary title was raised in the defence. **Lachman Das v Nabi Bakhs i, 6 A L J 39=31 All 109= 1 Ind Cas 161.**

45.—(II of 1901, local), Section 32—Division of occupancy holding—Suit for declaration of right —Suit maintainable.

A suit for a declaration of right to a share in an occupancy holding is maintainable.

A declaration as to his rights obtained by one co-sharer against the other co-sharers does not and cannot effect any division of the holding or distribution of the rent thereof. (30 All

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90, Fol, 29 All 66, *overruled.* **Najib Ullah v. Gulsher Khan. 6 A L J 343 (F B)= 31 All 348=1 Ind Cas 594.**

46.—S. 32—Fixed rate tenancy—Division among co-tenants—landlord.

The tenants of a fixed rate tenancy are entitled, as between themselves, to divide the holding; such division cannot bind or anywise prejudice the landlord, but as between the tenants themselves it is perfectly legitimate.

Sheobalak Kalwar v Kalka Singh, 5 Ind Cas 317.

47.—S. 32—Division of tenancy—Abatement—Death of pro forma defendant.

Plaintiffs claimed a half share in an occupancy holding and prayed for possession of that share or such other relief as the Court might think fit to grant. The Court below passed a decree for possession of the share claimed.

Held, that this was substantially a decree for division of the holding and was opposed to S. 32 of the Tenancy Act. The plaintiffs were, however entitled to a declaration of right to one half of the holding. **Ashiq Husain v Arghari Begam. 4 A L J 809=30 All 90= 1908 W N 21.**

Notes:—Ref: 6 A L J 343 F B=31 All 348 =1 Ind Cas 594.

48.—S. 32 Cl. 2—Proceedings commenced—Partition of a holding—General Clauses Act 1 of 1887 (local) Sec 11.—

"Proceedings" include the whole proceedings from the filing of the plaint down to the final order in execution. Hence where a suit was instituted before the coming into force of the new Tenancy Act, but an appeal was filed after its coming into force:—*Held*, that the proceedings commenced when the plaint was filed, and that the last clause of Section 32, Act, II did not apply to such proceedings by reason of Section 11 of the Local General Clauses Act.

Saligam v Kharag Jit. 1 A L J 428.

49.—S. 32—Suit for exclusive possession of occupancy-holding—U P Land Rsvenue Act S 44 —Revenue Court refusing to correct an entry—Jurisdiction of Civil Court.—

Where a suit is brought by the plaintiff for exclusive possession of an occupancy-holding on

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the ground that the defendant is a trespasser, it cannot be regarded as a suit of division of an agricultural holding, and S. 32 of the Tenancy Act does not bar it. 1906 A W N 274 dist. The decision of the Revenue Court refusing to correct an entry in the revenue register as to the name of a tenant cannot preclude the plaintiff for maintaining a suit in the Civil Court. S 44 of the Agra and Oudh Land Revenue Act refers to registers A-D and not to register E. (1906) A W N 274 Dist. **Ajodhya Singh v Ram Dyal Upadya. 4 A L J 769= 1908 A W N 3.**

50.—S. 32—Act (Local) No. III of 1901 United Provinces Land Revenue Act) S 233—Civil and Revenue Courts—Jurisdiction—Suit for partition of a rent free plot:—

Held,, that a suit for partition of certain isolated plots of land alleged to be held rent free is not excluded from the jurisdiction of a Civil Court either by Section 233 of the United Provinces Land Revenue Act, 1901, or by Section 32 of the Agra Tenancy Act 1901, 6 All 452 ref to. **Abdul Karim v Ramzan 1909 A W N 197.**

Notes:—Apppr: (1908) A W N 279, 5 A L J 734, 31 All 49.

51.-S. 34-Applicability of the Section—Tenant holding with consent of Zemindar.

Section 34 of the Agra Tenancy Act. 1901, applies to a case where a person occupies land without the consent of the land holder. and not where he occupies it as his tenant. **Chidda Singh v Rup Ram 10 Ind Cas 224.**

Agra Tenancy Act.—Sections 40, 90 —**See** Landlord and Tenant —Compensation for improvements.

52.—S. 41—Enhancement of rent—Correction of Jamabandi as to rent—Determination of occupancy rights by temporary absence.

A zamindar can obtain an enhancement of rent, only in accordance with S. 41 of the Tenancy Act, which provides that the rent of an occupancy tenant should be liable to enhancement only by a registered instrument, and by a decree or order of a Revenue Court. An order to correct the *jamabandi* is not an order within the meaning of the section. The decree or order referred to in the section is the decree or order made by a Revenue Court on land-holder's application for enhancement of rent. A temporary absence of an occupancy tenant from his village owing to famine does not determine his occupancy rights. **Ganesh Baksh Singh v Mata Din. 1 Ind Cas 70.**

53.—S. 45—C P C—O 2 rr 3, 6 (1882 S 45) Application of, to N. W. P Tenancy Act—Suit for rent—Separate holdings—Joint suit not maintainable.

S 45 of the Code does not apply to suits for rent. A landlord cannot bring a joint suit for rent of several holdings, both occupancy and non-occupancy. The N W P. Tenancy Act contemplates separate suit for arrears of rent in separate holdings. **Jagannath Prasad v Tore. 3 A L J 610=A W N (1906) 253 29 All 18.**

54—Agra Tenancy act (II of 1901), Schedule IV (47), execution of decree—Limitation.

The period of limitation for application to execute a decree under the Tenancy Act for a sum below Rs. 100 is three years from the date of the final decree. The object of the Legislature evidently is to expedite the execution of decrees. Hence, where the decree-holder having obtained a decree for a sum below five hundred rupees on 14th March 1901, applied for its execution on 13th March, 1904 and the decree was partially satisfied by sale of the movable property of the judgment debtor. Held that an application subsequently made on 22nd August 1904 for realising the balance by sale of the immovable property was barred by limitation, the application being a fresh application to execute the decree in a different manner. (15 M L J R 243 Foll.) **Mohabbat Bahadur Lal v Uda Kunwar 3 A L J 324=1906 A W N 97.**

55—Ss. 48, 49, 50—Landlord and tenant—Position of person excluded from assessment—Exproprietary tenant—Auction sale of his right—Status of purchaser—Tenant at will—Ejectment.—Where a person did not refuse settlement under Act XIX of 1873, but was excluded therefrom and allowed *malikana* allowance in recognition of the proprietary rights which he has originally possessed;—*Held* that he thereby lost his proprietary rights and became the ex-proprietary tenant of the *sir* land which he had held as pro

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prietor. Any one purchasing the rights and interests of such person in the land formerely held by him as *sir* can only be deemed to be a tenant at will of such person. **Bhagwan Das v Manohar Lal 6 A L J 524**

56—S 51—Remision-Thikadar's rent not expressly remitted—Thikadar liable to the proprietor—Lessor and lessee.

In consequence of frost, the Government granted a remission of revenue and also of the rents of tenants. The rent of the *thikadar* was not expressed to have been remitted in the order of remission. *Held*, that the *thikadar* was not entitled to any deduction from the rent payable to the proprietor on account of the remission.
Shiam Lal v Makhan Lal 2 Ind Cas 629.

57—N W T Tenancy Act (11 of 1901), Ss. 56 57 (a) (c) (d) and 80—Ejectment, breach of conditions in the lease inconsistent with the provisions of the Act. No tenant shall be ejected otherwise than in accordance with the provisions of the Act.

Hence, where a decree for arrears of rent in respect of an agricultural holding has been obtained on account of an agricultural year which does not remain unsatisfied at the end of such year a decree for the ejectment of a tenant would be inconsistent with the provisions of the Act.

Held also, that the tenant is entitled to costs only, his lease expiring by elluxion of time after the expiry of the agricultural year in which the decree is passed reversing ejectment by the lower Courts. **Tara Singh v Khushal Kunwar 3 A L J 349=28 All 610=(1906) A W N 110.**

58-Specific Relief Act S 42-Suit for declaration of title by zamindar against tenants who had got their own names recorded as owners in the khewat-Further relief for ejecting tenants not asked-Suit not barred—Agra Tenancy Act (Local 1 of 1901) S. 56—Ejectment—Verbal denial of landholder's title by tenants;—Defendants, who were occupancy tenants of a certain grove land, managed to have their own names recorded in the *khewat* as proprietors in respect of the plot of land. The *zamindar* sued for a declaration of his title. Defence was that the suit was barred by the proviso to S. 42, Specific Relief Act, inasmuch as the plaintiff had omitted to ask for the further relief of

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ejectment of the defendants. *Held*, that the mere fact that the tenants had got their names recorded in the *khewat* and had thereby denied the landholder's title, did not give the landholder a right to sue for ejectment in a Civil Court, and that the suit was not barred by the proviso to S 42, Specific Relief Act, as no further relief under the circumstances could have been asked for by the *zamindar*.

Obiter dicta—Tenants cannot be ejected otherwise than under the provisions of S 56 Agra Tenancy Act (11 of 1901). A mere verbal denial of landholder's authority by tenant is not sufficient ground for ejectment under the Act. 21 All 143 Ref. **Inayat Ullah Khan v Khuda Baksh 1 Ind Cas 665**

59—Ss. 56,58,63—The provisions of Ss. 56 58 and 63 U P Tenancy Act, refer to cases where the relation of landholder and tenant exists between the parties. **Lalu Ram v Thakur Das 1905 A W N 53=2 A L J 156.**

60-Ss.57,31,179,199-Ejectment of tenant and sub-lessee-Appeal to Commissioner-Tenant setting up custom of transfer—Proprietary title.

If a suit for ejectment on the ground of an act or omission detrimental to the land in a holding inconsistent with the purpose for which it was let, is brought against a tenant alone, an appeal lies to the District judge from the decision of the Court of first instance. If the suit is for ejectment of the tenant and his transferee on the ground mentioned in cl (d) of S 57, it is a suit under the second clause of S 31 and is a suit mentioned in group C; Sch IV & an appeal in such a case lies to the Commissioner.

A suit for ejectment was brought against the defendant on the ground that he had let the land for building purposes and that that was inconsistent with the purpose for which the land had been let to him. The defendant pleaded that there was a custom in the village by which the tenants were competent to sub-let. The suit was partly decreed. *Held*, an appeal lay to the Commissioner. *Held* further that no question of proprietory title was raised in the defence. **Lachman Das v Nabi Baksh 6 A L J 39=31 All 109=1 Ind Cas 161**

61—S. 57(b)—Ejectment—Trees planted by tenant—Breach of contract.

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A tenant who plants in contravention of the contract under which he holds the holding is liable to ejectment under s 57 (d) of the Agra Tenancy act. **Shiam Narain Singh v Ram Prasad 10 Ind Cas 28.**

62—Determination by Revenue Court of question of Proprietary title—*Res judicata*—

In answer to a suit for ejectment under S. 58 of the Agra Tenancy Act, 1901, the defendants pleaded that they were not tenants, but had proprietary rights in the land. The Revenue Court under the provisions of S. 199 of the Act itself determined the issue thus raised and decided as to one of the defendants that he was a tenant of the plaintiffs, and this decision became final. *Held*, that the decision of the Revenue Court was a bar to the institution by the defendant of a suit in a Civil Court claiming to recover possession of the same land as proprietor.
Salig Dube v. Deoki Dube, 1907 A W N 1.

Notes—4 A L J 545, 1907 A W N 189, 29 All 691, 30 All 170=A W N (1908) 192=5 A L J 404, 6 A L J 527, 6 A L J 917; Fol: 29 All, 160.

63—Rent and Civil Courts—Title, question of—Orders of ejectment—When a Rent Court orders the ejectment of a tenant upon one of the grounds mentioned in S. 58 of the U P Tenancy Act deciding itself under S. 199 of the Act the question of title against him, he is barred by the rule of *res judicata* from re-opening the question of title in a civil court. A W N (1904), 109, *relied on*. **Salig Dube v. Deoki Dube. 2 A L J 334.**

64—N W P Tenancy Act (II of 1901). ss. 58 (a), 177 (e)—Question of proprietary title-Appeal to District Judge.

Where in a suit for ejectment in the Rent Court the defendant pleads that he has proprietary rights in the law and has paid neither rent nor revenue, and the Court of first instance finds that he has held the land rent-free, *held*, that an appeal lay to the District Judge under s. 177. clause (e). Tenancy Act. **Raj Bahadur v. Jasodia 2 A L J 786=(1905), A W N 259.**

65—Tenancy Act (II of 1901, Local), Section 63—Tenant—acquiring—Zamindari, effect of ejectment.

When a person enters upon a land as a tenant he is liable to all the incidents of the tenancy. The fact that during the time of his occupancy he acquires a share in the proprietorship of the village makes no change in his status. **Abdul Hasan Khan v Bhura. 3 A L J 763=1906 A W N 226=28 All 763.**

66—Ss, 63, 79, 167—Landlord and Tenant—Agra Tenancy Act (II of 1901), U P S. 79—Order in ejectment— Suit in Civil Court by lessee of a tenant-*Res judicata*-Jurisdiction of Civil. An occupancy tenant leased his land to the plaintiffs. Subsequently he relinquished his rights in favour of the *Zemindar*. The *Zemindar* took proceedings in the Revenue Court and got the plaintiffs ejected and put other persons as tenants of the land in dispute. In the meantime he continued to take rent form the lessees but without prejudice to his contesting the lease. *Held*, that the relation of landlord and tenant subsisted between the parties up to the date when the landlord got the lessees ejected. The suit of the lessees for possession was consequently a case which was cognisable by a Revenue Court and was therefore barred by the rule of *res judicata* on account of the judgment of the Revenue Court in ejectment proceedings. **Balwant Singh v. Girdhari Lal 5 A L J 30=A W N (1908) 33.**

67—S. 76 (1)—Crops or other products—Jasmine and Bela plants-Whether included in section.

Jasmine and *bela* plants come within the category of standing crop or other ungathered product within the meaning of S. 76 of the Agra Tenancy Act. **Ram Prasad Bhagat v Suba Rai 7 A L J 397=6 Ind Cas 74=32 All 458**

68—S. 76—Award under—Suit on award—Act II of 1901, (N W P Tenancy) Ss. 76, 193—treated as an application for execution—Continuation of proceedings. Appellant, zemindar J, obtained an order under Act XII of. 1881, for ejectment of the respondent and offered to purchase the crops. An award was made under S. 42 of that Act, by which the respondent was awarded a cartain sum of money. By this time, the N. W. P. Tenancy Act (II of 1901) had come into force; but the respondent instead of executing the decree upon the award, brought a suit for the recovery of the sum awarded, as was provided for under the old Act. *Held*, that the suit may be regarded as a continuation of the proceedings commenced under S. 42 of act XII of 1881. *Held*, further, that having regard to the provisions of S. 193 of the N. W. P. Tenancy Act, the suit may

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also be properly regarded as an application for execution. **Jhabba Lal v. Chandi Prasad 2 A L J 644=A W N (1905), 247.**

69—S. 79-Landlord and tenant—Dispossession of tenant—Landlord letting out land in occupation of tenant to a third person—Tenant's remedy in Revenue Court not Civil—Jurisdiction.

When a landholder lets out land in the occupation of tenant to a third party, and he, acting under the landholder's authority, takes possession of the land, then the tenant must be deemed to have been ousted by the land-holder, and his remedy is by a suit under S. 79 of Act II of 1901. (2 A. L. J. 69; 27 All: 372, Fol:) **Sokhai v Ram Pershad. 7 Ind Cas 486.**

70—N W P Tenancy Act (No. II of 1901)—Sections 79 and 87—Zamindar letting occupancy holding of a tenant to a third person—Suit maintainable—Limitation.

Where on the death of an occupancy tenant the Zamindar let the holding to a third person who obtained possession, the remedy of the heirs of the tenant (or their representatives) is by a suit under section 79, Tenancy Act, to which the person in possession ought to be made a defendant. Where such suit is brought more than six months after dispossession it must be dismissed. **Ramlal v Chuni Lal 2 A L J 69=1904 A W N 281=27 All 372.**

71—Tenancy Act (II of 1901), sectins 79,196, variety of relief-claim to recover possession of a holding by a tenant-Civil and Revenne Courts -appeal-district judge jurisditcion of applicability of section 196.

The policy of the Legislature is that suits and questions arising between landlords and tenants should be decided in the Revenue Court and the plaintiff by claiming a variety of reliefs cannot come into Civil Court and set aside proceedings already had in the Revenue Court. Where the plaintiff alleged that one L. whom the plaintiff represented, was one of the tenants at fixed rate of a holding of which G was the recorded tenant and from waich G alone was ejected, and claimed a variety of reliefs, but in reality wanted to be restored to possession of the holding which had been ejected, on the ground that the ejectment proceedings in no way bound him, held that the suit did not lie in the Civil Court. Section 196 only applies to a case which was instituted in the wrong court but on appeal comes before the court to which an appeal would have lain if the suit had been rightly instituted in the prescribed court. **Ram Charan Ram v Sheora. 3 A L J 226=1906 A W N 91.**

72.—S. 83 (3)—Surrender of a holding by oral agreement—No notice necessary.

Under S 83 (3), it is open to the landlord and the tenant to agree orally to a surrender of the whole or any portion of a holding at any time of the year. When such an arrangement has been made, it is not necessary for the tenant to give the landlord notice as contemplated by cl. 2 2 of S, 83 (A W N (1898) 31; A W N (1902) 201; A W N (1905) 201; 2 A L J 665, Dist) **Kalayan Singh v Man Singh. 7 Ind Cas 637.**

73.—N W P Tenancy Act (No. 11 of 1901) Ss. 83,85—Landlord and tenant-Surrender, notice of.

The appellants, tenants applied to the Tahsildar to serve a notice of surrender on the respondent zamindar, but they did not state that they had already sent a notice of their intention to surrender to the landholder, and that he had refused to accept it.

Held, that the notice served by the Tahsildar on the landholder in compliance with the application of the tenant was not a good notice within the meaning of section 85 of the Agra Tenancy Act. The Tahsildar had no authority to effect service of such notice upon the landlord unless he had refused to accept a notice under section 83. **Sumera v Piare Lal. 2 A L J 665=1905 A W N 201=28 All 122.**

74.—N. W. P. Rent Act (XII of 1881), Sections 93, 189—N. W. P. Tenancy Act (Act 11 of 1901).

Section 180, clause *2*, section 175 Letters Patent, section 10.—No Appeal lies under section 180 clause 2 Act II of 1901. to a District Judge, from the appellate order of a Collector which does not decide a question of jurisdiction. When the Collector's decision was passed under Act XII 1881, and the appeal was filed after the coming into force of Act 11 of 1901. *Held* that the latter Act governed the right of appeal. An appeal lies under section 10 of the Letters Patent from the judgment of a

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single Judge disposing of a rent appeal. Section 575 of Act II of 1901 has not the effect of modifying section 10 of the Letters Patent. **Zamin Ali v Genda. 26 All 375= A W N (1904) 48=1 A L J 105.**

75.—S. 95—Fixed rate tenancy recorded in the name of predeceased son's widow and her father-in-law—Application of—Jurisdiction of Civil Court to declare title—Hindu law-Widowed daughter in-law.

Section 95 of the Tenancy Act applies only to suit between landlords and tenants. Where a father-in-law, by an application to the Revenue Court, got his predeceased son's widow's name recorded along with his own as a fixed rate tenant, and died intestate, held that the Civil Court could entertain a suit by the reversioners for possession of the fixed rate tenancy. *Held* further that, under the Hindu Law, a widowed daughter-in law was only entitled to maintenance. **Kali Charan v Musammat Utmi 7 A L J 658=6 Ind Cas 581.**

76.—S. 95—Claim between rival tenants—Tenancies at fixed rates- Suit for declaration of right of joint tenancy Alternative prayer for joint possession--Jurisdiction of Civil or Revenue Court.

The plaintiff brought this suit, against her rival claimant to the tenancy, for a declaration that she might be declared to be entitled to joint possession with the defendant over the property in dispute. She added a further prayer that, if she were deemed out of possessions she might be given joint possession over the property: *Held*, that such a suit was within the jurisdiction of a Civil Court. S. 95 of the Agra Tenancy Act had no application to the suit. (28 A. W. N. 3 Ref.).

Musammat Dhanpati v Jokhan Ahir. 2 Ind Cal 401.

77.—S. 95-Question of proprietary title-Code of Civil Procedure (Act V of 1908) S. 115—Revision.

In a suit under section 95 of the Tenancy Act, the defendant pleaded that he was a proprietor The Assistant Collector decreed the claim partially. The District Judge upon appeal decided the question of proprietary title, but remanded the case to the Assistant Collector for the assessment of rent on a portion

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of the holding. The Assistant Collector thereupon dismissed the suit, holding he was not competent to deal with it. Upon appeal the District Judge returned the memorandum of appeal for presentation to the proper Court. *Held*, that in so acting, the District Judge had faild to exercise jurisdiction, inasmuch as, a question of proprietay title having been raised, the appeal lay to him. **Ram Charan Lal v Muhammad Shafi. 8 A L J 894.**

78.-Ss. 95, 167—Rival claimants to tenancy—Civil and Revenue Courts—Jurisdiction.

S. 95 of the Tenancy Act does not apply to the case of disputes between rival claimants to a tenancy. It applies to questions, arising between the landlord on the one side and the tenant on the other. *Prima facie* the Civil Court is the proper Court to try all questions and it is only when suits are expressly excluded from its cognizance that its jurisdiction is ousted. The provisions of s. 95 coupled with the provisions of s. 167 do not exclude the jurisdiction of a Civil Court in questions between rival claimants to tenancies. The very words of section 95 providing that the "landlord or tenant" may sue show that the intention of the section is to provide a tribunal for questions arising between a landlord and tenant. The section does not provide for possession; it only provides for a declaration; and thus it contemplates the case of a landlord and a tenant and an existing tenancy. **Bhup v Ram Lal 8 A L J 1009.**

79.—S. 95—Rent must be agreed upon or fixed by the Court—Right of suit.

In the case of agricultural tenants, if the landholder wishes to get rent for the period of tenancy, he must either come to an agreement with the tenant as to the rent to be paid, or get the rent fixed by the Court while the tenancy subsist. There is no difference in this respect between the present Tenancy Act and Act XII of 1881. **Sheo Gopal Pande v Thakur Baldeo Singh. 8 A L J 1087,**

80—S. 95 Cl (b)—Declaration that the plaintiff as the adopted son of a tenant was entitled to his tenancy—Declaration of tenancy—Jurisdiction—Civil Court.

One D applied to revenue authorities that his adoptive father, I, was joint in cultivation with

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him and that his name should be recorded in respect of I's occupancy holding. The Collector dismissed the application on the ground that D was not the adopted son of I. D brought this suit in Civil Court for a declaration that he was joint in cultivation with D and that he was the adopted son of Ishir and that on account of the right of survivorships and his being joint in cultivation he was entitled to the possession of the estate of Ishir and of the occupancy holdings. *Held*, that the nature of the suit was that the plaintiff wanted a declaration as to the class of tenancy to which he belonged and its cognisance by the Civil Court, was barred by Cl. (b) of S. 95 of the Agra Tenancy Act. **Dori Lal v Sardar Singh. 1908 A W N 240=5 A L J 514.**

81—S. 101—Civ. Pro. Code. (Act V of 1908. S 11—Interest—Previous suit for interest on rent for a different period—*Res judicata*—Remission of revenue—Thikadar's liability to pay interest for the remission period on arrears of rent.

Where a Thikadar undertook to pay the Government revenue, and also a fixed sum as rent to the Zamindar he cannot claim exemption from payment of rent, on the ground that the Government has remitted the revenue on condition that the Zamindar should remit the tenant's rent. Under S 101 of the Agra Tenancy Act, he is also liable to pay interest on arrears of rent. The fact that in a previous suit for recovery of rent for a period other than that in the present suit, it was decided that interest was not payable does not operate as *res judicata*. **Bachan Lal v Musammat Pooran Kunar 1 Ind Cas 529.**

82—Ss 105 and 106-Jurisdiction to appeal an Amin—Powers of Amin-Not entitled to determine rent. When there is no dispute about the the disivion of the crop or its quantity or value, a Court has no jurisdiction to appoint the Amin to make an award. Where an Amin has been appointed under s. 105, his duty is only to estimate or appraise, and not to decide the proportion the lambardar was to receive from the tenant. Sub-section 6 of s 106 only entitled the Amin to determine the rent, as the result of what he finds to be the quantity and value of the crop, and his award is not final within the meaning of sub-section. **Rahim Bakksh v Ahmad Ali Khan 4 A L J 488= A W N (1907) 189**

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83—S 108—Entries of payment in pocket book=Presumption of full payment—Rent.

In a suit for arrears of rent due from lessees, the latter pleaded payment and in support of their plea produced a pocket book which contained certain entries of payments made. Payments were admitted by the plaintiff but he denied that they were accepted as a full discharge of claim. Held that the entries in the pocket book did not amount to receipt within the meaning of s 108 Agra Tenancy Act so as to raise a presumption that the amount entered in the pocket book amounted to an acquittance in full of all the demands up to the date on which entries were made. **Gulab Singh v Debi singh. 8 A L J 505.**

84—Act (Local) No II of 1901 (Agra Tenancy Act, s 134—Distraint sale adjourned owing to absence of bidders—Obstruction to sale on adjourned date Act No XIV of 1860 S 184

The law as laid down in Chapter IX of the Agra Tenancy Act 1901, does not authorize the adjournment of a sale of distrained property owing to the absence of bidders. Hence where for this reason an amin adjourned a sale and fixed a fresh date and obstruction was offered to the sale so adjourned it was *held* that the person so obstructing the sale could not be convicted under S.184 of the Indian Penal Code. **Emperor v Tara Singh 27 All 480**

85—Agra Tenancy Act s 146—Cause of action—Suit for damages—Knowledge of plaintiff.

A cause of action in favour of the plaintiff for bringing a suit for damages for loss of the property distrained under s 146 Agra Tenancy Act, arises when the property is lost, damaged or destroyed, or the loss, destruction or damage comes to his knowledge. The plaintiff's property was distrained by the defendants; security was furnished by the plaintiff and an order for release was made on 2 nd may 1906. Some property was made over to the surety before 31st May and some on 9th June when it was found that the rest of the property was not forthcoming. Held that the cause of action for bringing a suit for damages accrued to the plaintiff latest on 9th June. **Dambar Singh v Balwant Singh 8 A L J 503**

86—Ss.150,158,167—Rent-free grant—Proprietary title—*Res judicata*—Jurisdiction of Civil or Revenue Court.

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The plaintiff sued in the Civil Court for a declaration that he was the proprietor of a certain plot of land which he had been holding as a rent-free grantee for over fifty years. In a former suit instituted in the Revenue Court the defendant had obtained a decree for resumption of the same plot under S 150 of the Agra Tenancy Act 1901 against the plaintiff. Held that the present suit was barred on account of the former suit between the parties:

Held, further that the question of proprietary title based on what was originally at least a rent-free grant was exclusively triable by Revenue Court. The Civil Court had no jurisdiction to try such case. **Baldeo Singh v Mardan Singh 6 Ind Cas 425=7 A L J 818 see also 6 Ind Cas 245=7 A L J 828.**

87—S 150—Rent-free grantee—Resumption-Suit for declaration that defendant is rent-free grantee—Jurisdiction of Civil or Revenue Court—*Res judicata.*—In a suit for resumption of a rent-free grant the Revenue Court held that the defendant had become a full proprietor. The plaintiff thereupon brouget a suit in the Civil Court for a declaration that the defendant was only a rent free grantee: *Held* that the suit was triable exclusively by a Reveuue Court and was thus not cognizable by a Civil Court. 7 A L J 818= 6 Ind Cas 425 Fol. **Miss N. Sturmer v Chatoo Rai 9 Ind Cas 813.**

88—Appeal—Agra Tenancy Act (11 of 1901), S. 157—S, 310A. Code of Civil Procedure (Act XIV of 1882)—Jurisdiction.

Two decrees were obtained in the Revenue Court one for costs resulting in proceedings under S. 39 of Act III of 1901, and the other passed under S. 159 of Act II of 1901. The decrees were consolidated and one sale was held on account of both of them. The judgment-debtor applied to the Assistant Collector, offering to pay in the sum decreed under S. 310A, Code of Civil Procedure as made applicable to rent courts. The application was rejected by the Assistant Collector, and the auction purchaser obtained formal possession over the house in question. On appeal by the judgment-debtor the Collector set aside the order of the Assistant Collector and extended the time for payment. The money was paid in and the sale set aside. The Board of Revenue rejected the application for revision made by the auction purchaser who, thereupon brought a suit for confirmation of the sale in the Civil Court. Held, whether the sale was held under Act III of 1901 in which case appeals from orders passed in execution would lie to the Collector, Commissoner and the Board of Revenue, under Ss. 210,211 or in an order passed on the application under s. 310A was one passed under Act No. 11 of 1901 the Civil Courts had no jurisdiction to entertain any question relating to it. Whether or not an appeal lay to the Collector from the orders of an Assistant Collector, the Board undoubtedly had the power of revision.

Chhakawin Khan v Pir Baksh Khan. 6 A L J 164=31 All 279=2 Ind Cas 32

89—S. 158—Possession for two generations and 50 years—Grant—No presumption—Wajib-ul-raz—Construction of.

The Raja of Mainpuri gave certain lands to plaintiffs for planting groves on the condition that, when the groves were cut away, the zamindar would have a right to assess rent but the plaintiffs would remain in possession. These terms were recorded in *wajib-ul-arz* The groves were destroyed when the piantiffs had been in possession for two generations and 50 years. Held, that, under the terms of the *wajib-ul-arz*, the plaintiffs became tenants of the lands in question when the groves ceased to exist.

The mere fact that the plaintiffs had remained in possession for two generations and 50 years without payment of rent did not raise the inference that a rent free grant was made in their favour. Without proof of such a grant, S. 158 of the Tenancy Act did not apply.

Shoe Mangal Singh v. Sardar Singh. 6 A L J 749=2 Ind Cas 985.

90—S 158—Act (local) No. III of 1901 (United Provinces Land Revenue Act) ss. 103, 66 and 210—Suit asking for assessment of revenue on a certain area of land—Misdescription of suit—Appeal.

Where the plaintiff sued in a Court of Revenue, asking for revenue to be assessed on a certain area of land, and describing his suit as one under S. 158 of the Agra Tenancy Act, 1901 where as he should have come to Court under s. 103 of the United Provonces Land Revenue Act, 1901, or possibly under s. 66 of the same Act, it was

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held, that an appeal lay to the superior Revenue Court and not to the District Judge. **Narain Das v. Balgobind.** **A W N (1907) 225**

91—Agra Tenancy Act s. 158—Successor, meaning of—Resumption of rent free grant.

The word "successors" used in s. 158 of the Agra Tenancy Act is wide enough to include not only an heir but a transferee also. **Sunder Singh v The Collector of Shahajahanpur** **8 A L J 539.**

92—Agra Tenancy Act S. 158—Rent-free grant—Presumption—"Two successors" meaning of—Proof as to who the original grantee was.

S. 158 of the Agra Tenancy Act does not provide that the person succeeding must necessarily be the heir of the person who preceded him For the purpose of S. 158, it is not necessary to prove who the original grantee was.
Nihal Singh v. Baldeo Pershad **10 Ind Cas 39.**

93——Suit by co-sharers against lambardar—Lambardar entitled to 5 per cent, on the Revenue—Agra Tenancy Act (11 of 1901) S. 159—"Other dues"—Set off. In a suit for profits by co-sharers against a lambardar, the latter shall be remunerated by fees not exceeding 5 per cent on the Government revenue, and he is also entitled to the village expenses incurred by him.

The expression "other dues"—in S. 159 of the Tenancy Act includes *lambardari* dues.

Pokhar Singh v. Gulab Kunwar **4 A L J 781=A W N (1908) 2**

94—Under S. 159 of the Agra Tenancy Act, 1901, a *lambardar* is entitled to sue a co-sharer for the recovery of his remuneration.

A *lambardar* is entitled to his remuneration even though the co sharer has himself paid the revenue into the Government treasury.

A lambardar is not entitled to interest on his fees. **Bhoj Raj v. Srigopal 7 Ind Cas 647.**

95—Tenancy Acts (3 and 4) U P Act 11 of 1901 S. 162—Suit to recover arrears of malikana allowance—Civil and Revenue Courts—Jurisdiction—Act XV of 1877 (Indian Limitation Act) Sch II, Art 132—Limitation.—*Held* that a suit for

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the recovery of arrears of malikana allowance will lie in a Civil Court and is governed as to limitation by Art, 132 of the second Schedule to the Indian Limitation Act, 1877. N W P H C Rep 1870, p 228 D. **Manohar Lal v Kashi Ram** **A W N (1908), 209**

96—Ss 164(2) 166—Successor of a Lambardar, liability of—For profits not collected by his predecessors:—

The successor in title of a deceased Lambardar is not liable to account for profits which his predecessor may have failed to collect or which he permitted to remain un-collected owing to negligence or misconduct **Dip Singh v. Ram Charan. 1906 A W N 265=3 A L J 608= 29 All 15.**

Notes—Fol:—1907 W N 107=4 A L J 244

97-C.P.C. O 2 r. 2 (1882 S. 43)-First suit for settlement of accounts and profits againt co-sharer—Second suit for profits against the same defendant as lambardar—Agra Tenancy Act (11 of 1901) Ss. 164, 165—Suit of Civil Nature.

The plaintiff brought two suits against the same defendent. One suit was for settlement of accounts under S. 165, Tenancy Act, against the defendant in his capacity as co-sharer, and the other was for share of profits under S. 164 in the defendant's capacity as lambardar. Held that the suits were of different descriptions, and the causes of action for the two suits were not the same, inasmuch as the legislature, by enacting Ss. 164 and 165, Tenancy Act, contemplated two classes of suits. The second suit was not therefore barred by S. 43 of Act XIV of 1882.
Chunno Lal v Parbhu Dial 7 A L J 526.

98—Ss 164, 197—Suit for profits—Question of jurisdiction—Civil or Revenue Court—Appellate Court, power of.—A suit for profits was brought in a Revenue Court, but was dismissed on the plea of want of jurisdiction being taken on behalf of the defendant; an appeal was made to the District Judge who also dismissed the suit: *Held*, that under s. 197 of the Agra Tenancy Act, it was the duty of the appellate Court to treat the suit as properly instituted and deal with it on merits. **Bharat Indu v. Khetsi Das,** [illegible] **Ind Cas. 848**

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99—S. 164 (2)—Negligence of predeccessor-Decree against defendant not justified Section 164 (2) of the Tenancy Act does not justify a decree against a defendant lambardar, for a share in sums, which remained uncollected, on account of negligence or misconduct of the predecessor of the defendant. 3 A L J 608 fol **Gulzari Lal v Dan Dayal** **4 A L J 244= A W N (1907) 107**

100—S. 165—Suit for profits against co-sharer—Actual collection of gross rental—Calculation of profits—In a suit for profits brought by a co-sharer against another co sharer under s. 165, Agra Tenancy Act, only the actual collections made by the defendant co sharer are to be taken into account, in determining the amount of profits due, and not what might have been collected. A W N (1908), p 68 Fol, **Ram Lal v Tasaduk Ali** **2 Ind Cas 260.**

101—S 165—Possession in proportion—Suit for settlement of accounts —

Where the plaintiff and the defendants were in exclusive possession of the cultivated portion and in joint possession of the uncultivated portion of the village in the proportion of 12 to 4 and the terms of the wajib ul arz in respect to the latter were that if a co-sharer would cultivate waste land newly broken up he should pay rent like tenant and a co-sharer did break up and cultivate portion of waste land, held that the reasonable interpretation of the contract was that if either party brought into cultivation any of the waste land, he should become and be treated as tenant to his co-sharer of the part so brought into cultivation and that he should be liable to pay rent to his co-sharer in proportion to the shares in which the village was held. As there were no accounts to be settled, the suit might be maintained in the form in which it was brought. **Hab Lal v Ramcharan** **3 A L J 472**

102—Agra Tenancy Act Ss 164, 165 -In a suit under s. 164 of the Tenancy Act, only the actual collections made by the defendant, are to be taken into account in determining the amount of profits due In a suit like the present a plaintiff is not entitled to have profits calculated on what might have been collected or on the rates paid by tenants in other khewates, for lands of the same kind.

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This constitutes the distinction between a suit of this nature and one under S 165 Tenancy Act **Abdul Rashid v Abdul Latief** **5 A L J 117=A W N (1908), 68**

103-Ss 167, 177 196, 197—Execution of decree—Appeal—Revision—Jurisdiction.—A suit was dismissed by the Revenue Court as not cognizable by it, and the District Judge, upon appeal, having dealt with it under Ss. 196 and 197 of the Tenancy Act, made a decree, execution of which was applied for in the Court of the Assistant Collector of the first class who rejected the application. *Held*, that no revision lay against the order of the Assistant Collector refusing execution. **Damber Singh v Sri Kishan Dass.** **6 A L J 552=2 Ind Cas 377= 31 All 445.**

104—S 167—Suit for ejectment—Class of tenancy determined—Subsequent suit in Civil Court—Not maintainable

In a suit for ejectment of the defendant on the ground that he was a tenant-at-will, the Revenue Court decided that he was a tenant at fixed rate. The present suit was brought in the Civil Court for ejectment of the defendant on the ground that he was a trespasser. *Held* that the Revenue Court having determined the nature of the defendant's tenancy and the class to which he belonged, a suit in the Civil Court could not be maintained **Maharaja of Vizianagram v Chango Kurmi** **7 A L J 555= 6 Ind Cas 834.**

105—Ss 167 and 177 (e)-Ejectment-Defence that defendant is a proprietor—Question of proprietary title-Limitation Act Section 5—Appeal presented to wrong Court In a suit for ejectment the defendant pleaded that he cultivated the land as a co sharer *Held*, that this defence raised a question of proprietary title and an appeal lay to the District Judge.

The appeal was, however, preferred to the Commissioner who returned the memorandum of appeal to be presented to the District Judge.

It was presented beyond time, but the Judge admitted it *Held*, that the Judge exercised a right discretion in admitting the appeal.

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When a co sharer cultivates more land than his share he is not liable to ejectment as a tenant, but the proper remedy against him is by a suit for settlement of accounts 2 A L J 176 Ref

Indar Lal v Deojit **4 A L J 1= A W N 1907, 26**

106—Limitation Act (No XV of 1877)—Article 179—Step in aid of execution—application for ejectment. An application for ejectment of a tenant against whom a decree for arrears of rent had been passed, is not a step in aid of execution and cannot keep the decree for arrears of rent alive.

Querry—Whether an appeal lies to the District Judge against an order passed by an Assistant Collector in execution proceedings, and if such order has the force of a decree. (27 All 31 Doub)

Maharani of Dumraon v Buddha Kunwari 2 A L J 661=A W N (1905) 213 =28 All 163.

107—S 174—Lease by Collector—Proceedings commenced before the passing of Act II of 1901—Termination of —In executing a decree of a Rent Court the Collector, purporting to act under S 174 of the N W P Rent Act made a lease of the judgment debtor, after the passing of the Tenancy Act II of 1901 In a suit brought to set aside the lease *held* that, the execution proceedings, having commenced before the passing of the new act should have been completed under that act and the Collector could grant a lease of the property instead of selling it

Ghulam Abbas v Abdulla Khan. 5 A L J 472=A W N (1908) 219

108—S 175—No appeal from orders to execute a decree—Orders—Decrees—

An appeal does not lie from an order of an Assistant Collector of the first class passed on an application to execute a decree of a Court of Revenue, such orders not having the force of decrees (1905) 27 All 31 overruled

Musammot Zohra v Manju Lal 1906 A W N 223=3 A L J 569 F B =28 All 753.

See also 28 All 163=2 A L J 661=1905 W N 213

Notes—Fol 5 A L J 184 note Ref 31 All 445; 6 A L J 552

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109—Tenancy Act (Agra) Ss. 176, 177—Dismissal of suit for default by Rent Court—Decree or order—not appealable—Code of Civil Procedure (XIV of of 1882) S 2—

The Tenancy Act confers no right of appeal from an order Hence where in a suit for profits in the Rent Court, the suit was struck off the file for default of appearence, *held* that the order was not appealable **Karnapal Singh v Bhimma Mal 7 A L J 246=5 Ind Cas 423= 32 All 373.**

110 - Act (Local) No II of 1891 (Agra Tenancy Act) Ss 176, 177, 195—C P C Ss. 2 244 order—Decree—Appeal

No appeal lies from the order, as distinguished from the decree, of an Assistant Collector of the first class **Zohra v Mangulal. 28 All 753.**

111—Tenancy Act (Agra) S 177—Proprietary title—Defendant pleading to hold the land as *khudkasht* and not as *shikmi*—Appeal to district Judge Jurisdiction —In a suit for ejectment, the defendant pleaded that he held the land as *kaudkasht* and not as *shikmi* from the plaintiff The claim was decreed against him. He appealed and raised the same question as in the Court of first instance. *Held*, that the question was one of proprietary title and an appeal lay to the District Judge 2 A L J 176; A W N (1905) 46 Fol. **Partap Singh v Kewal Ram. 7 Ind Cas 737**

112—S. 177— Decree, meaning of, S. 177 —Civ. Pro Code (Act XLV of 1882) S 54 (d)—Order of Assistant Collector rejecting plaint—Appeal.

An order passed by an Assistant Collector of the first class, rejecting a plaint under S 54 (d) —of the Civ Pro Code 1882 not being a decree within the meaning of S 177 of the Agra Tenancy Act is not appealable to the District Judge. (28 All 753 A W N (1906) 223, 2 A L J 569 F. B Foll. (1901) A C 495 (506) 70 L J P C 76, 65 J P 708 17 T L R 749 50 W R 139 85 L T 289 27 All 31 Ref **Moulvi Mohamed Abdul Aziz v Moulvi Mohammad Abdul Jalil 5 Ind Cas 371**

113—S 177-Subject—matter of suit exceeding Rs 5,000-Appeal to High Court-Jurisdiction.

The subject-matter of a suit decided by an Assistant Collector of first class being above

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Rs. 5,000 an appeal lies to the High Court, and not to the District Judge **Moulvi Abdul Majid v Moulvi Abdul Ghani 6 Ind Cas 249.**

114.—S 177—Appeal—suit for recovery of fees under the Excise Act—Relief for compensation joined—not entertainable by the Assistant Collector—no appeal lies

S. 28 of the Excise Act is confined to the recovery of arrears of fees. Under the section the plaintiff is not entitled to sue in the Revenue Court, for recovery of compensation or damages in respect of a breach of contract.

Where a claim for fees, amounting to a sum below Rs. 100 is not entertained by the Assistant Collector, no appeal lies to the District Judge, under S, 177 of the Tenancy Act, supplemented by S. 28 of the Excise Act, and no second appeal will lie to the High Court.

Jugal Kishore v. Mul Chand 3 A L J 802= A W N (1906), 314

115—S.177—Appeal-Question of proprietary title—Sir holder and his subtenant.—

Where the plaintiffs sued the defendant for rent of their sir land alleging that he was their sub tenant and the defendant claimed to be the principal tenant. *Held* that as between the plaintiffs and the defendant there was a question of ownership of the particular land and the question raised was a question of proprietary title and an appeal lay to the District Judge against an appellate decree of a Collector. **Chhitar Singh v. Rup Singh 1906 A W N 247=3 A L J 603.**

Notes—Overr: 30 All, 133=(1908) A W N 145=5 A L J 71; dist. (1908) A W N 89 =5 A L J 128.

116—Question of proprietary title—Decision by Assistant Collector—Appeal—Agra Tenancy Act (II of 1901) Local Ss. 177 and 199. It is the intention of the legislature, that all suits, in which question of proprietary title are raised, should be decided by Civil Courts.

Where a suit for ejectment was brought in the Court of an assistant Collector, and the defendant denied that he was a tenant and the Court decided to determine the question of title, it ceased to be a Revenue Court and became for the moment a Civil Court. An appeal against the decision in such cases should be preferred to the District Judge. If an appeal was preferred to the Commissioner, the Commissioner's decision was without jurisdiction and did not operate as a bar to any subsequent proceeding. **Genda v Sukh Nath Rai. 4 A L J 686=A W N (1907) 271=30 All 25.**

117—S 177—Which party a tenant-Question of proprietary title. The question which of the two parties is a tenant of specified land, is not a question of proprietary title. A W N 1906, 247 overruled. **Niranjan v. Gajadhar 5 A L J 71 = A W N (1906) 45=30 All 133.**

118-N W P Tenancy Act (11 of 1901), Ss. 177 (e) 195—Question of proprietary title—Occupancy holding or khudkasht—Appeal to District Judge. Where the plaintiffs in ejectment suit in the Revenue Court claimed to be occupancy tenants of certain land and the defendant zamindar claimed the same as his khudkasht; held, that a question of proprietary title was in issue, and the appeal lay to the District Court. Though there was no denial of the defendant's proprietary interest in the property, there was denial that by virtue of proprietorship he held possession of the land in suit. **Dal Chand v. Samla. 2 A L J 179=1905 A W N 46.**

Notes=Ref (4 A L J 91 = 1907 A W N 26,) Dist 5 A L J 128=(1908) A W N 69,

119—Ss.177, 193—Civil P C S 244—Execution sale—Collector's order setting aside—Appeal to District Judge. No appeal lies to the Civil Court or the Board of Revenue against an order of the Collector passed under s. 312 Code of Civil P. But where the Collector sets aside a sale as void *ab initio* his order must be looked upon as one passed under s 244 Code of Civ. Pro. It will therefore have the force of a "decree" and an appeal will be against it to the Civil Court. (1 A L J. 305=A W N (1904) 156 Fol)

Muhammad Yusuf Ali Khan v Hasan Fatima. 2 A L J 130=1905 A W N 55

120—S. 177 Sch IV (Group A)——Second appeal to District Judge-Proprietary title, question of. When a person, against whom a suit for arrears of rent is brought, only pleads that the relation of land lord and tenant does not subsist between him and the plaintiff, and Assistant Collector and

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the collector decided against him, no second appeal lies to the District Judge inasmuch as no question of the proprietary title is involved in the case. A W N (1905) 46. A W N (1906) 247 dist **Ahmad-ullah Khan v Murli 5 A L J 128= A W N (1908) 69.**

121—Ss 177,175—Powers of Board of Revenue—Revision—Appeal to the Judge. The Board of Revenue has no power to interfere in revision in cases in which appeals lie to the Civil Court. Where the Board, professing to act under the provisions of s 185 of the Tenancy Act set aside an order of an Assistant Collector in a cess in which appeal lay to the Judge, *held*, that the order was *ultra vires* and did not authorise the Assistant Collector to rehear the case. **Narain v Parsanni. A W N (1905) 119=2 A L J 331.**

122—S 177 cl. (e)—Question of proprietary right—Appeal.—

In answer to a suit to eject the tenant, as being a tenant from year to year, the defendant pleaded that she held proprietary *malikana* rights in the land and that she paid neither rent nor revenue. The Court of first instance went into the question, and found that the defendant and her predecessor-in-title had held the land free of rent. *Held* that an appeal lay in this case to the District Judge under s.177cl.(e) of the Agra Tenancy Act 1901. **Raj Bahadur v. Jasodhia A W N 1905, 259=2 A L J 786.**

123—A suit cognizable by Civil Court was filed in a Revenue Court, which decided a question of jurisdiction raised before it: *held*, that an apeal lay to the District Judge. who, acting under S. 196 or S. 197 of the Agra Tenancy Act, could decide the case on merits, although the Court, in which the suit had been instituted, was a Court which had no jurisdiction to try the suit.

Held, further, that where the appellant had not filed the appeal in a proper Court,owing to some *bona fide* mistake as to Jurisdiction, the period, during which he had been under the mistake, shall not be computed towards the period of limitation. **Ganga Sahai v. Musammat Rai Kunwar. 1 Ind Cas 902.**

124—Ss 177,193—Sch IV-Decree of Assistant Collector class 1 order in execution-Appeal to District Judge Civil Procedure Code,ss 2,244-Decree. An order made by an Assistant Collector of the first class in execution of a decree for over Rs. 100 in a suit falling under groups A and B of Schedule IV N W P Tenancy Act is a "decree" within the meaning of section 177 of that act and an appeal will lie therefrom to the District judge (unreported (*1*) approved) **Kharag Singh v Pala Ram 1 A L J 305=1904 A W N 156 =27 all 31 overruled by 1906 A W N 223 =3 A L J 569 F. B.**

Notes-Fol 2 A L J 130=(1905) W N 55. Doubt 28 all 131=2 A L J 661=(1905) W N 213 over 28 all 753 F B=3 A L J 566=(1906) W N 223. 5 Ind. Cas 371,Ref 31 all 445 6, A L J 552

125-Agra Tenancy Act S 177-Order by Assistant Collector regarding execution when and whether appealable. An order in execution of a decree of an Assistant Collector, the value of the suit in which the decree was passed exceeding Rs. 100 and therefore falling under Group A, is within the definition of the term "decree" being an order under s 244, C. P. C. and is therefore appellable. **Naraini v. Parsani 1 A L J 307** note.

Notes—Ref 1 A L J 805 27 All 31=(1904) A W N 156.

126—S. 177—Landlord and tenant—Assessment of revenue suit for—Plea that a third person is zemindar—Proprietary title—Question between the third person and plaintiff tried-Appeal to District Judge.

A brought a suit against B for assessment of revenue. B pleaded that the land in question fell within the zemindari of C and not of A C was made a defendant in the suit. The question whether the land fell within the zemindari of A or C was tried by the first Court; held, that, as a question of qropritary title was raised, an appeal lay to the District Judge under s. 177 of the Tenancy Act. 1901. **Parbhu Narain Singh v. Baldeo Prasad, 8 Ind, Cas 817.**

127-S.180-Appellate decree of Collector in rent suit—Question of proprietary title raised —No appeal to District judge—Subsequent suit for declaration of title in Civil Court—*Res judicata* A person who is declared by a Collector in an appellate decree to be an occupancy tenant, and who has not appealed against that decision, under S. 180 of the Agra Tenancy Act, to the District judge,and has allowed the Collector's decree to become final, cannot, in a Civil Court, obtain decla-

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ration that he is not an occupancy tenant but a proprietor of certain plots of land Such a civil suit is barred by the principle of *res judicata* (29 All 601, 2 Ind Cas 218=6 A L J 259 Ref

Kalyan v Tika Ram **2 Ind Cas 353**

128—S 180 Code of Civil Procedure Ss 551, 584—Appeal—Question of title— Notice to respondent—

An appeal under section 180 (2) of the Agra Tenancy Act II of is not a second appeal of the description contemplated by sec 584 of the C P C The procedure of Sec 551 of the Code is inapplicable to appeals where notice has already been issued to the respondent **Hamid Husain v Bholanath 1906 A W N 186**

129—N W P Tenancy Act (II of 1901) Ss 180 193—Appeal order of remand—Rent suit

An order passed by a District Judge remanding a rent suit for retrial does not amount to a decree S 588 of the Civil Procedure Code does not apply to proceedings in rent suits and therefore no appeal would lie to High Court against an order of remand under Sec 562 of the Civil Procedure Code. **Zahur Ali v Sher Ali 3 A L J 20=1906 A W N 5=28 All 283.**

130—Ss 180 182 (1) Collector's appellate order returning plaint—Appeal to District Judge—C P C Ss 2 588

Under S 180 (cl 2 N W P Tenancy Act) no appeal lies to the District Judge from an appellate order of the Collector as distinguished from a decree An order returning a plaint for representation to the proper Court is not a decree within the meaning of the sections providing for appeals in the N W P Tenancy Act In order to find what are orders and what are decrees under the N W P Tenancy Act 1901 the definitions contained in C P C. Section 2 must be applied **Dhanu Ram v Bhola Singh. 1904 A W N 152=1 A L J 308=27 All 21**

131—S 182—Second appeal to District Judge—Further appeal to High Court—No appeal lies to the High Court from a decree of the District Judge deciding a rent appeal from an appellate decree of a Collector. **Lachmi Narain v Narotam Das.** **1906 A W N 251=3 A L J 623**

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132—S 182—Third appeal—Rent suit—High Court Jurisdiction of—S 182 of the N W P Tenancy Act was intended to meet, and was confined to, suits which were instituted in the Court of an Assistant Collector of the first class or of a Collector, and was not intended to embrace suit instituted before an Assistant Collector of the second class No third appeal lies to the High Court from the decree in second appeal of a District Judge in a rent suit **Lachmi Narain v Narotam Das 1906 A W N 272=3 A L J 688=29 All 69.**

133—S. 182—Appeal—Second appeal to Judge—Further appeal to High Court—Land Revenue Act (III of 1901) S 34 (5)—Application of new Act—Landholder in possession before the passing of the new Act

In a suit to contest a distraint, if a question of proprietary title is raised, an appeal lies to the District Judge from an appellate decree of a Collector, and a further appeal lies to the High Court under s 182 of the N W P Tenancy Act

Where the defendant had obtained possession of the property before Act No III of 1901 (N W P Land Revenue Act) came into force, S 34 (5) of that Act cannot affect the right of distraint given to the landholder by S 119 of the N W P Rent Act **Chajmal Das v Sirya 3 A L J 625 =A W N (1906) 254**

Notes—1 Ind 7 Ind Cas 540

134—Tenancy Act (*Agra*) s 182-Second appeal—Revision—Delay of five and half months in filing revision

Where a District Judge gives a judgment in his appellate jurisdiction in an ejectment suit a second appeal lies to the High Court under s 182 of the Agra Tenancy Act

After a delay of five and half months a revision cannot be entertained

Manturna Kuari v Bani Singh 8 Ind Cas 529

135—S 193—Procedure—Order remanding case to Court of first instance for re-trial Appeal

Held that no appeal lies from an order of an appellate Court in a suit under the Agra Tenancy Act, 1901 remanding the case to the Court of first instance for trial upon the merits **Jahur Ali v Sher Ali** **A W N 1906, 5=3 A L J 20=28 All 283**

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Notes—Ref 5 A L J 117

136—S 193 (g)—Set-off—Suit against tenant who happens to be a lambardar

No set off can be allowed in a suit for recovery of rent under the Agra Tenancy Act, except for a sum due to the defendant on an unsatisfied decree under that Act or any enactment Where the plaintiff a co sharer, sued the defendant, who happened to be also the lambardar, for recovery of rent in respect of certain plots of land which he was cultivating, the lambardar was not allowed to claim a set off of a sum which he had paid as a lambardar for the Government revenue due on plaintiff's share, inasmuch as it was a set-off of an amount the right to which arose in respect of a matter wholly different from the subject matter of the suit **Ram Chandar v Mona 4 A L J 681=A W N 1907, 269**

137—Ss 193, 197, Cl vi—Civil Procedure Code, Section 103-Dismissal in default -A suit in a Revenue Court having been dismissed in the presence of the defendant on the ground of absence of the plaintiff, there is no course open to the Court except to dismiss a second suit under S 103, Code of Civil Procedure, which is rendered applicable to proceedings under the New Tenancy Act by S 193 of that Act S 197 Cl I of U. P Tenancy Act requires an appellate court to dispose of an appeal if it has before it all the materials necessary for the determination of the suit as it has been instituted in the right court

Musammat Majid-un nissa v Mohammad Hamid Ali Khan 2 A L J 118

138—S 195—Reference under—Question whether an appeal lies

Under S. 195, U P Tenancy Act, 1901, a reference can be made where the court making the reference entertains a doubt as to the form of the appeal and not as to whether an appeal lies at all **Janor v Mansoor Khan 1 A L J 37.**

139—Ss. 196, 197—Power of Appellate Court to remand

The expression used in S 197 is most liberal so long, always, as the decision of the Court, in which a suit is instituted, whether made rightly or wrongly, is the decision from which an appeal lies to the District Judge. If the appellate Court has not before it all the materials necessary for the final decision of the appeal it has the power to remand the case to any Court which it considers competent to try it **Badam Singh v Mussammat Sabta Kuar 2 A L J 119**

140—S. 196—Resumption—Jurisdiction—Civil or Revenue Court—Objection as to jurisdiction not taken in first Court—Pleadings

A suit was brought in a Revenue Court for resumption of certain land, defendants pleaded that they were proprietors of the land sought to be resumed The Revenue Court, acting under s 199 of the Agra Tenancy Act ordered the defendants to have their claim declared by a Civil Court No objection was taken by plaintiffs to this order Defendants instituted a suit in the Civil Court and obtained a decree No objection was taken either in the Munsiff's Court or in the lower appellate Court to the Jurisdiction of the Civil Court to try the suit, *Held*, that having regard to the provisions of s 196 of the Agra Tenancy Act the plea of jurisdiction could not succeed in the High Court **Chhaturbhuj v Mangal Singh 9 Ind Cas 1005**

141.—Suit— Contribution — Agra Tenancy Act (II of 1901) S 197

Suit for contribution cannot be treated as a suit for settlement of accounts In a suit for contribution towards the amount of a joint decree for arrears of revenue all that the plaintiff can claim is the amount if any which he has paid on account of the decree in excess of his proportionate share of liability Any other amount which may be due to him from the defendants, cannot be brought into account in a suit for contribution

Under S 197 of the Agra Tenancy Act, 1901 the Court cannot treat a suit for contribution as a suit for a settlement of accounts

Pandit Kunj Behary Lal v Kishan Behari Lal. 4 Ind Cas 491.

142— Tenancy Act (II of 1901 Local) s 197, mesne profits suit for—Suit for profits-Lessee

A suit for mesne profits cannot be treated as a suit for profits under the Tenancy Act A lessee from a co sharer is not a trespasser and a suit for mesne profits cannot be (1891) maintained against him (1891) A W N 127 Fol **Amin ullah v Hajira 3 A L J 767=(1906) A W N 222**

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Agra Tenancy Act. S. 197—Munsiff returning plaint for presentation to the Revenue Court—Order remanding the case to the Munsif—Second appeal—**See** **8 A L J 312=9 Ind Cas 666.**

143.—S. 198—Application of—Arrears of rents admitted—Tenancy not denied—Payment not made to any one.

S. 198 of the Tenancy Act applies to a case where a tenant, who has been impleaded by a landlord and who has actually and in good faith paid the rent of his holding to some third person, pleads such payment But it does not apply to the case of a person who does not deny the relationship of landlord and tenant between the plaintiff and himself and has not paid the rent to any one on the ground that he has been prevented from doing so by a third person who claims it as purchaser of the share in dispute.

Sheodihal Singh v Badri Narain.
7 A L J 1198.

144.—S. 198—U P Rent Act S. 198—Suit for rent—Co-sharer defendants—Plea of tenant, payment to one co-sharer in good faith no decree against a co-sharer defendant.

The defendant, a tenant, pleaded in answer to a suit for arrears of rent that he had in good faith paid rent to another co-sharer of the village who was also made a defendant to the suit. The co-sharer defendant admitted having received the entire rent from the tenant. *Held*, that no decree could be given against the co sharer defendant in this suit, and that the proper remedy of the plaintiff was by a suit for profits or set lement of accounts against the co sharer defendant who had realized rent in excess of his share. *Held* also, that this was not a suit to which S. 198, U. P. Tenancy Act II of 1901, applied. S. 198 of the New Act differs from S. 148 of Act XII of 1881 in this that under the provisions of the New Act the question of payment to a third person shall be enquired into when in any suit against a tenant the defendant pleads that the relation of landlord and tenant does not exist between the plaintiff and himself. **Nabuan Bibi v Gaya Datt.**
1 A L J 707.

145.—S. 199—Judgment of Assistant Collector for second class—*Res judicata.*

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In answer to a suit for arrears of rent in the Court of an Assistant Collector, second class, the defendant pleaded that he was the proprietor of the land and not a tenant. The Revenue Court proceeded under s. 199 of the Tenancy Act and held that the defendant was not the proprietor but a tenant, and decreed the suit. The defendant then filed a suit in the Civil Court, for declaration of his proprietary right to the land and valued the suit at Rs. 250. *Held*, that, although an Assistant Collector of the second class had jurisdiction to try suits only up to the value of Rs. 100, his decision on the question of proprietary title barred the subsequent suit brought in the Civil Court to try that question. **Shahzade Singh v Mohamad Ahmed Ali Khan.**
6 A L J 917=32 All 8=3 Ind Cas 954.

146.—S. 199—Suit filed beyond the period prescribed by, but within time under Limitation Act—Whether time barred

When an order under S. 199 of the Agra Tenancy Act is passed by a Revenue Court, directing the defendant to file a suit in Civil Court within the time limited by that section, the ordinary period of limitation is thereupon suspended and the special period provided by the Tenancy Act is substituted. Such suit instituted beyond the period prescribed by the Tenancy Act is barred by limitation irrespective of the period prescribed by Sch. II of the Limitation Act. **Banwari Lal v Gopi.** **4 A L J 713=A W N (1907) 282=30 All 44.**

Notes.—*Dist*: 74 P W R 1908=124 P L R 1908=12 P R 1909=1 Ind Cas 321.

Agra—Tenancy Act S. 199.—Suit for ejectment in Revenue Court—Omission on part of defendant to plead title in himself—*Res judicata.*—**See.** **1907 A W N 189=4 A L J 545=29 All 601.**

147.—Ss. 199, 200—Action in ejectment—Defence that defendant a sub-proprietor—Question of title—Decision of a Revenue Court same as decision of Civil Court—Appeal to Civil Court.

Suit for declaration does not lie. When the defendant to an action for ejectment defends the suit on the ground that he is not a tenant but a subordinate proprietor, he raises a question of a proprietary title. The Revenue Court can either try the question itself, or refer

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the parties to the Civil Court, under the provisions of S. 199 of the Act. When it follows the former course and decides against him and orders his ejectment, an appeal lies to the Civil Court, and it is not open to him to bring a suit in a Civil Court for declaration of his subordinate proprietary right. The legislature intended that the decision of a Revenue Court upon a question of title should have the same effect as the decision of a Civil Court. 2 A L J 334 Fol.

Beni Pande v Raja Kausal Kishore Prasad Mal Bahadur. 4 A L J 53=A W N (1907) 6=29 All 160.

Notes.—*Ref*: 29 All 601=4 A L J 545=A W N (1907) 189, 32 All 8=3 Ind Cas 954=6 A L J 917.

148.—S 199—Suit for arrears of rent-Tenant not pleading proprietary title—subsequent suit for declaration—*Res judicata.*

In a suit for arrear of Rent under Act No.II of 1901 the plaintiff did not set up his proprietary title to the land in suit; *Held*, that a subsequent suit in the Civil Court for establishment of his proprietary right was barred by the principle of *res judicata.* (Ref. 2 Ind Cas 353.)

Lal Singh v Kalip Singh. 6 A L J 259=31 All 323=2 Ind Cas 218.

Agra Tenancy Act S. 201

See Transfer of Property Act s. 41.

149.—S. 201—Presumption—Recorded co-sharer—Defendants to rebut. Where the plaintiff in a suit for profits is a recorded co-sharer, the presumption referred to in s. 201 of the Act arises in his favour and it is for the defendants to rebut that presumption. In such a case, it is not for the plaintiff to prove, by evidence of receipt of profits within twelve years, that the rights subsisted, (I L R 27 All 436).

Banwari Lal v. Naider. 4 A L J 27=A W N (1907) 5=29 All 158

Notes—Ref. 1907 W N 292; 5 A L J 495; 30 All 58. Expl: 30 All 447=(1908) W N 186. Ref: 6 A L J 138 F B; 145 F B; 31 All 257 F B; 253 F B.

150—S. 201—" Shall presume "— Recorded co-sharer—Presumption rebutable—Revenue Court—Question of title—Jurisdiction.

Agra Tenancy Act-*Contd.*

The fact that the plaintiff is a recorded co-sharer does not itself preclude the Revenue Court from trying the question of title. The presumption which arises from the plaintiff's being a recorded proprietor is a rebuttable presumption. (30 All 447: A W N (1908) 186; 5 A L J 495; over. **Ali Ahmad v. Said-un-nisa Bibi. 6 Ind Cas 703.**

151.—Tenancy Act Agra (II of 1901 Local) s. 201 entry in Khewat—Question of proprietary presumption whether rebuttable.

Per Knox J. That 'shall presume' in s. 201 clause 3 Tenancy Act does not mean 'shall be conclusive proof' of a fact. Where there was other evidence, besides the entry of the plaintiff's name in the Khewat, upon which lower appellate court came to the conclusion that the plaintiff in a profits suit only recorded solatii cause held that it was justified in doing so (4 A L J R 3 Fol.). Per Richards J. The policy of the Tenancy Act is that a revenue Court, which is not a court particularly suited to try complicated questions of title, should as far as possible, accept and act on the records of the mahal, leaving difficult questions of law and title to a Civil Court. The Revenue court should accept the record in the Khewat as correct and is not competent to decide whether a recorded co-sharer has or has no right to share in the profits. (29 All 158 Ref.)

Bhaiyka v Umrao Singh, 4 A L J 302=1907 A W N 292=30 All 58 Confirming on appeal 1907 A W N 43=4 A L J 166.

Notes:—Fol: 30 All 447=(1908) A W N 186; Ref: 5 A L J 495.

152—The words 'shall presume' in section 201 of Agra Tenancy Act have no higher force than similar words contained in the Evidence Act. Where therefore a plaintiff is recorded co-sharer but it is proved that he has no proprietary right, the presumption falls to the ground. The plaintiff as a recorded co-sharer brought this suit for profits. The defendants pleaded that they were in adverse possession and proved it. *Held*, that the suit was rightly dismissed.

Dilkunwar v. Udai Ram, 4 A L J 3=A W N (1906), 316=29 All 148.

Notes:—Ref: 31 All 257 F B; 253 F B; 6 A L J 138 F B; 145 F B; 5 A L M L J 309 F B; 9 C L J 453=13 C W N 544; 33 Mad 206; 1907 A W N 43.

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153—S. 201—Act 1 of 1872 (Indian Evidence Act), S. 4—Evidence—Presumption—Record of plaintiff's name as a co-sharer.

Held, on a construction of section 201 of the Agra Tenancy Act, 1901, that the words "If in any suit instituted under the provisions of Chapter XI **** the plaintiff is recorded as having such proprietary right, the Court shall presume that, he has it" mean that so far as the Revenue Court is concerned, such Court is bound to presume in favour of the plaintiff, and it is for the defendant "to establish by suit in the Civil Court that the plaintiff has no such proprietary right". (30 All 58, 29 All 148 Diss: A W N (1907) p. 43, Fol. 29 All 158 Explained). **Bechan Singh v. Karan Singh, A W N (1908), 186=5 A L J 495=30 All 447.**

154—S. 201 (3)—"Shall presume" Presumption—Whether rebuttable.—

Held, Per Stanley, C. J. and Griffin, J. (Tud-ball, J., dissenting) that a presumption is a logical assumption that a thing is true until disproved. The expression "shall presume" in S. 201 (3) does not make the presumption conclusive and irrebuttable. The Revenue Courts therefore are competent to go behind the entry in the record-of-rights.

Held, Per Tudball, J. that the presumption mentioned in cl. 3, S. 201 of the Agra Tenancy Act, is one which is rebuttable only in a Civil Court, not in a Revenue Court. The Revenue Court cannot, therefore, go behind the entries in the Khewat. (29 All 148; 30 All 447; (1907) A W N 43; 29 All 158; 31 All 257; 31 All 253, Ref.)

Waris Ali Khan v. Parshottam Narain, 7 A L J 682 F B=32 All 427=6 Ind Cas 609.

155—S 201—General Clauses Act I of 1904 (Local) Section 6—Effect of a repealing Act on a pending appeal—N. W. P. Tenancy Act (Local) II of 1901 Section 201 (3)—Suit for determination of title—Decree for profits previously passed—Effect of the appellate decree of a Judge in a suit brought in the Revenue Court—*Res judicata.*

An appeal pending at the time when a repealing Act comes into force, is not affected thereby, Section 201 of the N. W. P. Tenancy Act, 1901, is not applicable to an appeal against a decree for profits filed under Act XII of 1881, and a suit brought in the Civil Courts by the defeated party for a declaration that he was the owner of the share in respect of which the decree for profits had been passed is not a suit under clause (3) of that section. The decision of the appellate Court in a suit brought in the Court of Revenue under Section 93 of the Act No. XII of 1881 although it is the decision of a Civil Court, has no higher effect than if it were the decision of the Court of first instance, that is, of the Revenue Court, consequently the decision of that Court on a question of title is no bar to the maintenance of a suit brought in the Civil Court for the determination of the plaintiff's proprietary title. (26 All 601 ref. to) **Muhammad Inayat Ali Khan v. Muhammad Murad Ali Khan, 2 A L J 283=1905 A W N 103=27 All 569.**

156—S 201, Sub. (3)—Person recorded as having proprietary rights—Presumption.—

In a suit for profits by a person who was recorded as having the proprietary right entitling him to claim profits, it was held that under sub-sec. (3) of S. 201 of the Act, the Court should presume that such person had a proprietary right, and that the defendant was competent to sue in a Civil Court under the proviso to that sub section to establish that the plaintiff had not the proprietary right claimed by him.

Niaz Ali Khan v. Govind Ram. (1908) A W N 187 Note.

157—Ss. 201 — Sub-sec. (3) & 165—Person recorded as having proprietary rights—Presumption.—

An entry in a khewat according to the provisions of S. 201, Sub-Sec. (3) of the Act is conclusive, and the Courts have no power in a suit under S. 165 of the Act, to go behind the entry in the khewat. **Har Prasad v. Syed Muhammad Baqar, A W N (1908), 187 (note)=30 All 451.**

158—S. 201 (3)—Jurisdiction of Civil and Revenue Courts—Question of title decided by Civil Court—Subsequent suit for profits — Recorded co-sharer—Presumption:—

Where a Civil Court of concurrent jurisdiction has already determined the extent of the proprietary right possessed by the plaintiff, in a subsequent suit for profits there is nothing left for the Revenue Court to presume, and the question as to the nature of the presumption under S. 201

Agra Tenancy Act-*Contd.*

(3) of the Tenancy Act does not arise.—

Gobindi v. Saheb Ram, 6 A L J 138=31 All 257 (F B)=1 Ind Cas 885.

159.—S 201 "Shall presume"—Recorded co-sharers—Revenue Court bound to presume proprietary title.

The Revenue Court, before which a suit comes under the provisions of Ch. XI of the Tenancy Act, where the plaintiff is recorded as having proprietary right, is bound to presume that the plaintiff has such proprietary title, and the Revenue Court is not entitled, in that suit to go into any evidence to contradict the record

(30 All 447. A W N 1908, 186, 5 A L J 495, Fol.)

Meharban Singh v Umrai Singh. 3 Ind Cas 709.

160.—S 201-Evidence Act, S 4—Evidence-Record of plaintiff's name as a co-sharer—Presumption:—Per Knox J. (Richards, J., dissentiente):—The presumption enjoined by S. 201, Cl. (3) of the Agra Tenancy Act, 1901, is not conclusive, but may be rebutted by evidence offered to the contrary.-1906 W N 316 ref to. Per *Richards, J*—So far as a Revenue Court is concerned it is bound to act upon the presumption created by S. 201, Cl. (3), of the Agra Tenancy Act, 1901, subject only to the result of a suit in a Civil Court.—

Dhanka v Umrao Singh. 1907 A W N 43=4 A L J 166=Also 1907 A W N 292=30 All 58=4 A L J 802.

161.—S 201 (3)—Suit for profits in Revenue Court—Question of title decided by Civil Court—No question of presumption:-A co-sharer sued the defendant lambardar for profits. The defendant pleaded that plaintiff was not entitled to profits of certain plots which had been wrongly included in his patti, and that he, the defendant, had obtained a declaration of his title from the Civil Court. The District Judge held that so long as the Khewat was not corrected, the plaintiff was entitled to succeed and the Revenue Court was not bound to pay any regard to the decree of the Civil Court. *Held*, that the Revenue Court was not competent to ignore the decree of the Civil Court and that the decree of the Civil Court being in this case in favour of defendants, the plaintiff could not rely upon the Khewat as it stood. **Bhawani Singh v Dilwar Khan, 6 A L J 145=31 All 253 (F B)=1 Ind Cas 886.**

Agra Tenancy Act *Contd.*

162.—S 202—Suit in a Civil Court—Defendants pleading that they are plaintiff's tenants—Civil court bound to follow the procedure laid down in S 202.

In a suit brought by a Zamindar in a Civil Court for the concellation of a will and possession of a holding, defendants pleaded that they were tenants of the plaintiffs: *Held*, that the Civil Court was bound to require the defendants to institute a suit in the Revenue Court, within three months, as provided for in S 202 of the Agra Tenancy Act (24 A W N 114; 25 A W N 46).

Mahadeo Prashad v Ramdhari Khan 2 Ind Cas 455.

163.—S 202—Question of tenant—right in Civil Court-Question decided by Civil Court-Appeal-Procedure:—Where, in contravention of the provisions of S 202 of the U P Tenancy Act, 1901, a Civil Court heard and determined a suit in which a question of tenant right was raised, and on appeal the lower appellate court remanded the suit under S 562, C P C, it was *held*, that the lower appellate court ought not to have remanded the case, but should itself have passed the order required by S. 202 of the Tenancy Act, and the High Court made such an ordar. **Jagan Nath v Bshawani 1904 A W N 203=27 All 167.**

164.—S 202—Scope of— *Held*, that where the defendant simply alleges that he is in possession of the land in suit as a tenant but does not allege that he is in possession of the land in suit as a tenant of the plaintiff, the Civil Court need not require the defendant to institute a suit in the Revenue Court as directed by S 202, Agra Tenancy Act. **Rikhai Rai v Sheoyan 7 A L J 960=7 Ind Cas 97.**

165.-S 202-Question of tenant right in Civil Court—Jurisdiction—Procedur :-The plaintiff sued in a Civil Court asking for a declaration that the defendants had no title to land which had therefore been held as an occupancy holding by a person deceased before suit. The defendants pleaded that they were the tenants of the holding and denied the jurisdiction of the Civil Court. The Court found against the plea of want of jurisdiction but on the merits dismissed the plaintiff's suit. On appeal the plaint was returned for presentation to a Court of Revenue. *Held* that this procedure was erroneous: the appellate

Agra Tenancy Act-*Concld.*

Court ought to have instructed the Court of first instance to take action under S 202 of the U P. Tenancy Act 1901 **Madari v Kubir un nissa 1904 A W N 114=1 A L J 212.**

Notes —Fol (1905) A W N 46.

166 —**S 202**—Question of tenant right in Civil Court —Appeal—Remand:—Where a Civil appellate court finds that the Court of original jurisdiction ought to have passed an order under S. 202 of the Agra Tenancy Act 1901, but has not done so, the proper course to be adopted by the appellate court is not to remand the case under S 562 of the Code of Civil Procedure, but to send the case back to the original court with direction to pass the order which it should have passed in the first instance. 1904 A W N 114 foll

Mare v Gauri Sahai, 1905 A W N 46.

167-Sch IV No 47-Execution of decree—Limitation.

A Rent Court decree for Rs 156—14—9 was passed on the 14th of March 1901. On the 13th March, 1904, the decree holders applied for execution by attachment and sale of certain moveable property of their judgment debtors Execution issued as prayed, but only a small portion of the decretal amount was realized. On the 22nd of August 1904, the decree-holders, filed a further application for execution against the immovable property of the judgment-debtors.

Held, that execution was time brrred. The second application could not be treated as an application merely in continuance of the application of the 13th of March, 1904 (15 M L J 243 Ref)

Nahabhat BahadurLal v Uda Kunwar (1906) A W N 97 = 3 A L J 324.

Agreement.

See also cases under:—

(1) Account.
(2) Advocate.
(3) Champerty and Maintenance.
(4) Civil Procedure Code 1882, S 375.
(5) Compromise decree.
(6) Consideration.
(7) Contract.

Agreement-*Contd.*

(8) Contract Act, ss 23,27,2,25,63, 27,51,
(9) Co-sharers
(10) Hindu Law-Widow.
(11) Impartible Estate
(12) Jurisdiction.
(13) Kabuliyat.
(14) Practice.
(15) Right of suit—Contracts and Agreements.
(16) Setting Aside Sale.
(17) Specific Performance.
(18) Stamp Act.
(19) Stamp Act 1879 Sch 1 Art 5
(20) Stamp duty.

—acknowledging a debt.

See Stamp Act (II of 1899), Sch I Arts 1, 5.

—adjusting Suit.

See (1) Arbitration
(2) Compromise-compromise of suits under. C. P. C

—admitted in pleading.

See Admission, statement and pleading.

—against public policy.

See Contract Act s 23—Illegal contracts.

—altering decree.

See (1) Execution of Decree
(2) Limitation Act (1908) Art. 160

—and conveyance.

See Sale

—as to payment of decretal money.

See C P C O 21, r 1 and O. 21 r 2.

—at Delhi to pay money in Bombay

See Jurisdiction-Causes of jurisdiction

Agreement-*Contd.*

--at marriage not to remove wife from parent's house.

See Restitution of conjugal rights

-at time of adoption affecting son's rights.

See Hindu Law — Adoption — Effect of adoption.

--before decree by the decree-holder not to recover costs which the decree might award.

See (1) Civil Pro. Code O 21 r. 1 & O 21 r 2
(2) Costs.

--between adoptive mother and natural father.

See Hindu Law—Adoption.

—between Government and Government Solicitor.

See Costs—Taxation of Costs

—between husband and wife.

See Divorce

—between landlord and tenant.

See (1) Tenancy Act (XXVII) of 1868), S 2.
(2) Tenancy Act (XXVIII of 1868), S 5
(3) Tenancy Act (XXVIII) of 1868), S 8

—between pleader and client.

See Pleader and Client.

—between pleader and person retaining him.

See (1) I egal Practitioner's Act.
(2) Pleader.
(3) Attorney & Client

—breach of, by insolvent

See Insolvency

Agreement-*Contd.*

—breach of, to pay a certain sum.

See Penalty.

—by a guardian to give a word in marriage on payment of a sum of money.

See Guardian—Powers of a guardian

—by correspondence.

See Stamp Act

—by mortgagor to sell mortgaged premises to mortgagee.

See Mortgage-sale of mortgaged property

—by occupancy tenant to relinquish his holding.

See Landlord and tenant — Abandonment, relinquishment of surrender of tenure

—by plaintiff and defendant not to bid against each other at an auction.

See Contract Act S 23

—Collateral to lease.

See (1) Evidence Parol
(2) Evidence-Varying or Contradicting written Instruments.

—coming to an end with the extinction of the equity of redemption.

See (1) khoti—Settlement Act
(2) Khoti Tenure.

—contrary to terms of lease.

See Lease—Landlord & tenant.

—entered into with one party to a suit by an attorney.

See Attorney & Client—Pleader

—executed both in England and India.

See Stamp

Agreement-*Contd.*

—exempting from liability in case of loss of carrying ship.

See (1) Shipping Law.
(2) Carriers.

—extending time of payment without Sanction of Court.

See C. Pro. Code O. 21, r. 1

—for an undivided share in Bhag.

See Bombay Bhagdari Act.

—for differences.

See Contract—Wagering Contracts.

—for division of family property in equal shares.

See (1) Malabar Law
(2) Hindu Law joint family.

—for not enforcing payment of instalments.

See Execution of decree—Execution of decree on or after Agreement or —Compromises

—for, or to give time for satisfaction of judgment debt.

See Civil Pro Code O. 21 r. 1 & O. 21 r. 2.

—for payment by Deputy to the watandar out of the cash allowance for procuring the deputy's nomination.

See Bombay Heriditory Offices Act.

—for payment by instalments.

See C P C O. 21 r. 1 & O. 21 r. 2.

—for satisfaction of judgment debt

See Civil Pro. Code O. 21, r. 1 & O. 21, r. 2.

—for the management of a public charity, illegal.

See (1) Right of suit-Charities and trusts.
(2) Advocate General.
(3) C P C Ss. 92, 93.

Agreement-*Contd.*

—illegal.

See (1) Cases under Contract Act, S. 23.
(2) Receiver.

—in regard to the equity of redemption.

See Mortgage—Redemption.

—in respect of family property.

See Hindu Law—Joint family.

in respect of fiee vatan election.

See Bombay Heriditory Offices Act.

—in satisfaction of judgment-debt.

See Civil Procedure Code S. 257 A.

—no bar to partition.

See Hindu Law—Partition——Partition of portion of Property.

—not certified to Court

See Civil Pro. Code O 21, r 1 & O 21, r. 2.

—not sanctioned by Court.

See Civil Procedure Code O. 21, r. 1 & O. 21, r. 2.

—not to alienate ancestral property.

See Hindu Law—Joint family.

—not to appeal.

See (1) Appeal to Privy—Council—Practice and Procedure — Miscellaneous Cases
(2) Contract Act, S. 28.
(3) Counsel.

—not to execute a decree.

See (1) Execution of decree.
(2) Contract Act S. 23.

—not to execute decree regarded as satisfaction of decree.

See Civil Pro. Code O 21 r. 1 & O 21 r. 2.

Agreement-*Contd.*

-- not to partition.

See Cases under Hindu Law—Partition—Agreement not to partition.

-- not to partition and restraint on partition.

See Hindu Law Partition.

-- not to work for a rival trades man.

See Contract Act, S. 27.

-- of parties.

See Execution.

--of parties to suit to refer matters in dispute to decision of Court.

See Arbitration Contract Act, S. 28.

--of relinquishment, validity of.

See Hindu Law—Will——Construction of wills-Estates -Absolute or limited

-- of service -vatan Inam land by the holder of it.

See Bombay Heriditory Offices Act.

-- of share by a co-parcener.

See Hindu Law—Joint family.

-- opposed to public policy.

See Contract Act S. 23-Illegal contracts.

-- or memorandum of agreement relating to the sale of shares.

See Stamp Act.

- restricting right of occupancy.

See Right of occupancy.

-- running with land.

See (1) Pre-emption.
(2) Vendor and purchaser.

-- sanctioned by Court executing decree.

See Civil Pro. Code, O. 21, r. 1 & O 21, r. 2.

Agreement-*Contd.*

-- Secret.

See Attorney and Client

-- to become a member of association.

See (1) Companies Act
(2) Company.

-- to carry out decree.

See (1) Execution of Decree.
(2) Limitation Act (1908) art. 182.

-- to compensate for services rendered during defendant's minority.

See Minor—Liability of minor and right to enforce contracts.

--to divide, effect of.

See Hindu Law—Partition.

--to extend time for enforcing decree by execution.

See Civil Procedure Code O. 21, r. 1 & O. 21, r. 2.

--to forego legal proceedings.

See Arbitration.

--to give time to judgment-debtor.

See Civil Procedure Code (1908) O. 21, r. 1.

—to give time to the judgment debtor for payment of decreed money.

See Civil Pro. Code O 21, r. 1 & O. 21 r 2

-- to lease.

See (1) Registration, 7 B L R App 21.
(2) Specific Performance.
(3) Stamp, 17 Cal 548.
(4) Stamp Act.

—to lend money on mortgage.

See Mortgage.

Agreement-*Contd.*

--to liquidate decree by instalments appeal by judgment-debtor subsequent to.

See Appeal.

--to pay additional rent for excess land.

See Enhancement of rent.

--to pay interest.

See Interest — Miscellaneous Cases—Bill of Exchange.

--to prevent acquisition of easement not document creating a right in immoveable property.

See Registration Act.

- to procure marriage in consideration of money payment.

See Contract Act S. 23.

--to procure re-admission into caste

See Jurisdiction of Civil Court.

—to re-convey on re-payment of purchase money.

See Vendor and Purchaser--Miscellaneous Cases

--to refer.

See appeal (Decree).

--to refer mother in dispute to arbitration.

See (1) Contract Act S. 28.
(2) Arbitration.

—to refer to arbitration.

See Compromise—Compromise of Suits under Civil Procedure Code.

--to refer to arbitration.

See Arbitration.

-to relinquish exproprietary rights

See Landlord & tenant.

--to remain united.

See Hindu Law——Partition—Effect of Partition.

Agreement-*Contd.*

--to renew a kanom and to credit as renewal fees a sum of money then due by plaintiff to defendant.

See Registration Act.

—to rent pasture ground.

See Stamp Act.

--to sell.

See (1) Contract, S. 65.
(2) Limitation Act XV of 1877, Sch. 11, Art. 97.
(3) Small Cause Court Registration Act (VIII of 1871), S. 17.

—to sell land.

See Specific Relief Act.

--to share property after litigation if successful.

See (1) Contract Act S. 23.
(2) Champerty.

--to share property the subject of suit.

See Champerty.

—to supply money for another person's suit.

See Champerty.

--unregistered.

See Registration Act (III of 1877), S. 17.

--void if not sanctioned by the Court.

See (1) Civil Pro. Code O. 21, r. 1 & O. 21, r. 2.
(2) Compromise — Compromise of suits under C. P. C.

--volutary or by Act of Law.

See Transfer of Property Act.

Agreement-*Contd.*

--with respect to the property of the deceased husband by his heirs pendente lite.

See Mahomedan Law--Debts.

Agreement—Accounts, Court's order to furnish—Company transferring its business to a limited Company—New Company not bound by the order. See Account (6) **7 Bom L R 107 =29 Bom 107**

Agreement—Champerty—Public Policy—English Law, not applicable—See Champerty (7) **35 Cal 420=12 C W N 393 =18 M L J 100=7 C L J 335 =5 A L J 184=35 I A 48.**

Agreement—Advocate and client—Professional misconduct—Advising client and taking part in matters of invalid agreements—See Advocate (27) **33 Cal 151**

1—Distinguished from agreement.

An arrangement is not necessarily an agreement. It is a preparatory measure or negotiation. **Chabildss v Dayal Mavji. 6 Bom L R 557**

2—C. P. C (Act XIV of 1882), Ss. 150 151—Agreement of parties to refer to Commissioner—Appeal.

Where the parties agree to refer certain issues of fact to a Commissioner and to abide by his decision, they impliedly agree not to appeal against the decree passed in accordance with the Commissioner's report and hence they are estopped from impugning that decree and the order of remand passed on appeal therefrom and the subsequent proceedings in pursuance thereof are all null and void. (8 Cal 455, Ref:)

The principles laid down in Ss. 150 and 151, C. P. C. are applicable in this case.
Bahir Das Chakravarti v Nobin Chandra Pal. 6 C W N 121=29 Cal 306

3—Arbitration—Agreement of parties to refer question to Court for decision—Decision if appealable—Acting as arbitrator—Extra cursum curial.

In the course of a suit for recovery of possession of some land, the parties who owned different shares of a Pergunnah came to an agreement to the effect that they should ask the Court to decide the question of title on the basis of the *thakbust* map only, and the plaintiff said he would abide by that decision. The Court decided accordingly and held that "the *thak* map itself showed that the plaintiff's predecessor and his co-sharers were disputing about the land and the survey map showed that it was newly formed *chur* land and that, in such circumstances, the *thak* map could not hold sufficient evidence of plaintiff's title."

Held—That in deciding the question on the basis of the *thakbust* map, in accordance with the agreement of the parties, the Court acted as arbitrator, and hence no appeal lay from that decision **Kumar Saradindu Roy v Bhagabati Debya Chowdhurani. 10 C W N 835**

4—Consideration unlawful—Brocage of office—Consideration for creating facilities for confirmation in office.

A promise to pay money in order to procure resignation of an office by the promisee with a view to the promisor securing the appointment is not an enforceable promise, the consideration being unlawful. **Saminatha Aiyar v Muthuswami Pillai. (1907) 17 M L J 252= 30 Mad 530**

5—Agreement of parties to sue within certain time-Suit filed but withdrawn and re-filed—Sufficient compliance—District Munsif—Inherent jurisdiction—To try compensation cases—Land Acquisition Act.

When the parties before Court come to an understanding to file a suit within a certain date and when it was so done, the fact that it had to be withdrawn with leave of Court and a fresh suit had to be instituted owing to a technical objection of non-joinder, is not fatal, and the original order of the Court has been complied with.

A District Munsif has inherent jurisdiction to try a suit for determining the rights to money awarded as compensation under the Land Acquisition Act.

When both parties agree to such a trial, one cannot question the jurisdiction of the Court at a later stage. (5 M L J 59, Ref., and 2 C L J 359 Expl.) **Pichuvier v Perumal Konan, (1912) 1 M W N 163.**

Agreement-*Contd.*

6—Agreement to maintain defendant in consideration of a will—Prior suit on agreement by defendant for arrears of maintenance and decree therein—Present suit by plaintiff to set aside agreement—Plaintiff not entitled to rely on events prior to the former suit——Res judicata——Subsequent events disclosing intention to defeat the will—Not a sufficient cause of action.

By an agreement, Exhibit I, the plaintiff agreed to give maintenance to the defendant in consideration of her executing a will bequeathing all her moveable property to him after her death. The defendant instituted O. S. No 160 of 1907 for two years' payment due to her under Exhibit I and obtained a decree. Now the plaintiff sues for a declaration that there was a failure of consideration of Exhibt I and therefore the agreement could not be enforced against him.

Held—That the plaintiff cannot rely on events prior to O S No 160 of 1907 to avoid the agreement, as he was bound to put forward in that suit all pleas which would entitle him to get the Court to hold that the agreement was not enforceable against him.

That the only events subsequent to that suit alleged as entitling him to relief, *viz*, that the defendant made false complaints to the Police of loss of some properties included in the will and also concealed some of them in a third person's house, disclosed no cause of action to avoid Exhibit I.

The allegation of a mere intention on her part to defeat the bequests is not suffcient.

Atyam Yenkiah, (1912) 1 M W N 182.

7—Agreement by tenant not to take compensation for improvements made without consent of the zemindar—Illegality—Agra Tenancy Act (II of 1901), ss. 40, 90—Agreement to pay enhanced rate–Distinct promises for the same consideration —One of them illegal, effect of—Cess—Essential to be proved.

An agreement between tenant and a landlord whereby the former undertook not to make any improvements without the consent of the *zemindar*, and provided that, if he did make any improvemant, he would not be entitled to any compensation at the time of ejectment, is illegal and unforceable at law.

An agreement by a tenant to pay an enhanced rate of rent is not illegal, unless there has been a legal enhancement within 10 years of the agreement.

If several distinct promises are made for one and the same consideration, and if one or more of them be such as the law will not enforce, this will not of itself prevent the rest from being enforced.

In order to show that a condition in an agreement as to a certain payment is of the nature of a cess which should not be recognized, it must not only be shown that the condition refered to, relates to the payment which comes within the definition of a cess, but it should also be shown that the payment of this nature has not been recognized by the Settlement Officer. **Bhola v Mohammad Habibul Rahman Khan. 10 Ind Cas 465**

8—Mortgage–Agreement by third party to pay mortgage amount to mortgagee and interest–Part payment of interest—Breach of other conditions of agreement—Right of suit by mortgagee on the mortgages—Whether mortgagee bound to refund the amount received from third party—Agreement to pay intending purchaser for not competing for purchase of property—Consideration.

An agreement, where by a person undertakes to pay money to another in consideration of the latter not competing for the purchase of certain property with the former, is not illegal.

Second defendant executed three mortgage bonds to plaintiffs. First defendant entered into an agreement with the plaintffs, whereby he agreed to pay a certain portion of the principal within three months, the interest on the principal amount immediately, and to execute a fresh mortgage for the balance. The agreement was not carried out save that the first defendant paid Rs 10,000 out of the principal and the interest on the whole liability under-taken under the agreement up to a certain date. In consequence of the breach of the agreement by first defendant, plaintiff sued for the balance of the amount due to them under the three mortgage bonds executed by second defendant:

Held (1) that plaintiffs were entitled to sue on the mortgages and that they were not bound to enforce specific performance of first defendant's agreement;

(2) that the first defendant was not entitled to refund of the interest he had paid in part

Agreement-*Contd.*

performance of his obligations under the agreement. **Rungiah Gownden v Fakir Mahomed 10 Ind Cas 627.**

Agreement——to convey property after decree in lieu of expenses of litigation. **14 O C 139.**

Agreement—to surrender expropriatary rights—Possession not delivered—Suit for damages for breach of contract. **8 A L J 826.**

Agreement—to refer to arbitration, if of a personal nature. **14 C L J 188.**

Agreement—Mortgagee in possession agreeing with mortgagor to charge for his personal services—Validity of—Clog on equity of redemption. **13 Bom L R 162.**

Agreement—Transfer of reversionary right—Agreement to give share in property to be recovered by litigation—Validity—Specific performance—Litigation—Burden of proof. **9 Ind Cas 243.**

Agreement——between members of family as to division of earning as priest—Enforceability. **13 C L J 449.**

Agreement—between Government and public servant—Increase of pay for risky service—Suit to enforce. **15 C W N 470.**

9—Order refusing to set aside a sale—Appeal, whether lies against——Agreement of discharge, effect of.

An appeal lies against an order refusing to set aside a sale under S. 310-A of the Civ Pro Code, 1882, even though the purchaser is not the decree-holder but a stranger.

An agreement between the decree-holder and the judgment-debtor, whereby the former agrees to treat a portion of the decree debt as discharged in consideration of certain services rendered by the judgment-debtor, is tantamount to a receipt of the amount. (9 M L J 258; 23 Mad 37 F.)

Lakshminarasimhacharyulu v Lakshmamma 12 Ind Cas 169.

10—Hindu dedicating for mosque—Legality—Agreement to do so, illegal and unenforceable—Contract Act, S. 23.

Under the Mahomedan Law, a Hindu cannot make a dedication in favour of a Mahomedan

Agreement-*Contd.*

place of worship. An agreement by a Hindu to do so is illegal and cannot be enforced.

Fazle Rahman Naskar v Anath Bandhu Pal 11 Ind Cas 436.

11—Specific performance—Agreement to pay money in instalments—Suit not maintainable.

A suit for specific performance of an agreement to pay a certain sum of money by instalments is not maintainable, as compensation in money for the non-performance of it is an adequate relief. **Hukum Singh v Khunni Lal. 8 A L J 1282.**

12—Fraud of agent—Agent fraudulently withholding information from the principal—Principal cannot be fixed with the knowledge—Company—Internal defects such as want of resolution or non-existence of a competent board of directors, not to affect innocent third party without notice—Agreement to borrow money on a charge on property—Agreement creates valid charge.

The plaintiff advanced to the defendant Company six lacs of rupees on a mortgage of the Mills belonging to the Company on the 15th April 1905. Under the terms of the deed of mortgage, the plaintiff appointed his *Munim*, J to be a director of the defendant-Company, which office J filled till the 12th July 1909 on which date he sent in his resignation. During his directorate it came to J's knowledge that the Company had on 11th July 1907 borrowed three lacs of rupees from a Bank for one year on condition not to further mortgage or charge the property of the Mill during the currency of the loan. The loan was renewed twice, but at neither time was this condition renewed. On the 5th August 1909, the Company's principal agent and director D obtained from the plaintiff a loan of two lacs of rupees and passed a receipt bearing one anna stamp which recited that the sum was a part—payment of the sum of five lacs of rupees which the plaintiff had intended as a further charge of the Mills; that if the plaintiff advanced the said amount, the Company would execute a proper legal conveyance; and that if he did not, the sum would be returned to him with interest. This transaction was not sanctioned by the board of directors; and as a matter of fact there was no competent board in existence then to authorize it. Before making the loan, the plaintiff had consulted J as to its advisability, but J had whithheld the knowledge he had about the Company's borrowings from the Bank and had ad-

Agreement-*Contd.*

vised him that there was no objection to his making the loan. The receipt was subsequently stamped as a conveyance and duly registered. The affairs of the defendant—Company having gone into liquidation, the plaintiff sued to have a charge declared on the Mill as to his loan of two lacs of rupees; and to have it declared that he was a secured creditor to the extent of the loan.

Held, (1) that J, in concealing the information which he had from his master, the plaintiff, was guilty of fraud and misfeasance against the plaintiff; and that the plaintiff could not, therefore, be fixed with knowledge of things which were fraudulently concealed from him by J.

(2) That the resolution by which the Company had agreed not to further charge the Mill property had exhausted itself on the 11th June 1908,

(3) That, even if the condition not to further mortgage or charge the property had existed, the defendant-Company could not be permitted to plead the same in derogation of the rights and claims of the plaintiff to a charge on their property.

(4) That, if the plaintiff acquired a charge on the property of the defendant-Company, that charge was valid and binding on the Company, notwithstanding the facts that, at the time the charge was given, the board of directors had not passed a resolution authorising the creation of such charge, or that there was not at the time in existence a Board of Directors properly constituted according to the requirements of the Articles of Association,

(5) That a valid, legal and binding further charge was created in favour of the plaintiff against the mortgaged property of the defendant Company for the two lacs of rupees advanced by the plaintiff on the 5th August 1909.

Where the agent, though acting on the principal's behalf in some transaction in which his knowledge would otherwise be imputed to his principal, takes part in any fraud or misfeasance against the principal, the principal is not bound by the agent's knowledge of such fraud or misfeasance.

In law, neither the want of a resolution nor the defect in the board of directors of a Company can affect adversely the rights of third parties, who have no knowledge of the existence of such

Agreement-*Contd.*

infirmities when dealing with the Company

Shivlal Motilal v Tricumdas Mills.
14 Bom L R 45.

13—Landlord and Tenant—Rent due to office holder—Agreement transferring the right of transferee to collect rent after transferor's death.

The second defendant, as guardian of her minor son who was an office-holder, executed an agreement to the plaintiff, where by the latter was to perform the duties of the office and receive a portion of the emoluments therefor, inclusive of the right to collect rents from tenants:

Held, in a suit by the plaintiff for the recovery of rent from a tenant after the death of the minor office-holder, that, as the plaintiff's rights under the agreement terminated on the death of the office-holder, he had no cause of action and his suit should be dismissed. **Ganalal Somalingam v Kamuju Gangulu**
11 Ind Cas 699.

14—Suit for account against heir of deceased agent—Art 120 applicable—Arts. 62 and 89 not applicable—"Refusal" mentioned in Art. 89—Meaning.

Where the suit is instituted against the heirs of a deceased agent for rendition of accounts as regards the receipt by the deceased agent of the rents and profits of the plaintiff's property which was under his control during his life-time, with a prayer that the amount found due might be directed to be paid out of the estate of the deceased agent in the hands of his heirs.

Held, that, to such a suit, neither Art. 62, nor Art. 89 of the Limitation Act would apply, but that Art 120 would apply, and that limitation would run from the date of the agent's death.

The correct interpretation of Art 89 is to hold that the refusal by the agent to render account as mentioned therein must be an express refusal on a definite date, and not merely a virtual refusal to be inferred from the omission or the failure on his part to fulfil a promise made by him to render the accounts to the pricipal in answer to a demand by the latter 96 P. R. 1888; 10

Agreement-*Contd.*

Cal 860 and 31 All 429 Ref 3 C L R 446. Not Fol 11 C L J 43, not in point. **Mussammat Fatima v Mussamat Imtazi Jan alias Chuni Jan and others 1 P R. 1912 (Civil)=33 P W R 1912.**

Agreement—between Mahomedans and Hindus regarding sacrifice of cows—Validity-Nudum Pactum—Specific Relief Act 1877, s. 42. **7 Ind Cas 318.**

Agreement—to provide funds for litigation-Specific performance—Limitation—Litigation. **10 O C 173.**

Agreement—For son-in-law to be maintained in father-in-law's family—Maintenance. **7 Ind Cas 118.**

Agreement—Vague and uncertain—Effect—Mortgage—General. **5 Ind Cas 373**

Agreement—To effect fraud on Court-Fraud not carried out—Effect—Divorce. **36 Cal 874=4 Ind Cas 334.**

Agreement—preventing the acquisition of easement—Easements Act 1882 s. 15 Expl, 1. **2 Bom L R 518=24 Bom 156.**

Agreement—Nature of, inadmissible without registration, when original agreement is registered—Evidence Act 1872 s. 92. **27 Mad 368.**

Agreement—That land would go to a shrine on the death of persons who were parties to the agreement-Gift in favour of shrine by one of the parties—Suit to question the gift by another party—Gift. **46 P L R 1910=8 Ind Cas 231.**

Agreement-Breach of-Suit for-Jurisdiction of High Court (Original Side)—High Court, Jurisdiction of—Calcutta. **1 C L J 219.**

Agreement—By Judgment—debtor to pay interest at rate higher than that provided in decree-Void if without Court's sanction—Civ. pro. Code 1882, ss. 244, 257-A **9 C W N 1004=32 Cal 917.**

Agreement-Giving time to judgment-debtor-Sanction of Court—Civ Pro Code 1882 ss 257 A 258. **6 A L J 726=6 M L T 180=2 Ind Cas 991.**

Agreement--Instalment bond executed by some of the judgment-debtors in decree-holder's favour in respect of decretal amount-Whether it is a mere agreement to give time Whether the whole agreement illegal owing to the agreement to give time not having had Court's sanction —Right of decree-holder to sue upon it—Civ Pro. Code 1882, s. 257-A. **12 C W N 674=7 C L J 543=35 Cal 870.**

Agreement—Agreement for sale—Vendee put in possession subsequently ejected by vendors —Sale not completed—Suit by vendee for possession and injunction—Similar suit by vendors—Subsequent suit by vendee for specific performance—Omission to set up ground of defence—Res judicata—Civ Pro Code, 1908 s. 11 O II r, 2. **24 Mad 491=6 C W N 17 P C**

Agreement—to set aside execution sale—Power to modify—Sale—Sale in execution of decree. **9 C L J 251=36 Cal 422=2 Ind Cas 338.**

Agreement-Power of re-purchase on condition—Enforcement of right—Re-sale. **14 C P L R 166.**

Agreement—Registration Act 1908 s 17. **27 Mad 43**

Agreement—Legal practitioner—Pleader—Remuneration **88 P R 1868=8 P R 1873=26 P R 1874=63 P R 1876=5 P R 1878.**

Agreement—Stipulation to recognise tenancy—Existence of rights—Effect of—Landlord and Tenant—Miscellaneous. **11 C L J 68=5 Ind Cas 301**

Agreement—to render services as medical practitioner in lieu of rent is "lease" within the meaning of s 105 of Act IV of 1882—Transfer of Property Act 1882 ss 105, 109. **32 Cal 243.**

Agreement—Privy council—Practice of—Costs. **9 B L R 460=14 M I A 203.**

Agreement—not to sue—U P Act XVIII of 1873 s 93 (h). **A W N 1881, 107.**

Agreement—Agreement of partnership between licensee to vend toddy and licensee to vend arrack—Rule prohibiting such agreement—Legality of agreement--Mad Act I of 1886. **24 Mad 401.**

Agreement—To pass another agreement, and which instances an old debt and acknowledges a

Agreement-*Concld.*

fresh loan is an agreement, and not an acknowledgment—See Bom Act XVII of 1879 s 72-A.
2 Bom L R 122=24 Bom 394.

Agreement—to divorce—Suit for custody—Plea of Khula—Validity of agreement—Custody of wife. 193 P R 1889.

Agricultural holding

See (1) Landlord & tenant
(2) Lease.

Agricultural land

See Landlord & Tenant

Agricultural lease

See cases under
(1) Transfer of Property Act ss 107 108, 116, 117.
(2) Lease.
(3) Landlord and Tenant

1—Transfer of Property Act—Applicability of its provisions.

The Transfer of property Act has no application in case of an agricultural lease. (30 Mad 322 Foll) **Maduri Mudaly v Masila Mani Gramani** 5 M L T 222.

Agricultural Purposes

See Bengal Tenancy Act VIII of 1885 s 23

Agricultural Tenancy

See (1) C P Acts (Tenancy Act s 81)
(2) Bengal Acts (Tenancy Act) s 23.

—ejectment.

See Landlord and Tenant.

Agricultural Tenant.

1—Tenant-Occupying room in the abadi-Ouster—Adverse possession. Where a tenant has been occupying a room in the abadi for a period of thirty years he cannot be ejected therefrom by the zemindar. If the room is appurtenant to his holding he cannot be ousted during the continuance of the tenancy and if not appurtenant thereto, he must be taken to have acquired a right of occupying it by adverse possession. **Nazar Hasan v Shibba** 1 A L J 479= 1904 A W N 168-27 All 81.

Agricultural Tenant-*Concld.*

See also cases under.
(1) Landlord and tenant.
(2) T P Act ss 116, & 117, 107 & 108.

Agricultural year.

See Deed—Construction.

Agriculturul year Expiration of—

See North-Western Provinces Rent Acts (1873 and 1881), s 94.

Agricultural Year.

See Instalment Bond, A W N 1882,174.

Agriculturist.

—Definition of.

See (1) Dekhan Agriculturists Act s 2.
(2) Dekhan Agriculturists Relief Act s 12.
(3) Landlord & Tenant.
(4) T P Act ss 107,116,117,& 108.
(5) Mining Rights.
(6) Attachment—Subjects of attachment.
(7) C P C s 60.

Agriculturists. Interest on bond given by
See Interest.

1-Code of Civil Procedure S 266.-Agriculturist. The term "agriculturist" as used in proviso [c] to S. 266 C P Code does not necessarily exclude a person who is proprietor of his holding. 12 Bom 363, 7 Bom 530 referred to. **Ganpat Ram & others v Laxman Rao.** 13 C P L R 30,

Agriculturist—Sale of house of—Legality. 9 Ind Cas 825.

Agriculturist.-House of—Sale in execution of decree on mortgage, whether legal. 8 A L J 1045.

Agriculturist-Mortgage by conditional sale—Both parties agriculturists-Necessity for reference to collector-See Punj Act XIII of 1900, s 9 cls 2 and 3.

Agriculturist—Adoptive and natural mothers—Kritrima adoption—See Custom-Punjab—Inheritance. 147 P R 1889.

Agriculturist also owner of Inam villages & pensioner.

See Dekhan Agriculturists Relief Act.

Agriculturist, an Inamdar can be an.

See Dekhan agriculturists Relief Act s 2

Agriculturist Bhagdar.

See Bombay Act V of 1862.

Agriculturists Relief Act Dekhan

See Dekhan Agriculturists Relief Act.

Agriculturists Loans Act (XII of 1884.)

See (1) Sale for Arrears of Revenue—Incumbrances—North—Western Provinces Land Revenue Act.
(2) Public Demands Recovery Act s 2.

1.—Ex-proprietary tenants—Hypothecation to secure takavi loans—Sale—Auction-purchaser—Relinquishment in favour of Zamindar.

Where ex-proprietary tenants take takavi advances from Government and hypothecate trees standing upon their holdings, they cannot defeat such hypothecation by relinquishing their holdings in favour of the Zamindar. (24 All 538 Fol:)

A purchaser of the trees at an auction—sale held for the realisation of the Takavi loan would step into the shoes of the mortgagors and the mortgagee and acquire ownership in the trees.
Babu Lal v Ram Sahai 1 A L J 261= 1904 A W N 101=26 All 540.

Ahban Thakurs.

1.—Family custom—Hindu Law Mitakshara school—Ahban Thakurs-Step-brother if may succeed equally with brother of whole blood-Specially family custom contrary to Mitakshara—Proof-Wajib-ul-arz, entries in—Value as evidence of custom. Under the Mitakshara law a brother of the whole blood is entitled to succeed to the estate of a deceased brother in preference to a step brother, and in the absence of evidence sufficient to establish such a special custom in the family as to rebut the ordinary presumption that the Mitakshara law prevailed the claim of the step brother to an equal share was properly rejected. There is no class of evidence which is more likely to vary in value according to circumstances than that of Wajib-ul-arzes. (L R 25 I A 161, 169: S C 2 C W N 737: L R 36 I A 125 P C; 13 C W N 1073) Where from internal evidence it seemed probable that the entries acorded connoted the views of individuals as to the practice they would wish to see

Ahban Thakurs-*Concld.*

prevailing rather than the ascertained fact of a well established custom. *Held* that the Court in India had properly attached weight to the fact that no evidence at all was forthcoming of any instance in which the allaged custom had been observed. **Thakur Anant Singh v Thakur Durga Singh 14 C W N 770.**

Ahirs,

See Hindu Law-Inheritance.

Ahamedabad talukdars Act, 1862.

1—Recital, effect of—Covenant to indemnify purchaser of rent-free land from future assessment. In P.J.1881, 101, referring to the recital in Bombay Act VI.of 1862 that Talukdari estates in Ahmedabad are now only held on leasehold tenure determinable at the pleasure of Government, and could not and cannot be lawfully encumbered, charged or alienated, the Court said : it has already been pointed out by the High Court (9 Bom H. C. Rep. 215, 216,) that such a recital in an Act or Statute is not conclusive, and that it is scarcely consistent with the concluding portion of S 7 of the Act. It is substantially displaced by the report of Mr. Peile, No. CVI. of the New Series of Selections from Bombay Government Records. In fact the recital is notoriously contrary to historical truth.

The Court also held that the liability of a vendor under a covenant contained in a deed of sale executed in 1835 to indemnify the purchaser of property thereby sold and alleged to be rent-free from any future imposition of assessment by Government, was not a claim which could have been brought in under the Act, where such assessment was not levied until 1870, the defendant's estates having been brought under the operation of the Act in 1863, and was therefore not barred by the Act.

"*Liabilities*" "*Incurred.*" The "liabilities" which the first ten sections of Bombay Act VI. of 1862 were intended to deal with are liabilities which, at the time of the declaration mentioned in S I, were not merely contingent, but could be made the subject of an immediate claim.

The word "incurred" in S 12 is used in its proper sense of "run into" and implies an act done by the Talukdar during the period of management.

The case of a debt or liability to which a Talukdar has become subject during such period, in

Ahamedabad talukdars Act, 1882 -*Concld.*

consequence of an event which could not be foreseen with certainty at the commencement of such period, must be treated as a *casus omissus* in the Act. **Shaik Gulam v. Waghela Rajsangji 1883 P J 68.**

2—Attachment of rents of Talukdari estates.

The plaintiffs having obtained a decree against the late father of the minor defendant, a Talukdar in the Ahmedabad Collectorate, both in his individual capacity and as guardian of his minor son, on a bond passed by the father while his landed estates were under the management of the Talukdari Officer appointed under Bombay Act VI. of 1862, attached certain moneys in the hands of the Collector as administrator of the minor's estate, which had arisen from the rents of the Talukdari estate:—

Held, that the attachment was forbidden by S 12 of the Act. The argument that the provisions of that section only referred to the estates while they belonged to the defendant's father, and not when the defendant succeeded to them, was quite untenable, having regard to the scope and object of the Act, and to the general language of the concluding portion of the section.

The prohibition against "the enforcement of such a debt in any manner whatever" against the Talukdari estates included an attachment as well against the rents and produce as the corpus of the estates, and the moneys while in the hands of the Collector, and for which he was bound to account to the defendant as the produce of the rents of the estates, still retained their character as rents when they were attached. **Suba Miya v Sha Lalchand Teja 1884 P J 34.**

Air.

See (1) Prescription—Easements.
(2) Prescription—Light and air.
(3) Easements
(4) Easement Act

Air and Light.

See (1) Easements.
(2) Prescription.
(3) Easements Act.

Ajmere Court Regulation.

1.—S 18 et seq.—Reference by Commissioner of Ajmere—Powers of High Court—Jurisdiction.

Ajmere Court Regulation-*Contd.*

Held, that, where a point of law or a question as to the construction of a document is referred to the High Court by an order purporting to be made under S. 18 of the Ajmere Courts Regulation, the High Court cannot consider whether the point referred arises in the case in which the reference before it has been made or not; but its functions are limited to pronouncing an opinion on any point which may be so referred to it. **Kalian Mal v Ram Kishen. 21 All. 163=19 (1899) W N 4.**

1*A*.—Reference to the High Court of N W. Provinces——Question of fact——Second Appeal.

There can be no reference to the High Court of the North-West Provinces where the question involved is one of fact and not of law.

There is no provision of law for a reference to the High Court of an Ajmer case which has been decided by a second Court of appeal. **Badruddin v Bismillah. 11 Ind Cas 671.**

2.—Section 17—This was a reference by the Commissioner and District Judge of Ajmere and Merwara under Section 21 of the Ajmere Courts Regulation, No.1 of 1877. The question referred to was, "Whether an attachment (in execution of a decree) ceases when nothing can be realised by a sale, or whether the attachment remains in force till the property is formally released by the Court which caused the attachment to take effect." *Held*, that the question referred to was not properly coming within the scope of section 17 of the Regulation, not being a question of law or usage having the force of law, but a question of fact to be decided by a consideration of the circumstances of the cases of (12 B. L. R, P C. 411) and (I. L. R., 1 All, 616). **Sham Lal v Hamid 5 W N 57.**

3-4.—Ss. 17, 18, 21, 36 37—Reference to the High Court by the Chief Commissioner of Ajmere and Mairwara—Reference to Chief Commissioner by Commissioner of Amjere—Appeal from Commissioner's dicree made in accordance with Chief Commissioner's judgment.

On an appeal from a decision in a Civil suit of the Assistant Commissioner of Ajmer to the Commissioner of Ajmer, the latter feeling doubtful on a question of the nature specified in S.

Ajmere Court Regulation-*Contd.*

17 of the Amjere Courts Regulation I of 1877, referred such question, uuder s. 36 of that Regulation, to the Chief Commissioner of Ajmere and Mairwara. The Cnief Commissioner dealt with the case as psescribed in s. 37 of that Regulation, and returned it to the Commissioner, who dismissed the suit in accordance with the Chief Commissioner's judgment. The plaintiff preferred an appeal to the Chief Commissioner from the Commissioner's decision. The Chief Commissioner did not make any order on the memorandum of appeal admitting it, or directing that it should be registered, or that the respondent should be summoned, or that the appeallant should appear on a certain day under s. 551 of Act X of 1877, but issued a notice to the appeallant's counsel to appear on a certain day. The appeallant's counsel appeared on that day, and the Chief Commissioner intimated that he was acting under s. 551 of Act X of 1877. The appeallant's counsel then proceeded to address the Chief Commissioner, and was heard for some time, and then stopped in consequence of the Chief Commissioner resolving to refer to the High Court the question whether the appeal from the Commissioner's decision lay to him or to Her Majesty in Council. The Chief Commissioner subsequently referred such question to the High Court. *Held* by the Full Bench (Spankie, J. dissenting) on a reference by the Division Bench before which the Chief Commissioner's reference came, that such question arose "in the trial of an appeal" within the meaning of s. 21 of the Ajmere Courts Regulation I of 1877, and was properly referred to the High Court. *Held* by the Division Bench (Spankie, J., and Straight J.) that the appeal from the Commissoner's decision lay, in this particular case, not to the Chief Commissioner, but to Her Majesty in Council.

Thakur of Masuda v The Widows of the Thakur ot Nandwara. 2 All, 819.

Notes:—Ref: 30 All 290=(1908) W N 109= 5 A L J 584.

5.—Ajmere Courts Regulation 1 of 1887, Section 21—Jurisdiction—Civil Procedure Code, Section 57:—

In a suit for partition filed in the court of a Subordinate Judge of the first class in Ajmere the court, acting under Section 57 of the Code of Civil Procedure, returned the plaint on the ground that the subject-matter of the suit was beyond its Jurisdiction. There was an appeal against that order to the Court of the commissioner of Ajmere-Mariwara, which rejected it, holding the same view as the Subordinate Judge. Held, that under these circumstances the Chief Commissioner of Ajmere-Marwara had no power to refer the question of jurisdiction under Section 21 of the Ajmere Courts Regulation, 1877, to the High Court for its opinion.

Raj Mal v Pauna Lal. 1902 A W N 215

6.—Section 33.—Damdupat.

The rule laid down by s. 33, Regulation III of 1877 applies only to cases in which money is payable by the defendant to the plaintiff, and is not applicable to a suit for redemption of a mortgage. (13 Mad I A 44 Referred to.

Nemi Chand v Rudha Ballabhi; Radha Ballabh v Nami Chand. 26 All 354= 24 W N 43.

Ajmere Land Revenue Regulation.

1.—S. 41—Usufructuary mortgage—Proprietary rights, losing or parting with—Exproprietary tenant.

Per Richards J.—Usufructuary mortgagor, by placing the usufructuary mortgagee in possession temporarily, loses his proprietary rights within the meaning of Sec 41 of Reg II of 1877 of the Ajmere Code. The mortgagor, who before the mortgage was and since the mortgage remains, in cultivation of lands, is an occupancy tenant in respect to those lands.

Per Karamat Husain, J.—An owner of a holding, who makes a usufructuary mortgage of his holding, does not lose or part whit his proprietary rights, either temporarily or permanently, within the meaning of Reg. II of 1877, of the Ajmere Code, and does not become an exproprietary tenant of his khudkasht in that land.

Held, further, that where a mortagagor in the mortgage-deed promises to make over possession of the mortgaged property, which is his khudkasht to the mortgagee, Section 41 of the Ajmere Land and Revenue Regulations does not

Ajmere Land Revenue Regulation—*Concld.*

apply. Rules of interpretation of statutes discussed. **Nemi Chand v Ganesh. 7 A L J 370=5 Ind 503.**

Akyab.

See Burma Act XVII of 1875 ss. 31, 66.

Ala and Adna maliks.

1—Pre-emption—Village divided into two pattis—Sale of *adna* rights in one patti to *ala* proprietor—Suit by *adna* proprietor of other patti—Respective rights of *ala* and *adna* proprietors—Punjab Laws Act, 1872, Section 12 clauses (e) and (d)—Punjab Land Revenue Act, 1887, Section 3 (2)—**Mauza Sorab Hosar, Dera Ismail Khan District.**

See (1) Pre-Emption, Right of.
(2) Custom.

Ala Lambardar.

See Lambardar.

Ala Malik.

See Custom (Punjab.)

Alien.

See Jurisdiction of Civil Court.

Aliens.

—Law relating to—

See English Law.

—Period of minority for.

See Letters of Administration.

Alienability.

See Service tenure.

Alienable Interest.

See Hindu Law—Alienation.

Alienation.

See Cases under—

(1) Guardian & Ward.
(2) Religious institution.
(2A) Grant & Rahuana Grant.

Alienation—*Contd.*

(3) Mahomedan Law.
(a) Gift.
(b) Alienation.
(c) Wakf.
(d) Will.
(4) T. P. Act S. 10.
(4A) Punjab Tenancy Act s. 34.
(4B) Insolvent.
(4C) Hindu Law—Widow.
(4D) Occupancy Rights.
(5) Attachment——Alienation during attachment.
(6) Hindu Law—Alienation.
(7) Hindu Law—Joint family.
(8) Malabar Law—Endowment.
(9) Malabar Law—Joint Family.
(10) Buddhist Law—Alienation.
(11) Custom (Punjab)

—Condition against—

See (1) Lease. Construction of.
(2) Mortgage—Form of Mortgage.

—by Guardian.

See (1) Act XL of 1858, s. 18.
(2) Limitation Act, (1908) ss. 6 & 8.

—by Hindu widow.

See (1) Hindu Law—Alienation—Alienation by Widow.
(2) Hindu Law—Widow—Power of Disposition or Alienation.

Alienation

—Restraint on—See Transfer of Property Act, ss. 10 & 11.

1—Hindu Law—Guardianship—Step-mother can be guardian of her step-sons—and can alienate his property for legal necessity-Remarriage of itself does not deprive a Hindu mother of her right to be the guardian of the sons, 7 W R 321; 10 M I A 454; Ref 6 M I A 412; 26 Cal 820 Ref

Alienation-*Contd.*

16 C P L R 99 Ref. 20 Bom 753 Ref.
Jogo v Oodal. **4 N L R 20.**

2—Manager of a charitable or religious institution, powers of--Burden of proof of necessity for alienation—Money decree against manager how far evidence of necessity—

The powers of a manager of the property of a charitable or religious institution are the same as those of a manager for an infant heir. Where property belonging to such an institution has been alienated by the manager, the burden of proving necessity for the alienation lies upon the alienee. Where money had been borrowed by the manager in order to satisfy a decree against him, which had been followed by an attachment and an order for sale of property belonging to the institution, *held*, that the Court was not bound to accept the decree and the order for sale as conclusive proof of necessity. **Basdeo Ban (Mahaunt) v. Sri Kishun Gir, 13 O C 79=5 Ind Cas. 1005.**

Alienation—Prohibition against, by Government of house-sites which are not vatan property. See Bom Vatan Act III of 1874 ss. 5 & 7.

Alienation—of cantonment land—See Cantonment, **10 Bom L R 287=12 C W N 465; 4 N L R 65=7 C L J 401=3 M L T 339=18 M L J 199=14 Bur L R 102=35 Cal 478.PC.**

Alienation—by father—Necessity for sale established—Consideration for sale higher than the amount necessary to raise—Objection by sons, validity of—See Civ. Pro Code, 1908, O XXXII, r. 4.

Alienation—Meaning of, in S. 325, C. P. C. —Will whether an—See Civ. Pro. Code, 1908, sch. III, r. 10,

Alienation—of office by mothrr-in-law to son-in-law—Validity—See Hereditery office.

Alienation—by male members—Creation of reversionary rights in daughter of an undivided Hindu family by family arrangement—Suit by daughter for declaration—See Hindu law-Reversioners, **15 M. L. J. 392**

Alienation—of Math property, limitation for suit to set aside—See Limitation act, 1908, Art 134, **5, Bom. L. R 241=27 Bom 373=4Bom L R 743—27 Bom. 363.**

Alienation-*Contd.*

Alienation—of trust property limitation for suit to set aside—See Limitation Act, 1908, Art. 134, **5 Bom. L. R. 303=27 Bom 500.**

Alienation— Where there is a custom of primogeniture, there is no restriction on the alienation by the incumbent for the time being, unless a special custom is proved to the contrary **8 C L. J, 274=13 C. W. N. 163=4 Ind. Cas. 467.**

Alienation of istamrari estate.

See Istamrari Estate.

-By manager of religious institution.

See Religious Institution.

--By Guardian.

See Cases under.—

Guardian and Ward.

Alienation by a Mortgagee—A sale under powers conferred by a mortgage-deed cannot be held to be a private alienation within the meaning of s. 276 of the Civ. Pro. Code. 1882—Civ. Pro. Code 1908, S. 64, **3 Bom. L. R. 892.**

—by de facto manager of an endowment.

See Hindu Law Endawment-Alienation of endowed property.

--by a Mortgagee.

See Attachment—Alienation during attachment.

—by mulgenidar.

See Landlord & Tenant.

—by widow.

See (1) Hindu law-Alienation
(2) Limitation Act 1877 Arts 125 v 141.

—During Attachment.

See Attachment

Alienation-*Concld.*

—Limitation, Ancestral Land Act.

See Pun Act I of 1900

—of charitable trust.

See Cases under:—

Trust (Charitable trust.)

—of Endowed Property.

See Hindu law—Endowment.

Alienation of Lands Act Bundelkhand.

See U p Act II of 1903.

—Alienation of Land Act Punjab.

See Punjab Act XIII of 1900.

—Restraint upon

See—T. P. A. S. 10.

Alienee from widow bound to inquire if legal necessity to alienation

See Hindu Law-Alienation—Alienation by widow.

—of trustees not necessary parties.

See Parties

Alimony.

See (1) Divorce Act ss. 36-38 37.
(2) Husband and wife.
(3) Parsis.

Alyasantana Law

See Malabar Law.

Alyasantana law-Yajaman-Family arrangement regarding yajamanship, how far revocable-See Hindu Law—Custom.

Alyasantana Law *Concld.*

See 1 Hindu Law—Custom,
2 Hindu Law—Maintenance.

Alyasantana Law—of South Canara—Vesting of property in females—No compulsory division of property **1 M H C 380**

Alyasantana Law—Pattam or office of dignity—Indivisibility—Succession—See Hindu Law—Partition.

Alyasantana Law—Suit for maintenance—See Limitation Act 1908, arts, 127, 128 129

Alyasantana Law—Right of junior members of, family to show that a judgement-debtor did not represent the family when the debt was incurred—See Resjudicata—Parties.

Allegans Contraria Non Auditur.

See (1) Plaint, Form of.
(2) Pleadings.

Allegation of fraud

See—Fraud.

Allocature.

See—Costs—Solicitor.

Allonge

See—Government Promissory Note.
13 B L R 359.

Allotment

See Company

—on partition

See Partition.

Allowable deduction

See Divorce Act.

Allowance To Bankrupt.

See Insolvent Act.

—For Maintenance of Infant.

See Infant.

Allowance-*Concld.*

--For Maintenance of Lunatic.

See Lunatic.

Allowance for spoiled stamps.

See Stamp Act.

Allowances Act, Toda Giras.

See Bombay Act VII of 1887.

Allowing objection not taken.

See Appeal (objection by Respondent).

Alluvial & diluvial lands.

See (1) Accretion.
(2) Bengal Reg. XI of 1825.

Alluvion.

See (1) Accretion.
(2) Natural rights.
(3) Water rights
(4) Riparian rights.
(5) Riparian Proprietors.
(6) Bengal Reg. XI of 1825.

Almanac.

1—Copyright—Almanac—Burden of proof—Injunction.—

In a suit for injunction on the ground of infringement of plaintiff's copyright in an almanac published by him, it was found that the tables given in the parties' almanacs tallied, except as regards minutes and seconds, that the calculations were admittedly worked out on what are known as Makrand and that there were other almanacs which resembled the defendants'.

Held, that these findings were not sufficient to establish piracy on the part of the defendants.

Held, also, that the fact that in previous years the defendants obtained information for their almanacs from plaintiff on payment of money, did not affect the case. **Girdhari Lal v. Devi Dial, 95 P L R 1910.**

Altama Grant.

See Mahomedan Law—General.

Altamah Enam.

See Grant Construction.

Alteration.

See Cases under:—

(1) Contract (Alteration).
(2) Deeds.
(3) Documents.
(4) Bond.

--of character of suit.

See Cases under.—

C. P. C. O. 7 rr. 11, 17.

1—'He who seeks equity must do equity'.—

The maxim 'He who seeks equity must do equity' is applicable to a defendant as well as to a plaintiff, and a party who seeks to avail himself of an equitable defence must stand the test as well as one who appears as plaintiff in a case.

Eastern Mortgage and Agency Co. Ld. v. Rebati Kumar Ray 3 C L J 260.

2—Materiality—When.—

The alteration of a document to be material must affect the legal effect of the contract so as to make it cease to be the same instrument.

Adool Hoosein Mulla v. Goolam Hoosein Ally, 7 Bom L R 743.

3—Alteration of deed—Suit for recovery of money due on a bond—Forged bond—Material alteration, if and when vitiates instrument—Party, addition of fraudulent—Original debt, effect of, when recited in bond—Court. power of to dismiss suit against a party and not contesting—Material alteration, law as to limitation, if saved by acknowledgment of original debt recited in forged bond.

The test for determining the materiality of an alteration in an instrument is to see whether the addition gave a different legal character to the writing and whether it would completely change the nature of the relation towards each other of the parties to it and their remedies upon it.

If a party to a deed makes an alteration in a covenant after the deed is executed, not only the covenant but the whole deed becomes void.

Any change in an instrument which causes it

Alteration-*Contd.*

to speak a different language in legal effect from that which it originally spoke, which changes the the legal identity or character of the instrument, either in its terms or the relation of the parties to it, is a material change or technically an alteration, and such a change will invalidate the instrument against all parties not consenting to the change

The question, to what extent the identity of an instrument must be changed in order that its legal effect will be altered, so as to bring the case within the terms of a material alteration vitiaing the instrument, must depend upon the nature of the alteration in each particular case. The test is not necessarily, whether the pecuniary liability of one of the parties has been increased by the change; it is of no consequence, whether the alteration would be beneficial or detrimental to the party sought to be charged on the contract. The important question is whether the integrity and identity of the contract have been changed.

Where a party by his own act alters a genuine instrument, so that it cannot be the foundation of any legal remedy, he ought not to be permitted to prove the promise contained in it by any other evidence, on the principle that the debt is merged in the instrument and hence the destruction of the latter leaves nothing upon which to sue.

In the absence of fraud, the instrument only and not the original debt is, in such circumstances, destroyed, but where a party has voluntarily and fraudulently altered a deed and has thus destroyed the evidence of his debt, he should not be allowed to fall back upon the original consideration and establish it by evidence which he himself has destroyed.

As an ordinary rule, where the defendant has notice of an alteration in an instrument which is the foundation of the action, he should raise the issue by his pleading whether the alteration is material and the instrument has become void. If however, in proving the execution of a note, the testimony discovers the fact that it was designedly changed by the payee, the Court is not precluded from giving effect to the well-settled rule of law that an instrument is avoided by a material alteration. **Gour Chandra Das v Prasnna Kumar Chanda 3 C L J 363=10 C W N 788=33 Cal 812.**

Alteration-*Contd.*

Notes—Dist 12 C W N 716

4—Hatchita, suit on-Entry relating to acknowledgment of debt—Material alteration—Interpolation of entry as to interest-Document merely relied on as evidence Effect of interpolation—Defendant had acknowledgment of his indebtedness to plaintiff for a certain sum found due upon an adjustment of accounts, by signing his name over an eight anna stamp in a hatchita at a subsequent date. In a suit to recover the amount acknowledged, plaintiff put the hatchita in evidence but no reliance was placed on the entry relating to interest, nor was interest asked for. Held,—That plaintiff was not suing upon any instrument which he had fraudulently altered. The entry on which he relied and which had not been altered or tampered with, was put in merely as an acknowledgment of Defendant's liability and there being no question as to its genuineness. Plaintiff was entitled to a decree. The authorities discriminate between cases in which the altered document is the foundation of the claim, and those in which it is only used as evidence. (7 Cal 616=9 Mad 399=25 Bom 615 Ref. to) **Harendra Lal Roy Chowdhry v Uma Charan Ghosh 9 C W N 695.**

5—Delegatus non potest delegare,—is to be understood with this necessary qualification, that, in any particular case if no authority to delegate has been given, such authority may be implied from the circumstances of the case. **Jogewnr Narain Singh v RaiRadha Rawan-10 C W N 289=3 C L J 165.**

6—Of arbitrators—No application for filing it in Court—Whether it can be pleaded in subsequent suit—Deeds—Material alteration after execution and without privity of party to be affected by it, effect of—Deeds which have a continuing effect, and deeds taking effect at once—Distinction—Costs—Relief given to plaintiff not being that which he claimed—Practice.—An award of arbitrators can none the less be pleaded in a subsequent suit, and if valid must be given effect to, though no application for filing it in Court has been made, or such application has been actually put in issue, on such application.

A material alteration made in a written instrument after its execution and without the privity of the party to be affected by it, prevents

Alteration-*Contd.*

the party in whose custody the instrument has been, from making any use of it at all. But there is a distinction between those deeds or clauses of a deed which have a continuing effect, or are executory, such as a covenant to pay a sum of money, and those which produce their full effect at the instant of execution, such as a conveyance of land. For no case can be found in which a deed or clause of a latter nature has been prevented from taking effect because the deed was altered after execution, so that an altered deed may be given in evidence to prove any effect produced by it in its original form at the instant of its execution or of any right which existed *aliunde* and of which it is evidence.

In a suit brought by the plaintiff against the defendant the relief given to the plaintiff was not that which he claimed. *Held*, each party should bear his own costs throughout. 18 Cal 414 (P C) 12 C P L R 33.25 All 580 Fol:
Ganpat v. Ramkrishnapuri 6 N L R 1= 5 Ind Cas 425

7-Bill of exchange or promissory note exhibiting the appearance of alteration-Whether the onus lies on the person suing to account for it—Whether in other documents the alteration is presumed to have been made before execution.—If a bill of exchange or promissory note exhibit the appearance of alteratinn, the onus lies on the person suing to account for it; but in other documents (except wills) the alteration is presumed to have been made before execution.
Raja Shewbux Bogla v. MaMaGyi. 14 Bur L R 213

8—Deed—Material alterations — Voidability of such deed, written acknowledgment, material alterations in—Evidence.

A material alteration in an instrument avoids the same where an action is based on the instrument itself. A written acknowledgment, which is intended to save the bar of limitation and not to give a right of action, does not come within the rule in Pigot's case (1) viz., that the material alteration of a document by a party to it after its execution without the consent of the other party renders it void.

Hence, a material alteration, by a creditor without the debtor's consent, in a written acknowledgment of the debtor's liability does not render the acknowledgment void or inoperative.
Atmaram Bhagwan v. Umedram Haribhai 3 Bom L R 213=25 Bom 616.

Alteration-*Concld.*

Alteration—Pro-note signed by some of the apparent makers at different places and times—Material alteration. **9 Ind Cas 463.**

--by party.

See Contract Alteration.

--by the court.

See Contract Alteration.

--of acknowledgment.

See Acknowledgment, Limitation Act, S. 19.

—of Date.

Alteration of Date-of appeal without notice to appellant or his pleader. **A W N 1894, 19.**

Alteration of deed.

See cases under—

(1) Contract—Alteration of contracts.

(2) Deed, construction of.

Alteration of Document.

1—Unauthorised.

An unauthorised alteration of a document by one of the parties thereto which serves only to state explicitly what was already clearly implied in the document, and what the law would infer from it, will not invalidate the document.
Tikamdas v Ganga. 1874 P J 144

See also cases under:—

(1) Fraud.

(2) Promissory note.

(3) Contract, alternation in.

Alteration of easement.

1—Window- New windows—New easement.

Where a person opens new windows in place of old ones, but has them larger in size or at a higher level, the easement for his new windows becomes a new easement, which he can acquire

Alteration of easement-*Concld*

only by enjoying if for the required length of time. **Hariganga v Trikamlal 4 Bom L R 34=26 Bom 374**

Alteration or Amendment of Decree.

See Decree

Alterations and erasures in a will

See Will.

Altering decree on appeal where respondent makes on objection.

See Appeal (objection by Respondent)

Alternative claim.

See (1) Appellate Court—exercise of powers in various cases.

(2) Plaint.

(3) Pleadings

Alternative claims.

1—Proprietary right—Prescriptive right—Inconsistent claims.

A claim to relief on the ground of proprietary right is not necessarily inconsistent with a claim to relief on the ground of prescriptive right, and may be claimed in the alternative with the latter. When a plaintiff has been allowed to sue for relief based, in the alternative, on the ground of proprietary right and right by prescription and no objection has been taken to the frame of the suit in the Court of first instance objection cannot be allowed to be taken at the appellate stage (16 W R 198 Dist)

Durgamani Debya v Ambica Charan Sarma 4 C L J 367

Notes.—Appr 11 C W N 20=4 C L J 437=1 M L T 364=34 Cal 51 : Ref., 8 C L J 289

2—Inconsistent claims—Ownership—Easement.

A suit is not liable to be dismissed because the plaintiff claims in the alternative, over the same plot of ground, rights of ownership and easement. (4 C L J 367. Appr,) **Narendra Nata Baruri v Abhaya Charan Chottopadhya 4 C L J 437=11 C W N 20=1 M L T 364 34 Cal 51 F B**

Alternative claims-*Concld.*

Notes:—11 C W N 19, Note 8 C L J 289.

3—Suit for rent by one sharer. Alternative claim—Bengal Case Act, S. 29.

A suit is maintainable by one of several joint landlords for recovery of balance of rent due from a tenant, and in the alternative for recovery of the sum which may have been collected by his co-sharers in excess of their legitimate share. So far as the claim against the co-shares is concerned S. 20 of the Cess Act has no application. 4 Cal 350 applied. **Sham Singh v Kishan Satai. 6 C L J 190.**

See also:—

Landlord & tenant.

Alternative claims—of gift and inheritance, validity of—**Hindu Law—Inheritance. 17 M L J 285=8 M L T 357=30 Mad 406**

Alternative claims—Different cause of action—Alternative claim common to all different suits—**Mortgage—Redemption. 10 C L J 83=3 Ind Cas 395**

--claim on original consideration.

See Plaint-Form and contents of plaint.

Alternative Defence—Possession either as a tenant or for more than twelve years-Possession—Suit for possession. **8 C L J 557.**

Alternative Pleadings.

See cases under

(1) Practice

(2) Pleadings.

(3) Plaint.

—Pleas

See Pleadings.

--Prayer.

See (1) Alternative claims

(2) Pleadings.

(3) Plaint-Form & contents of plaints

Alternative relief in ejectment suit-*Concld.*

See Landlord and tenant-Ejectment

--relief.

See (1) Stamp Act.
(2) Plaint-Form and contents of plaint.
(3) Pleadings.
(4) Relief.

Amalnamah.

1--Commissioner's amalnamah-Legal rights-Protest.

A Commissioner's amalnamah cannot destroy legal rights notwithstanding that no protest or objection was made. **Ram Gobind Roy v Syud Kushuffudoza. 15 W R 141**

Amaram Grant.

See Grant—

Amaram Tenure.

See Madras Estates Land Act.

Amaram Tenure.

Nature of—See Permanent Tenure. **3 M L T 258=7 Ind. Cas. 202.**

Ambassador.

See International Law.

Ambiguity.

See (1) Deed—Construction of deed.
(2) Evidence Act, 1872, ss. 93 to 98.
(3) Will-Construction.
(4) Stamp Act, 1862, **1 Ind Jur N S 107**

Ambiguous Documents.

See (1) Deed-Construction of deeds.
(2) Evidence Act ss. 93—98.

Ameen.

(1) Functions of Ameen. (1–4)
(2) Power of Mufti Sudder Ameen to set-aside attachment issued by himself (5)
(3) Evidence taken by Ameen (6)
(4) Power to examine witnesses. (7 13).
(5) Direction to enquire into mesne profits (14)

C. C. 43

Ameen-*Contd.*

(6) Enquiry by Ameen as to existence and value of moveable property. (15)
(7) Deputation of second Ameen to make enquiry before first Ameen's proceedings are annulled. (16)
(8) Objections to Ameen's report. (17-20)
(9) Mis-conduct of Ameen. (21)

Ameen.

See Cases under local investigation.

—Report of—

See Cases under Evidence-Civil cases- Report of Ameen.

(1) Functions of Ameen.

1—Functions of Ameen-Deputation of Ameen to ascertain liabilities of judgment debtors.—

The deputation of an Ameen to ascertain the respective liability of several judgment-creditors is not an improper course for a Court to pursue, and at all events is not a ground for interfering in special appeal with the concurrent judgment of two courts. **Kristo Chunder Gupto v. Brojo Mohun Dey Chowdhry 22 W R 183**

2—Local investigation—Act VIII of 1859, s, 180—Functions of an Ameen appointed to hold a local investigation, under s. 180, Act VIII of 1859, discussed. **Iswarchandra Das v. Jugal Kishor Chuckerbutty 4 B L R Ap 33; 17 W R 473 note: 21 W R 281 note.**

3—Local investigation.-There were no limits to the powers conferred by Act VIII of 1859 on a Civil Ameen for the purpose of making an investigation. **Mohun Lall Roy v. Urnopoorna Dassee 9 W R 566.**

4—A Civil Court is not warranted in deputing its functions to an Ameen, and an Ameen is bound not to go beyond the points referred to him for enquiry. **Ram Dhun Dey v. Ram Monee Dey. 21 W. R. 280**

Iswar Chandra Das v. Jagal Kishor Chuckur Betty. 4 B L R Ap 33.
17 W R 473 note· 21 W R 281 note.

See Buroda Churn Bose v. Ajoodhya Ram Khan 23 W R 286.

Ameen-*Contd.*

(2) Power of mufti sudder Ameen to set aside attachment issued by himself.

5—Power of Mufti Sudder Ameen to set aside attachment issued by himself—A Mufti Sudder Ameen may set aside an attachment in a suit issued from his Court, and no longer property in force in the suit, although no express statutory power to do so exists. But on a petition to set aside such an attachment, he cannot also make a declaration as to the right to the property attached and claimed to have been acquired subsequently, and direct that possession should be transferred to the petitioner. **Ex-parte Chellapperumal Pillai. 1 M H C 135.**

(3) Evidence taken by Ameen.

6—Evidence taken by Ameen, Irregular—.

Where a principal Sudder Ameen had deputed a Civil Ameen to enquire into the fact of possession, instead of hearing the evidence on the point himself-*Held* that, even if the principal Sudder Ameen's order was improper, the deputation of the Ameen was legal, and the evidence taken by the Ameen was legal evidence, to be considered on its own merits. **Ram Churn Mahtoon v. Surubjit Mahtoon. 9 W R 494.**

(4) Power to examine witnesses.

7—Power to examine witnesses—Duties and functions of Ameen.

An Ameen should be appointed to hold a local investigation only when it is necessary to inspect the land which is the subject of dispute, to take maps of localities, to obtain information with regared to the physical features of the place, to identify the land in maps with parcels which are the subject of the suit, and to identify the maps with one another with the aid of objects to be found in the land; and for these and similar purposes an Ameen may examine witnesses when the evidence which they have to give is of such a nature that it ought to be taken by him on the spot. Where however, any fact can be proved by evidence taken otherwise than on the spot, that evidence ought to be taken by the Court itself in a regular manner, and not by an Ameen. *Quære*—Whether, where, an Ameen has in fact been, though improperly, deputed, and has examined witnesses, that evidence ought to be totally rejected. **Bindabun Chunder Sircar Chowdry v. Nobin Chunder Biswas 17 W R 282**

Notes—Foll: 16 Mad 350.

Ameen-*Contd.*

8.—Evidence taken by Ameen.

It is not admissible. **Chand Ram v Brojo Gobind Doss 19 W R 14.**

Notes:—Fol 13 C W N 696.

9.—It was not the intention of the Legislature to allow witnesses to be examined out of Court by Ameens, except with reference to points for the determination of which local inspection is required. **Shadhoo Singh v Ram Anoograha Lall 9 W R 88.**

10.—The report of an Ameen as to a local enquiry upon a matter which no personal inspection on his part could decide, and in regard to which the depositions of parties acquainted with the place could afford proper information, was held to be in no way irregular, simply by reason of his having examined witnesses on the spot.

Sheo Narain Bhuggut v Budh Singh 11 W R 423.

11.—Appointment of local Commission—Verbal abuse—Actionable wrong.

Held, that the appointment of a Commissioner to make a local investigation as to whether defendant abused plaintiff was irregular, as all that the Commissioner could do was to examine witnesses, which unless the witnesses were unable from illness or infirmity to attend to be personally examined, or were exempted from personal attendance in Court, should have been done by the Judge himself. *Held*, also, that mere verbal abuse is not actionable unless it causes material loss. **Gauri v Ram Parshad S C 66.**

Followed in S. C. 247, reconsideration of report and evidence recorded by Commissioner when Commission improperly issued.

12.—Local investigation—Suits for enhancement of rent—Act VIII of 1859 s 180.

In suits for enhancement of rent it is a proper course of procedure to appoint an Ameen to make a Local investigation in order to enquire as to the description of the land and as to the rates paid in the neighbourhood for similar land, and the Ameen has power, under s 180 Act VIII of 1859, to examine witnesses in the matter. **Gaur Chandra Roy v Rashbehari Dutt 1 B L R S N 1= 10 W R 43.**

13.—An Ameen appointed to hold a local investigation has power to examine witnesses rela-

Ameen-*Contd.*

hive to the matter he has to enquire into; but the Munsif has no power to direct the Ameen to try the whole case: when this course was adopted, the High Court expressed their disapproval of such a practice, and remanded the case to the Munsif for re-trial. **Raghunath Shaw v Rajkrishna Deb 1 B L R S N 2.**

(5) DIRECTION TO ENQUIRE INTO MESNE PROFITS.

14.—Direction to enquire into mesne profits.—An Ameen, when directed to make an enquiry as to mesne profits, ought not, in the execution stage of a suit, to enter into enquiries as to dates of dispossession, which must be taken to have been determined by the decree. **Bijoy Gobind Naik v Kali Prossono Naik 16 W R 294.**

(6) ENQUIRY BY AMEEN AS TO EXISTENCE AND VALUE OF MOVEABLE PROPERTY.

15.—Enquiry by Ameen as to existence and value of moveable property—Time for making enquiry.

In a suit in which the Court considers it necessary to order an enquiry by a Civil Ameen into the existence and value of moveable property, such enquiry cannot be left to be made after decree, but must be made before the final decree is drawn up. **Rohini Debia v Digambur Chatterjee 23 W R 422.**

(7) DEPUTATION OF SECOND AMEEN TO MAKE INQUIRY BEFORE FIRST AMEEN'S PROCEEDINGS ARE ANNULLED.

16.—Deputation of second Ameen to make inquiry before first Ameen's proceedings are annulled.—When an enquiry has been made by a Commissioner under the Code of Civil Procedure, the Court to which it is reported ought not, unless it annuls the proceedings of the first enquiry, to order another on the same matter. **Azim Ali Khan Bahadoor v Surussutty Debia 23 W R 93.**

(8) OBJECTIONS TO AMEEN'S REPORT.

17.—Objections to Ameen's report.—Where clear instructions as to a local enquiry ordered by the Court are given to an Ameen in the presence of both parties, and no objection is made to them by either party then and there, they have no ground of complaint, after the Ameen has carried out his instructions, if the Court acts upon his report. **Bissessur Roy v Kanchun Roy 11 W R 155.**

Ameen-*Concld.*

18.—Objections to the Ameen's report should be enquired into if taken within a reasonable time from the return of the report, even where the case has been struck off the file. **Issur Chunder Ahiree v Syam Khan Chowdhry 11 W R 95.**

19.—Notice of time fixed for.

Reasonable notice must be given of the time fixed for hearing objections to the report. **Ram Narain Singh v Goberdhun Lall Chowdhry 21 W R 2.**

20.—Party not appearing at local investigation.—

A party who refuses to appear before an Ameen at the time he holds his local investigation, is not at liberty afterwards to take any objection to the Ameen's report. **Bamun Doss Mookerjee v Brojo Kishore Mitter Mojoomdar 6 W R 130.**

Notes:—Con 7 W R 140.

(9) MISCONDUCT OF AMEEN.

21.—Misconduct of Ameen. The Court is bound to enquire into charges against a Civil Court Ameen (such as can be readily enquired into, and their truth either disproved or proved). **Abdool Kureem Biswas v Campbell 8 W R 172.**

Amendment

See Cases under:

(1) Plaint, amendment of
(2) Decree, amendment of
(3) Power of attorney, amendment of
(4) C P C (1908) O 6 rr 17 18

Amendments, limits of—Discretion of Courts not to be allowed to prejudice the substantial rights of the opposite party. **11 C L J at 289**

Amendment of decree

See Cases under Decree—Alteration and amendment of decree.

Amendment of decree-*Concld.*

—of decree after execution.

See (1) Decree—Alteration or Amendment of decree.

(2) Sale in execution of decree.

—Error in Probate

See Probate

—of issue

See Issue—Fresh and additional issue

—of mukhtear-namah

See Mukhtearnamah

—of patta

See (1) Lease

(2) Landlord and tenant

—of plaint by beinging on a new plaintiff on second appeal

See Plaint-Amendment of plaint

—or alteration of decree

See Decree Alteration or amendment of decree.

—of Pleadings

See (1) Pleadings

(2) Civ, Pro. Co. O 6 R 17

American Authorities—Value of—See libel. 12 C W N 1053 P C=19 M L J 20=14 Bur L R 225=4 M L T 21=1 Ind Cas 348.

Amin

See Ameen.

Amins effecting partitions, remuneration of

See Partition.

Amins Principal Sadr etc Bangal.

See Ben Act XVI of 1868.

Analogous Appeals.

See (1) Practice—Civil Cases—Court Fees.

(2) Appeal

—Analogous Cases

See (1) Appellate Court—Exercise of Powers in Various Cases—Special Cases—Analogous Cases.

(2) Execution of Decree—Decree to be Executed after Appeal or Review

(3) Review—Grounds for Review

Anomalous mortgage

See Mortgage-Form of mortgage

Anandravan

See (1) Malabar Law—Joint Family

(2) Malabar Law—Maintenance.

Ancestor

See Hindu Law- Joint family

Ancestral business

See Hindu Law- Joint family

Ancestral Estate, sons interest in.

See (1) Hindu Law—Alienation — Alienation by Father.

(2) Hindu Law—Joint Family—Nature of and Interest in, Joint Property.

Ancestral estate held jointly by family under the Mitakshara Law

See Hindu Law- Joint family.

Ancestral Property

1—Ancestral property—Occupancy holding—Proprietary holding—Burden of proof.

Where plaintiff claims to succeed to land or to restrain its alienation on the ground of the same being his ancestral property, the *onus* of proving that the land is ancestral lies on him. He must prove the fact by evidence beyond reasonable doubt.

The plaintiffs claimed possession of proprietary and occupancy holdings and alleged that the holdings were ancestral. The original and the lower appellate Courts found that the property was ancestral of the plaintiff and decreed the claim. Revision against the decree was admitted under s. 70 (*i*) (*b*) of the Punjab Courts Act,

Ancestral Property-*Contd.*

Held that, the findings of fact of the lower Courts could not be questioned, but the respondents were at liberty to support the decree in their favour by any arguments, whether on facts or law or custom, which they might have used in the lower Courts, and therefore the case was virtually, so far as the respondents were concerned, an open one.

The lower appellate Court observed that, since the occupancy holding was held by brothers in equal shares, there was a strong presumption that they had inherited it from their father. In the Settlement of 1851, it was entered that the brothers were tenants since ancient times, and in the papers of the next year there was entry that they were tenants styled *hakdaran* and had held for 60 or 70 years.

Held, that this established a strong presumption that their father must have held the land before them.

In the Settlement of 1882 in the pedigree table the name of the father of the brothers was shown in dotted lines, meaning that he was a *Farri muras*, meaning an ancestor from whom the land did not come down.

Held, that such an entry must have been deliberately made, and, as it was made before any dispute had arisen, it carried great weight, and, taken with the fact that at mutations in 1906 it was admitted that both the holdings were not ancestral, the land must be held as not ancestral. Land inherited by a person from his father and transferred to his sister, or sister's son when they have no right to inherit the same, ceases to be ancestral, as it involves the break of continuity.

Bel Parkash v Partapa. 19 P L R 1910 =6 Ind Cas 494.

See also Cases under:—

(1) Hindu Law (Joint family).
(2) Custom (Punjab).
(3) Burden of Proof
(4) Hindu Law—Partition.

2—Ancestral property—Burden of proof—Land held by common ancestor as lessee from Government and afterwards granted to one of the sons of the lessee,—Held, that, in suits to set aside alienations of ancestral property, the Court cannot presume that the property is ancestral. The party, alleging that it is so, must establish the fact by evidence.

Ancestral Property- *Contd.*

Mali and *Mira* were sons of *Dhuman*. The plaintiff *Aziz*, grandson of Mali brought a suit to set aside alienations of land made by his grant-uncle *Mira*. It was contended by the alienees that, the property not being ancestral never having been owned by *Dhuman*, the suit did not lie. It appeared that *Dhuman* was merely lessee of the land from Government: after his death, the lease was renewed in favour of *Mali*, *Mira* and another brother of theirs: subsequently, *Mali* alone was granted rights as proprietor in the land; thereafter *Mali* as owner gave two-thirds of the lands allotted to him to certain agnatic relations of his and retained one-third for himself and his two brothers. As regards this latter one third, he divided it between himself and his said two brothers: the land was held by *Dhuman*, common ancestor, as a mere tenant liable to eviction—at any time, if he failed to observe the terms of the lease, and with no rights to have the lease renewed in his favour. The plaintiff was a minor, and the suit was filed about eight or nine years after the alienations; other descendants of Mali did not join in the suit.

Held, that the land could not be regarded as ancestral, and the suit must be dismissed.

Bhuman v Aziz. 80 P L R 1909= 85 P W R 1909=4 Ind Cas 622

3—Character of land, taken in exchange for.

In the case of an exchange, the character of the land acquired would be that of the land parted with, and if the latter were ancestral, the acquired land would be equally ancestral.

Ghauns v Imam Dino. 57 P R 1910= 95 P W R 1910=7 Ind Cas 465= 106 P L R 1910.

4—Ancestral property—Piragheb, tahsil and District Jhelum—

Held, that when the lands of a village are held by various races and were given simply to any one who would undertake their burdens a portion of such land cannot be considered ancestral, merely because an ancestor may have held it or other land in the village in past times—

Fakir v Daulat. 81 P R 1901.

5—Custom—Succession—"Ancestral land"—Land devolving on descendant of common ancestor by abandonment of it by near relation—

Ancestral Property-*Contd.*

Property originally belonging to a common ancestor does not cease to be "ancestral property" because it comes to a descendant of that common ancestor through abandonment of it by a near relation rather than by simple inheritance—

Natha Singh v Harnam Singh.
31 P R 1894.

6—Custom-Alienation-Succession of daughter, effect upon character or property—"Ancestral property"—Brahmans of mauza Thanawal, Gurdaspur District—Riwaj-i-am.

The parties in this case were Brahmans of the Mehta *qaum* of Gurdaspur District, and plaintiffs, who were the sons of one S sued *inter alia*, for a declaration that an alienation of land by Mussammat I, the widow of S's brother D would not affect their reversionary rights on the death of the said widow. It was admitted that both S and D had succeeded to their respective property through their mother Mussammat A, who had inherited it, in default of heirs male, from their grandfather S. C. Defendants pleaded that the property in suit, having been inherited through a female, was not "ancestral," and that the alienation was lawful and for necessity.

Held, by the Full Bench (Roe S. J. and Rivaz, J. Chatterji J. dissenting) that in a village community where a daughter succeeds, either in preference to, or in default of, heirs male, to property which, if the descent had been through a son, would be "ancestral" property, she simply acts as a conduit to pass on the property as ancestral property to her sons and their descendants, and does not alter the character of the property simply because she happens to be a female.

Per Chatterji, J—The word "ancestral" can only be used in a relative and not in a fixed or absolute sense in Customary Law, and before this character can be predicated of any property in the hands of a male owner, it must be found that it has descended to him from a male ancestor, and, in the case of a claim by collaterals, from a male ancestor common to him and the claimants.

Lehna v Mussammat Thakri.
32 P R 1895 F B.

7—Custom—Alienation - Perpetual lease of occupancy rights—"Ancestral property"—Illegitimacy of descendants, effect of, upon character of inherited property—"Necessity"—Sodhi Khatris of Muktsar tahsil, Ferozepore District—Marriage of Muhammadan woman to Sikh Guru, validity of—

One Guru Fatteh Singh, a childless Sodhi Khatri of the Muktsar *tahsil*, Ferozepore District, shortly before his death executed certain perpetual leases in favour, severally, of the defendant and others in consideration of certain sums paid in cash as fines and certain rents payable by the lessees, who were thereby constituted occupancy tenants, but with plenary and uncontrolled powers of alienation and right of succession lineally as well as collaterally in the male line. Plaintiffs, who were the nephews of the alienor, thereupon sued for a declaration that the leases were alienations of ancestral property by a childless male proprietor without necessity, were invalid by custom and would not affect their reversionary rights. In the Chief Court it was urged on behalf of the respondent lessee that (i) the lease should be regarded merely as an act of management within the capacity and competency of the late proprietor—the alienor having died after the institution of the suit-and not as an act of alienation (ii) that the property having descended through illegitimate children was not ancestral; (iii) that by custom the right of Guru Fatteh Singh to alienate in the presence of such agnates as the plaintiffs was not restricted to cases of necessity; and (iv) that, if the leases were held to be acts of alienation, there was necessity.

Held, (i) that no necessity had been proved; (ii) that the intention of the lessor being to prejudice the reversioners when he knew that his life was drawing to a close, and that he himself would not long be able to enjoy full proprietary interest in the land to which he has tenaciously clung until that period, the leases could not be regarded as mere acts of management of the cultivation on the part of the late proprietor, but were acts of alienation; and (iii) that even if it were conceded that the children of the common ancestor through whom the property had descended, were illegitimate and could not have succeeded in the presence of other legitimate sons, there would not necessarily be an insuperable legal objection to plaintiffs proving that they were descendants of the same ancestor, and that the property coming from him was ancestral property.

Found, that by custom among Sodhi Khatris of the Muktsar *tahsil*, Ferozepore District, a

Ancestral Property-*Contd.*

childless male proprietor is not competent to alienate ancestral property without necessity in the presence of nephews—**Sodhi Kartar Singh v Sher Singh (No. 50 P. R.), 1895.**

8. Custom—Alienation—Gift to sister's son follwed by possession and mutation of names—"Ancestral property."

In a case in which the property in dispute had been acquired by one K, jointly with his brothers, but had never been held by their father, *held*, that the said property was not ancestral property *qua* K's collaterals.

Held, therefore, that a gift of such property, followed by possession and mutation of names, by K in his lifetime to his sister's son was not invalid by custom.

Mutation of names by itself does not in every case constitute a valid transfer, but it is good evidence of such transfer. **Jowahir Singh v Dial Singh. 76 P R, 1898.**

9.—Custom—"Ancestral" property—Ancestral and acquired property—Profits of ancestral immoveable property, and purchases effected with such profits—Unequal distribution of such profits and purchases among sons.

Held, that the profits of ancestral immoveable property and purchases effected with such profits are not ancestral property, under Customary Law in such a sense that a descendant of the ancestor from whom such property devolved can interfere with the disposal of such profits or purchases.

Held, therefore, that it was competent for a proprietor from the profits of his ancestral property to effect a mortgage of certain land in the names and for the benefit of three of his four sons. **Sher Singh v Kishen Singh. 4 P. R, 1900.**

10.—Self-acquired property of uncle inherited by nephews—Sons of nephews whether can claim it as ancestral.

The self-acquired property of an uncle who died without issue and whose nephews inherited it was held to be not ancestral property, *qua* the sons of those nephews, not being inherited from a direct male ancestor.

Jhanda Singh v Gurumukh Singh. 93 P R 1901.

Notes—Ref- 110 P R 1906; Ctied and Fol 58 P R 1905=59 P L R 1905.

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Ancestral Property.—Sale of, and self-acquired property—sanction of Government given after sale—Sufficiency of sanction.

—**Property**—Sale—Sale in execution of decree—General. **14 O C 115.**

—**Property, alienation of.**

See Hindu Law—Joint family-Powers of alienation by members.

Ancestral property, assigned to wife in lieu of maintenance, Devolution of, on her death.

See (1) Hindu Law—Reversioners

(2) Hindu Law-Streedhan.

—Property in the Lands of the son liable-for father's death.

See Hindu Law—Debts

1.—Punjab Laws Act, 1872, Section 12 (b)—Pre-emption—Villages held an ancestral shares-Meaning of the term.

A village held on ancestral shares within the meaning of Section 12 (b), Punjab Laws Act, 1872, as amended by Act XII of 1878 (regarding rights to pre-emption in villages) must be a *zamindari* village. If there has been a territorial division into *pattis*, the village (by which is meant the whole village) is no longer held on *shares* but by *pattis*. The land in the *pattis* may be still held upon ancestral shares, but this is insufficient to bring the village within the description in clause (b) of the section. **Jalal v Mazhar Ali. 13 P R 1893.**

2.—Punjab Laws Act, 1872, Section 12, clause (b)—"Village held on ancestral shares"-Pre-emption.

Held, by the Full Bench, that a village cannot be said to be "held on ancestral shares" within the meaning of clause (b) of Section 12 of the Punjab Laws Act, 1872, unless the dominant feature of the tenure is a primary division of the village upon fractional shares ascertained with reference to ancestral right, such primary division being commonly, but not necessarily, a territorial division and importing, at least, a definite

Ancestral Property-*Contd.*

separation of intrests in the village, as an entirety in accordance with the customary rules of inheritance.

In the case of joint immoveable property the fact that portions of its area are separately cultivated by the persons recorded as having specified interests therein indicates no more than the fractional share to which such persons or group would become entitled on a partition being made either by a definite separation in interest by agreement among the co-owners or by a division of the area itself. Until the group of co owners is thus separated, the thing, which is the subject of their co-ownership, is joint undivided immoveable property within the meaning of clause (a) of Section 12 of the Punjab Laws Act, 1872, whether it be an entire village, or a portion of a village, or a house, and the co-owners are co-sharers in such property for the purpose of that clause. No 13 P R 1893 overruled. **Champa Mal v Baisakhi Mal. 87 P R 1894 F B**

Ancestral trade.

See Hindu Law—Joint Family.

Ancestral trade carried for benefit of minor by natural guardian.

See Guardian.

--Zamindari sold in execution of decree for money against the father in chiding the son's right of succession.

See Hindu Law—Debts

Ancient documents.

See Evidence Act (1872) ss. 35,74,80,90.

Ancient holdings.

See Landlord & tenant

Ancient Lights, Obstruction of.

See (1) Injunction—special Cases—Obstruction or Injury to Rights of Property-Light and Air.
(2) Prescription—Easements-Light and Air.
(3) Easements.

Ancient Rights.

See Injunction-Special cases.

Angle of 45 degrees

—In cases of infringement of light.

See Easement Light and Air.

Animel.

Animal.—Rabid dog—Liability of master. **8 Ind Cas 984.**

Animals feræ Nature.

See Cases under Wild Animals.

Anna Chattra.

See Hindu Law-Will.

Annual Jamas Tenancy.

1.—Revenue Sale Law (Act XI of 1859), S. 2—Holding on which revenue was assessed at Permanent Settlement—Annual jama—Date for payment fixed by board of Revenue—Settlement Mannual, Part III, Chap. XVI. Rule 7.—

Where the annual jama for a holding is fixed for payment by the Board of Revnue at a certain date, it is meant that the jama for the current years is payable on that date, instead of on the first day of the financial year, as would be the case ordinarily under r. 7 of Part III. Chap. XVI of the Settlement Manual. S. 2 of Act XI of 1859 has no application to annual jamas of tenure. **Haji Buksh Ellahie v Durlaw Chandra Kar. 9 C L J 341 =13 C W N 633=3 Ind Cas 986.**

Annual Tenancy.

See (1) Landlord & tenant.
(2) Bombay Land Revenue Code Section 84

Anuity.

1.—Suit for—Small cause nature—Suit for an annuity—Allowance not in satisfaction of any right of maintenance.

Where a person allows maintenance to his sister not by way of satisfaction of her right of maintenance but the allowance is to be paid out of the income of her own property which she

Annuity-*Contd.*

transfers to her brother the same is an annuity and a suit for the recovery thereof is maintainable by a court of small cause.
Saminatha Pandaram, v Kuppu Udayan. 13 Mad L G 471.

2.—Annuity, creation of—Binding effect on the representatives to the extent of the grantor's assests,

A person can create a personal obligation in the form of annuity which will be operative as against his representatives to the extent of his assests in their hands.
Babubhai v Beharilal. 7 Bom L R 686.

3.—Annuity suit to enforce arrears of—Small Cause Court—Cognizability.

A suit to enforce arrears of an annuity payable under a will and to which the executors have assented is cognizable by the Presidency Small Cause Court; it does not fall under S. 10 (k) of the Presidency Small Cause Courts Act 1882. **Dosibai Markar v Cooverbai H Markar 10 Bom L R 758= 32 Bom 575.**

See also (1) Second Appeal
(2) Registration Act S 17.

4—Grant of—Life-interest—Bequest of a specified sum—Absolute interest—

The simple grant of an annuity to a person carres no more than a life-interest in the annuity, in the absence of a contrary intention.

When a specified sum of money is bequeathed, the entire interest in the same passes to the legatee; and that interest necessarily involves an absolute right to the disposal of the whole sum. Similarly, in the case of an annuity also, the entire interest passes.

The mere circumstance of the continuance of the annuity after the life of the first grantor affords no indication as to the absolute duration of the annuity,and the fact that the annuity is charged on the village revenues does not serve as an indication of an intention to create an annuity as co-equal in duration with property itself.
Gopal Krishna v Ramnath 5 Bom L R 729.

5—Decree for payment of annuity—Arrears—Execution of decree—Fresh suit—C. P. C., 1882, s, 244.

Annuity-*Concld.*

The arrears due under a decree directing payment of an annuity could be recovered only by execution of the decree and not by a separate suit, s. 244 of the C. P. C., being a bar to such a suit.
Sughra v. Muhammad Husain, A W N 1888, 230.

Annuity.—Note due if garnishable.
14 C L J 127.

--creation of.

See Will.

--value of.

See Court Fees Act, Sch. I, Art. 11.

Annulment of Incumbrances.

See Bengal Act (Tenancy Act) VIII of 1885 S. 167.

-- of sale.

See (1) Sale for arrears of rent.
(2) Sale for arrears of revenue.
(3) Sale in execution of decree.
(4) Right of suit, sale in execution of decree.

Antecedent debts.

See (1) Hindu Law (Debts).
(2) Hindu Law (Joint family).
(3) Hindu Law (Alienation).
(4) Custom (Punjab).

Ante-nuptial agreement.

See (1) Contract Act S. 25.
(2) Contract Act S. 23—Illegal contracts.
(3) Husband & Wife.

--contracts.

See (1) Contract Act S. 25.
(2) Contract Act S. 23—Illegal contracts.

--settlement.

See Husband and Wife.

Anticipation, Restraint on.

See Husband & Wife.

Anticipatory attachment.

See Attachment

Antiquities not proved to have any market value.

See Land acquisition Act.

Anubhavam Tenure

See Landlord & tenant.

Anumatipara

See (1) Public Documents.
(2) Evidence Act S. 74.
(3) Hindu Law—Adoption.

Apostacy.

See (1) Act XXI of 1850.
(2) Caste.
(3) Conversion.
(4) Hindu Law—Conversion.
(5) Custom—Punjab—Divorce, 152 P. R. 1890.
(6) Mahomedan Law—Divorce, 106 P. R. 1891.
(7) Mahomedan Law—Divorce, 61 P. R. 1899.
(8) Hindu Law, marriage.
(9) Mahomedan Law. Acknowledgment.
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Apostacy—Forfeiture of property on—Abrogation by legislation—Suit to enforce forfeiture—Limitation.

See Hindu Law—Inheritance.

Apostate father.

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(a) Proceedings instituted prior to change in procedure.

1-3.—Appeal from order under s. 312 Civil Procedure Code (Act XIV of 1882)—Act VII of of 1888 ss. 55, 46.

On the general principle of law that an appeal merely given by law is made applicable to proceedings instituted before that change is made in procedure. *Held*, that an appeal from an order under the second paragraph of s. 312 of the Code of Civil Procedure although made before Act VII of 1888 came into force, would, upon the operation of that Act, lie to the Court to which an appeal would lie from the decree in the suit in relation to which such order was made. 13 Calc 56 explained and distinguished. **Anund Chunder Roy v Nital Bhoomij. 16 Cal 429.**

Notes:—Ap; 21 Bom 822.

2. RIGHT OE APPEAL EFFECT OF

(a) C. P. C (X of 1877).

4.—(Act X of 1877) Civil Procedure Code. In all suits instituted before Act X of 1877 came into force, in which an appeal lay to the

Appeal-*Contd.*

2. Right of Appeal. Effect of Appeal—*Contd.*

High Court under Act VIII of 1859, an appeal will still lie notwithstanding the fact that, that Act is repealed by Act X of 1877.

Runjit Singh v. Meherban Koer, 3 Cal 662.

(b) C. P. C. (X OF 1859).

5.—Civil Procedure Code 1859—Repealed by Civil Procedure Code, 1877.

A decree was obtained *ex parte* before October 1st, 1877, and an application was made by the defendant for the 1st time in May 1878 to have the case re-opened. This application was refused, and an appeal was thereupon preferred against the order of refusal. *Held* that no appeal would lie under Act X of 1877. and that, as there was at the time of that Act coming into operation, no proceeding on foot on the part of the appellant which could be saved by the operation of s.6 of Act I of 1868, there was no remedy by way of appeal from the order under Act VIII of 1859. 1 L R 3 Cal., 662; 2 C L R., 391, distinguished. **Apach Ojha v. Ram Dulari Koer 4 C L R 18.**

6.—Order in execution—Repeal of *Act*—Pending Proceeding—Civ. Pro. 1859—Act I of 1868, s. 6—Act X of 1877.

The holder of a decree for money applied for attachment in the execution of the decree of certain moneys deposited in court to the credit of the judgment debtor. On the 4th June 1877, the Court of first instance refused the attachment on the ground that the decree directed the sale of certain immoveable property for its satisfaction and awarded no other relief.

The order of the Court of first instance was affirmed by the lower appellate Court on the 4th August 1877. Act X of 1877, repealing Acts VIII of 1859 and XXIII of 1861, came into force on the 1st Oct., 1877. On the 13th November 1877 the decree-holder applied to the High Court for the admission of a second appeal from the order of the Lower Appellate Court on the ground that the decree had been misconstrued. *Held* that an appeal was admissible under the repealed Act VIII of 1859, under the provisions of section 6 of Act I of 1868. *Held* also that the order of lower appellate Court was also appealable under Act X of 1877.

Thakur Parsad v. Ahsan Ali. 1 All 668

Appeal-*Contd.*

(2) Right of Appeal Effect of Repeal on-*Contd.*

Notes:—Diss: 2 All 71. Ap. 13 Cal 86. Fol: 2 All 91. Ref. 16 Cal 207 F B; 12 Bom 149: 1 All 715 F B; 748 F B.

7—Appeal—Act VIII of 1859 Section 257—Execution proceedings under Act X of 1871—Irregularity in Execution Sale—Act X of 1877. Sections 281 and 290-Proclamation-Waiver of.

Execution proceedings brought after Act X of 1877 came into operation upon a decree obtained in a suit instituted under the old Code of Civil Procedure are subject to the provisions of the new Code and an appeal will lie from orders made in such proceedings, although no appeal was allowed from such orders under the old Code.

Harbuns Sahai v Bhairo Pershad Singh 5 Cal 259=4 C L R 23

(C) C P C (1877)

8—C P C—s. 588 (16)—Order setting aside Execution Sale—Civ Pro 1877 ss. 311, 588 Act XII of 1879, ss. 50, 102—Act I of 1868, s. 6.

On the 25th June 1879, a Subordinate Judge made an order setting aside the sale of immovable property in the execution of a decree, from which an appeal was preferred, under Act X of 1877, to the District Court on the 25th July, 1879 before Act XII of 1879 came into force. *Held* that as the appeal would not have lain at all, had Act XII of 1879 been in force on the date of its institution, section 102 of that Act did not apply, but as the appeal lay to the District Court under the law in force on that date, it was competent to dispose it of under the provisions of section 6 of Act I of 1868. **Durga Prasad v Ram Charan. 2 All. 785.**

(D) REGISTRATION ACT.

9—Registration Act, 1871—General Clauses Consolidation Act, I of 1868—Repeal by Registration Act. III of 1877.—

An order refusing registration of a deed was passed on 23rd August 1872; and when Act VIII of 1871 was in force, an application for review was presented, and finally rejected on 20th December 1877, after the repeal of Act VIII of 1871 by Act III of 1877. *Held* that, under the provisions of s. 6 of Act I of 1868 (the General Clauses Act), the proceedings must be governed by the Act in force at the time when they were instituted,—namely, by Act VIII of 1871,—and therefore no appeal would lie. **Mahomet Hossein v Hadzi Abdullah. 3 Calc., 727**

10-Decrees passed by Assistant Collectors under s. 108, cls. 2, 3, and 11 of Act XXII of 1886—Decrees passed in appeal by Commissioner before the date on which Part II of Act XX of 1890 came into force—Second appeals from the decree of Commissioner presented after the said date—Forum for such appeals Act XX of 1890, s. 54—Act I of 1868, s. 6—Meaning of the words "Repeal of an Act" and "proceedings" Per Curiam:—

The application of s. 6, Act I of 1868, to the provisions of Act XX of 1890, amending the Oudh Rent Act XXII, 1886, is not impliedly excluded by the wording of s. 54 of Act XX of 1890, *Per Howell*, A J C:—A repeal of part of an Act is a "repeal of an Act" within the meaning of s. 6, Act I. 1868. *Per* Curiam:—A mere change of *forum* does "affect" proceedings within the meaning of that section. The word "proceedings" in that section includes all the proceedings in a suit from the date of its institution to the date of its final disposal in appeal. S, 6 Act I. 1868 being applicable to the provisions of Part II Act XX 1890, amending the Oudh Rent Act, XXII 1886, appeals presented after the date on which Part II of Act XX 1890, came into force from decrees of Commissioners passed before that date on appeal from original decrees passed by Assistant Collectors of first class in suits brought under s. 108, cls. 2, 3, 8 and 11 of the Rent Act XXII, 1886, lie to the Judicial Commissioner's Court under s. 117 of the Rent Act as it stood before its amendment by Act XX. 1890, not to the Board of Revenue under s 116 of the Rent Act as amended by Act XX, 1890. If at the hearing of any of these second appeals a remand to the lower Appellate Court should be found necessary, it should be made to the Commissioner, **Hearsey v. Neja. S. C. 193.**

Notes:—Foll: in S. C. 211. Dist: S. C. 293.

11 Order refusing to re-hear exparte case—Order passed before Act XII of 1879 Appeal filed after Act XII of 1879—

The law governing an appeal is the law in force when it is instituted. Where, therefore, an appeal was filed after the passing of Act VII of 1879 (under which an appeal was allowed) against an order refusing to re hear a case decided

Appeal-*Contd.*

(2) Right of Appeal Effect of Repeal on-*Concld.*

ex-parte, and the Commisssoner held that as the decision appealed against was passed before the said Act came into force, no appeal lay to his court, *held* reversing the order of the Commissioner, that such an appeal was admissible, and must be heard and disposed of **Court of Wards v. Fatteh Singh P R 75 of 1881,**

Notes—Dist 97 P R 1907. Ref: 121 P R 1907 =51 P W R 1907.

12—Suit instituted before passing of Act XXV of 1899—Right of appeal, how far affected by new Act—Act XVIII of 1884, Section 40—General Clauses Act, 1897, Section 6.—

Held, by the Full Bench, that the enactment of Act XXV of 1899, which came into force on the 13th October 1899, has not the effect of depriving parties to suits, instituted before that date, of the right or privilege of appeal allowed by Section 40 of the Punjab Courts Act, 1884, as it existed prior to its amendment by Act XXV of 1899. **Chaudhri Narsing Dass v Lala Dholan Das 12 P R 1900.**

3 ACTS,

(A) Act XXXV OF 1858.

13—Act XXXV of 1858-Order on application for permission to alienate property of lunatic.—An appeal lies under s 22 of Act XXXV of 1858 against an order passed on an application for permission to alienate the property of a lunatic. **Dinesh Chunder Banerji v. Soudamini Debi 4 C W N 526.**

(B) ACT XL of 1858, Ss. 21, 28.

14-Order rejecting application for removal of guardian—The order af a Judge rejecting an application for the removal of a guardian under Act XL of 1858 is appealable.

Mohendro Nath Mokerjee 7 B L R Ap 9
Mohendro Nath Mookerjee v. Rama Soon duree Dabea. 15 W R 493.

(a) CANCELLING OF ORDER APPOINTING COLLECTOR MANAGFR.

15—Cancelling of order appointing Collector manager-

Whether a Judge cancels his own order under Act XL of 1858 appointing the Collector to take charge of a minor's estate, a friend of the minor on behalf of the minor as the party interested is at liberty to appeal under the provisions of s. 28. **Sheo Pershun Chobey v. The Collector of Sarun 13 W R 256**

Appeal-*Contd.*

3 Acts—*Contd.*

(b) PARTY TO PROCEEDINGS.

16—Minor Act XLV 1858-Appeal from order under section 28 of Act XL of 1858—Certificate withheld under certain circumstances.

An application for a certificate under Act XL of 1858 ought not to be granted when there is a minor who has almost attained his majority, unless under special circumstances, as where very great weakness of mind in the minor is proved, or where it is shown that there is some absolute necessity for the certificate being granted.

Under section 28 of Act XL of 1858 an appeal is allowed to any person injured by an order under the Act. **Muhamdee v Nazirun 6 Cal 19=6 C L R 210.**

(c) ORDER REFUSING TO RECALL CERTIFICATE UNDER ACT XL OF 1858.

17—Order refusing to recall certificate under Act XL of 1858—

Where a Civil Court, in the exercise of its discretionary power, refuses to recall a certificate granted under Act XL of 1858, there is no appeal from such refusal. **Chumutkar Mohinee Dossee v Raj Rakhal Mitter. 22 W R 479.**

(d) BURMA COURTS ACT

18—Administration certificate-Burma Courts Act (Act XVII of 1875) s 95—The appeal which is allowed by S. 28 of Act XL of 1858 is subject to the ordinary law of appeal laid down in the Burma Courts Act. So no appeal will lie from an order refusing an application for the issue of an administration certificate under Act XL of 1858, it being impossible to set any specific money valuation on such an application. **Mulla Adjim. 14 Calc 351**

(C) ACT IX OF 1861.

19—Act IX of 1861, Order passed under—An appeal lies, under Act VI of 1871 to the Judge from an order of the Subordinate Judge passed under Act IX of 1861. **Sonamonee Dossee v. Doorga Dossee 17 W R 551.**

Appeal-*Contd.*

3 Acts—*Contd.*

(d) Act XXIII OF 1861 S 6

20—Act XXIII of 1871, s. 6—Talabana, Failur to deposit—Application for review of judgment—

A filed a memorandum of appeal, but failed to deposit the sum required to defray the cost of issuing the usual notice on the respondent. When the case came on for hearing it was found that, in consequenee of A's failure to deposit, no notice had been served on the respondent; and the Judge dismissed the appeal under s. 6 of Act XXIII of 1861. Within 30 days after this, A presented a petition, explaining the reasons of his default, and praying that, on payment of the talabana, the appeal might be restored to its place; but the Judge, without considering the reasons which A had given in his petition, disallowed his prayer. *Held* that no appeal lay from the order of the Judge rejeeting A's petition, which was of the nature of an application for a review of judgment.

Kalikrishna Chandra v Harihar Chuckerbutty. **1 B L R A C 155. 10 W R 160.**

(1) ORDER DISMISSING APPEAL FOR WANT OF PROSECUTION.

21—Order dismissing appeal for want of prosecution—

There was no provision in s. 6, Act XXIII of 1861, for the readmission of appeals once dismissed under the provisions of that section. No appeal lay from the order dismissing them.

Ramessur Dutt v Lootfunnissa. **6 W R Mis 130.**

(c) ACT XIV OF 1863.

22—Act XIV of 1863—Proceedings of Settlement Officer under Act XIV of 1863—

The proceedings of a Settlement Officer under section 3, Act XIV of 1863, were not judgments or orders appealable to the Judge, or especially to the High Court under Act X of 1859.

Ahmed Ali Khan v Nubeea. **2 Agra 239.**

(f) ACT XIX OF 1863.

23—Act XIX of 1863—Suit for partition under Act XIX of 1863, s. 8—

An appeal lay to the Judge, in cases of partition under Act XIX of 1863, where the objection raised by the party opposing is severalty of holding by virtue of a former partition.

Kunchun Singh v Choonna. **1 Agra Rev 44.**

(g) ACT XX OF 1863.

24—Act XX of 1863, Order passed under—

An appeal does not lie from an order passed under the Religious Endowments Act (XX of 1863), but the party dissatisfied with the order may seek to set it aside by a regular suit.

Khudiram Singh v Sham Singh Poojoory. **W R 1864 Mis 25.**

Kalub Hossein v Ali Hossein. **4 N W 3.**

(1) S 5.

25—S. 5—Civil Procedure Code, 1877, s. 647—

An appeal lies under s. 647 of the Code of Civil Procedure against an order of a District Court under s. 5, Act XX of 1863. **Sultan Ackeni Sahib v Bava Malimiyar.** **4 Mad 295.**

Notes—Fol. 19 Mad 285; 24 Mad 95 Dist. 10 Mad 98; Ex. 11 Mad 319.

(2) ORDER APPOINTING TRUSTEE OF RELIGIOUS ENDOWMENT.

26—Order appointing trustee of religious endowment—Civil Procedure Code, s. 622—Superintendence of High Court—

No appeal lies to the High Court from the order of a District Judge under s. 5 of Act XX of 1863 appointing a trustee of a religious endowment. 11 Mad 26 followed. 4 Mad 295, dissented from. The High Court, therefore, can revise such an order under s. 622 of the Civil Procedure Code. **Somasundara Mudaliar v. Vythilinga Mudallar.** **19 Mad 285.**

Notes:—Ref. 26 Mad 89.

(3) S 10.

27—S. 10—District Judge's order for filling vacancy in a committee—It should not be supposed that every matter which comes under the consideration of a Judge is appealable. A right of appeal must be given by some enacted law or any other equivalent outhority. The High Court cannot hear an appeal from the order of a District Judge on a petition under sec 10 of Act XX of 1863 (Religious Endowments) appointing a member to fill a vacancy in a committee

Appeal-*Contd.*

3 Acts—*Contd.*

Such a right of appeal is not given either by this Act or by the general law, and so an appeal does not lie from such an order. **Minakshi Naidu v Subramanya Sastri. 11 Mad 26=14 I A 160.**

Notes—Ap. 9 C W N 956=2 C L J 384; 1 M L J 537. Fol. 25 Cal 146: 19 Mad 285, 24 Mad 95; 26 Mad 176; 178:12 M L J 264 Dist. 10 M L J 398. Ref. 11 Mad 319, 220 F B; 13 Mad 211;22 Mad 172; 23 Mad 314, 9 M L J 173; 10 M L J 51, 13 Bom 650, 23 Bom 22 26 Mad 85. 31 Cal 819. 27 Mad 504; 5 C L J 611 8 C W N 705; 7 C L J 152; 11 Bom L R 1330; 36 Cal 193; 9 C W N 955.

28—S. 10 -No appeal lies to the High Court from an order by a District Judge filling a vacancy on a Committee under s 10 of Act XX of 1863. (11 Mad 26 followed)

Fariuddin Ahmad v. Muhammad Nasarullah Khan. 9 W N 7.

(h) S 18.

29—S. 18—No appeal lies from an order passed under Act XX of 1863 s. 18. **Delrus Banoo Begam v Abdoor Rahman 21 W R 368.**

30-Act XX of 1863—s 18. There is no appeal from an order passed under this section.

Hajee Kalub Hossein v Ali Hossein. 4 N W P 3.

(1) C P C S 622.

31—Civil Pro Code S. 622—Order refusing permission to sue—An appeal cannot lie against an order, passed under s. 18 of Act XX of 1863 refusing leave to sue nor can such order be revised under s. 622 of Civil Pro- Code if the Judge has used has discretion. 10 Mad 98 note I L R 18 Cal 382. Also an order under s. 18 giving leave to institute a suit is not appealable. **Prtap Chandra Misser v Brojonath Messer. 19 Cal 275.**

(2) ORDER MADE WITHOUT JURISDICTION

32—Order made without jurisdiction.

Where a Civil Judge, upon a petition applying under s. 18 of Act XX of 1863 for leave to institute a suit, made an order disposing at once of the matter in dispute, and his successor, reversing the former order, decided by an order upon the rights of the parties,—*Held* that, though both orders were made without jurisdiction, that fact did not give the High Court an appellate jurisdiction in the matter. **Kaviraja Sundara Murteya Pillai v Nalla Naikan Pillai 3 M H C 93**

(I) ACT XXI OF 1863

33—Act XXI of 1863 s. 27—Interlocutory order of Recorder of Rangoon—Civ. Pro. Code 1859, s 83—No appeal lay to the High Court, under s. 27 Act XXI of 1863, from an interlocutory order of the Recorder of Rangoon passed before judgment in the suit, e..., one passed under s 83, Act VIII of 1859, directing a defendant to furnish security. Quaere—Whether, under Act VIII of 1859 there was any appeal from an order to furnish security under s. 83. **Ahmed Ally Mahomed v Gladstone Wyllie 7 W R 508**

(J) BENGAL TENANCY ACT VIII OF 1858.

34—Bengal Tenancy (Amendment) Act, S. 1—Effect of—Retrospective validation of sales:

Section 1, Act I of 1903 (B. C.), enacts retrospectively that no transfer which has heretofore been made under s 13 of the Bengal Tenancy Act, shall be deemed to be invalid merely on the ground that the landlord's fee has not been paid; and consequently it validates all such transfers, questioned in appeals pending when the Act was passed. A sale held at the instance of an assignee of a rent decree who is not also an assignee of the landlord's interest in the land if legal, has at most the effect of a sale held in execution of a decree for money under the Civil Procedure Code. Such a sale accordingly does not affect the interest of unrecorded cosharers in the tenure who are not parties to the decree or to the execution proceedings. **Manuratt Nath v. Harinath Das I C L J 500,**

34 A—Bengal Tenancy Act (VIII of 1885) s. 84—order of Civil Court—under s 84 of the Bengal Tenancy Act no appal lies from an order passed by a Civil Court. **Goghun Mollah v. Ra Meshur Narain Mahta 18 Cal 271**

Notes—Fol 19 Cal 485; 9 C W N 472

(1) C P C SS. 2, 588.

35.—Civil Procedure Code (Act XIV of 1882) ss. 2, 588—An order of a Civil Court under s. 84 of the Bengal Tenancy Act not being a decree within the meaning of s. 2 of the Code of Civil

Appeal-*Contd.*

3 Acts—*Contd.*

Procedure nor an appeal being allowed by s. 588 of the Code or by any special provisions of the Bengal Tenancy Act is appealable. 18 Cal 271 referred to and followed.

Peari Mohun Mukerji v Baroda Chucker-butti. 19 Calc 485.

(K) SS. 90, 91.

36—Ss. 90, 91—Measurement order—S. 2 of the Code of Civil Procedure—

A proceeding under S. 90 of the Bengal Tenancy Act is not a suit and the order passed in such a proceeding does not come within the definition of "decree" given in S. 2 of the Code of Civil Procedure and no appeal lies from an order made under S. 91 on an application under S. 90 is not appealable, although by the operation was therein made that the petitioner was entitled to measure with a pole of certain measure. **Dya Gazi v. Ram Lal Sukul.** 2 C W N 351.

(L) S 104 Cl 2

37—S. 104 cl-2—Decision of a Special Judge Dispute regarding the settlement of Rent-Judge-No appeal lies to the High Court under S. 104 cl 2 of Bengal Tenancy Act from the decision of a special Judge. **Lalakirut Narain v Palukdhari Pandey** 17 Cal 326.

Notes.—Fol 21 Cal 776 Ref. 33 Cal 837 = 4 C L J 138.

37 A—Ss. 109-A - Appeal from order.

Where an appeal under s. 109-A, was dismissed for default and a petition for revival of the appeal was filed but was rejected.

Held, that S. 588 of the Civ. Pro Code 1882, does not apply to proceedings under s. 106 of the Bengal Tenancy Act.

S. 109-A, sub-sec. (3) confines the power of the High Court to the hearing of second appeals and not appeals from orders either under s. 558 or s. 560 C P C. 12 C W N 888 Ref. **Mathura Nath Roy Choudhuri v Basanta Kumar Chakravarthi** 36 Cal 510 = 2 Ind Cas 572

(m) SS. 93, 143.

38.—Ss 10, 143—Application for manager—An application under s. 93 of the Bengal Tenancy Act, is not a suit between a landlord and his tenant under s. 143 and no appeal is allowed from an order rejecting such an application.

Hussain Bux v. Mutookdharee Lall. 14 Calc 312.

(N) SS. 105, 106

39 Ss. 105 106 - Res judicata -Settlement—proceeding—Entry of rent.

S 105 of the Bengal Tenancy Act lays down that during the pendency of the draft publication any person affected by an entry in the record may raise an objection with regard to it, which the Revenue officer is to 'receive' and 'consider' and dispose of in a summary manner. From an order disposing of such an objection there is no appeal and no second appeal, and the order cannot have the effect of res judicata. A dispute under S. 106 is to be heard and decided by the Revenue officer under the procedure laid down in the Civil Procedure Code for the trial of suits and is subject to appeal and second appeal, and an order disposing of such a 'dispute' will have the effect of res judicata 24 Cal 462 explained. **Karban Ali v. Jafar Ali** 5 C W N 798 = 28 Cal 471

(O) S. 153.

40.—S. 153—Appeal—Amount—*Held*, for the purpose of determining whether an appeal lies or not under s. 153 of the Bengal Tenancy Act, the term "amount" in that section does not mean merely the amount of rent claimed, but the whole amount claimed in the suit inclusive of rent, interest etc. **Behary Churn Sen v. Bhut Nath Pramanik.** 3 C W N 214.

41—S 153 Appeal—Suit for rent by a cosharer landlord.

S. 153 of the Bengal Tenancy Act covers the case of a suit for rent by a cosharer landlord.

Jogendra Nath Ghosh v Paban Chandra Ghosh 7 C W N 908.

Notes.—Ref: 11 C W N 1026.

(1) Suit for rent.

42.—Rent suit—amount of rent.

The question being about the amount of rent to be paid annually, the plaintiffs claiming Rs. 15 and the defendants alleging the rent to be only Rs 7-8:—*Held* an appeal lies under s. 153 of the Bengal Tenancy Act. **Aubhoy Churn Maji v. Shoshi Bhusan Bose.** 16 Cal 155.

Notes:—Appl. 17 Cal 189 F B. Ref: 25 Cal 531 F B, 31 Cal 1026. Fol 8 C W 923.

Appeal-*Contd.*

3 Acts—*Contd.*

(2) APPEAL FROM DECREE IN RENT SUIT UNDER Rs. 100

43—Appeal from a decree in a suit for rent under Rs. 100—The words " amount of rent annually payable by a tenant " in S. 153 (a) of the Bengal Tenancy Act include the case of rent payable by a tenant to one of his cosharer landlords who collects his share of the rent separately. Therefore an appeal lies to the High Court in such cases, notwithstanding the fact that the amount claimed is less than Rs. 100

Narain Mahton v Manofi Puttuk 17 Cal 489.

(3) CESSES SUIT FOR.

44—Suit for cesses—Road Cess Act (Bengal Act IX of 1880) S. 47. meaning of rent—cases under Rs. 100.—Appeal—Although the Bengal Tenancy Act declares that in ss. 53 to 68 and ss. 72 to 75 " rent " includes cesses, yet these are enabling provisions, passed to extend the meaning of " rent " and it in no way interferes with the law which refuses a right of appeal in suits below Rs. 100 in value, which law is made applicable to suits for cesses by s. 47 of Bengal Act IX of 1880.

Rajani Kant Nag v. Jageshwar Singh. 20 Cal 254.

Notes—Fol: 4 C L J 119.

(4) SUIT FOR ARREARS OF RENT.

45—Rent suit— Dak cess when rent—appeal under Rs. 100—Where dak cess is claimed under the contract by which the rent is to be paid, it should be regarded as rent i. e. as part of what is lawfully payable in money for use and occupation of the land held by the tenant, and where there is a dispute as to such dak cess, the amount of rent is in dispute, and an appeal will lie even though the amount in dispute is less than Rs. 100 and notwithstanding the provisions of s. 153 of the Bengal Tenancy Act.

Watson & Co. v. Shreekristo Bhumick. I L R 21 Cal 132.

Note—Ref: 22 Cal 680.

(5) ORDER OF REMAND.

46—Remand order—The term " order " in s. 153 of the Bengal Tenancy Act does not mean merely a final order, but it includes an interlocutory one such as an order of remand. S. 153 of the Bengal Tenancy Act does not allow an appeal from remand order made in an action for rent which is for an amount less than Rs. 100, unless such order has determined any of the questions which are specified in s. 153.

Gagan Chand Sardar v. Caspersz. 4 C W N 44.

46A—S. 153 cl. (h)—Co-sharer landlord—Suit for share of rent without making other co-shares parties—Appeal—Second appeal—Civ. Pro. Code (Act XIV of 1882), S. 522.

A suit by a co-sharer landlord for his share of the rent only without making the other cosharers parties is a suit instituted by a landlord for the recovery of rent within the mening of s. 153. Bengal Tenancy Act.

Where the rent claimed in such a suit did not exceed Rs. 50 and it was tried and dismissed by a Munsif who was specially empowered under cl. (b) of S. 153.

Held, that no appeal lay to the Subordinate judge and hence no second appeal from his decision revising that of the Munsif.

But the decision of the Subordinate judge being without jurisdiction was set aside under S. 622, Civ. Pro Code (12 C. W. N. 249 *applied* and 8 C. W. N. 472 *not followed*). **Bhagabati Bewa v. Nanda Kumar Chuckerbutty. 12 C W N 835.**

(6) S. 173.

47—S. 173—Appeal by an auction puchaser —

An auction purchaser cannot appeal against an order setting aside a sale under s. 173 of the Bengal Tenancy Act. Cal 825 referred to.

Harabandhu Adhikari v Harish Chandra Dey Pal. 3 C W N 184.

Roghu Singh v. Misri Singh. 21 Cal 825.

(P) S. 174.

48—S. 174, Order under *Civil procedure Code* 1882, s. 244.

An order under s. 174 of the Bengal Tenancy Act is not one under s. 244 of the Civil Procedure Code, and is therefore not appealable. **Kishori Mohun Roy v. Sarodamani Dasi 1 C W N 30**

Sukh Narain Lal v. Goroke Prosad 3 C W N 344.

Appeal-*Contd.*

3 Acts—*Contd.*

49—S. 174—Civil Procedure Code (Act XIV of 1882), S. 311—Application under both sections—Withdrawal of latter—Effect—Appeal.

An order under s. 174 of the Bengal Tenancy Act is appealable, if the question is between the parties to the suit of their representatives, and the question raised, in a question relating to execution, discharge or satisfaction of the decree.

The word "applies" in the proviso to s. 174 of the Bengal Tenancy Act, means "applies and prosecutes."

If a judgment-debtor has made an application under s. 311, C P C he is competent to apply under s. 174 of the Bengal Tenancy Act, if he withdraws his application under s, 311, C. P. C.

Where a judgment-debtor made an application under s. 311, C. P. C., on the 13th July, to set aside a sale held on the 11th July, and subsequently on the 5th August he applied under s.174 of the Bengal Tenancy Act, and the Court ordered that the money might be received if the application under s. 311 was withdrawn, the necessary deposit was made on the following day, and on his application on the 7th August to withdraw the application made under s. 311, C. P. C, the same was dismissed on the 24th August and the application under s. 174, Bengal Tenancy Act, allowed;

Held, that the order under s, 174 of the Bengal Tenancy Act, for setting aside the sale was validly made. **Sital Rai v Nanda Lal 13 C W N 591= I Ind Cas 304.**

(Q) COMPANIES ACT XIX OF 1857.

50—Companies Act, XIX of 1857—Order placing name on list of contributories of company.

No appeal lay from an order of a District Court placing the name of an alleged allottee on the list of contributories of a company wound up under Act, xix of 1857. **Jamiyatram Himatram v. The Gujarat Trading Company 6 B H C 185.**

(r) ORDER UNDER COMPANIES ACT (VI OF 1882,) S. 58.

51-Companies Act (VI of 1882) S. 58-Appeal-

An appeal will lie from an order, passed under Section 58 of the Indian Companies Act even though no issue has been directed upon a question of title. **Amrita Lall Ghose v Shrish Chunder Chowdhry. 26 Cal 944=4 C W N 101.**

Appeal-*Contd.*

3 Acts—*Contd.*

52—Companies Act (No. VI of 1882) Ss. 58, 147, 169—Appeal—Notice of intention to appeal—Proper Court to give notice. S. 58 of the Indian Companies Act provides for the rectification of an error, in the register of shareholders during the continuance of a Company. By S. 147 of the Act, a Court is empowered when a company is in liquidation to make orders under the cricumstances set out in S. 58. Notice of an appeal under S. 169 of the Indian Companies Act should be given to the opposite party through the Appellate Court and not throngh the Court whose order is sought to be appealed against. **Anand Sarup v Sultan Singh. 2 A L J 311=1905 A W N 75= 27 All 509.**

(s) S. 162

53—s. 162, Order under—Notice of appeal—Companies Act, s. 214—Limitation Act (XV of 1877), s. 12.

Held that no appeal lay from an order made under s. 162 of Act VI of 1882 by a Court under the supervision of which proceedings in liquidation were being conducted declining to continue an investigation commenced by it under that section. *Held* also that, whether or not the service of notice of appeal within three weeks provided for by s. 214 of Act VI of 1882 implies that all the formalities prescribed for the presentation and admission of an appeal by the Code of Civil Procedure must first be gone through before notice of appeal can be served, a person appealing under the said section cannot avail himself of the provisions of s. 12 of the Limitation Act. **Wall v. Howard 18 All 215.**

Notes--Ref: 19 M L J 511.

54—Company——Order in winding-up proceedings—Appeal against the order—Notice of appeal—Delay in service of notice—Excuse of delay.

In the winding-up proceedings of a Company, an order was passed by the Court on the 12th April 1910. An appeal against the order was lodged on the 22nd idem; but the notice required by S. 169, Companies Act, 1882, was not served on the respondent until the 9th May 1910. In the meanwhile, at the respondent's attorneys' request, the appellant's attorneys furnished a copy of the memo of appeal on the 29th April 1910. The three weeks period prescribed by S. 169 having expired on the 3rd of May 1910, the appellants moved the

Appeal-*Contd.*

3 Acts—*Contd.*

the appeal Court for extension of time until the 9th May 1910

Held (1) that for the purposes of computing the period of three weeks prescribed by S 169 of the Act the order appealed against was to be taken as made on the day it was pronounced and not on the day it was drawn up

(2) That the furnishing of the memo of appeal by the appellant's attorneys to the respondent's attorneys on the 29th April 1910 did not constitute giving of the notice required by S 169.

( ) That the notice not having been served in the form and manner prescribed or within the time allowed the appeal was barred under S 169 **Goverdhandas Khattao v J Sanders Slater 13 Bom L R 558**

55—S 169 Appeal from order winding up—Ex parte application for extension of time—Service of notice within the extended time—Extension made on ex parte application valid right of respondents to object at hearing of appeal

By S 169 of the Indian Companies Act 1882 appeals are provided against orders and decisions made in the winding up of companies It further provides that no appeal shall not be entertained or the same is given without security unless a complaint has been made in a manner new notices of appeal are required to be given under the Code of Civil Procedure unless such notices extended by the court of appeal Certain applications under S 214 for an order against delinquent directors and officers of a company appealed to the High Court against the order of the District Court dismissing their petitions An application was made for extension of time and was granted and notice was given within the extended time—*Held* that notice of the application was unnecessary but as the order for extension was made *ex parte* the respondent could object to it at the hearing Such an appeal must under S. 169 be filed within three weeks of the date of the order at the latest *Obiter*—S 169 of the Companies Act is probably complied with by lodging the memorandum of appeal

Lakshminarasayya Setti v Venkana Setti 25 Mad 576.

Notes—Fol. 19 M L J 511

Appeal-*Contd.*

3 Acts—*Contd.*

55A—Ss 169 131—Appeal.

Order holding that withdrawal of an application under S 131 of the Companies Act does not operate as a withdrawal of the rest falls within the purview of S 169 and is consequently appealable **Dacca Loan Office Company v Ananda Chandra Roy 31 Cal 106**

56—S 169—Time within which appeal should be filed—Power of Court to extend time for serving notice of appeal—Reasonable cause for such extention—Limitation Act (XV of 1877) S 12 whether applies to appeals under the Companies Act Appeals under the Indian companies Act Appeals under the Indian Companies Act must be filed within three weeks from the date of the order appealed against

S tion s t 1877 has no application to appeals under the Companies Act and the appellant cannot demand that the time requisite for filing a copy of the order appealed against should be excluded from the period of time fixed by notice of the appeal within which the appellant is required

Under the Companies Act the Court appealed to has power to extend the time and the Court may properly exercise the power conferred by section 576 18 All 21 **The East Indian Distilleries and Sugar Factories Ltd v The Tinneyelly Ssrangapani Sugar Mills Co Ltd 4 Ind Cas 872=19 M L J 511**

57 S 169—Notice of appeal

Notice of appeal from an order made in the winding up proceedings should strictly be given within 3 weeks from the date of order and an appeal will not be heard in the absence of such notice. **Prosunna Kumar Guha v Bani Kanta Bhattacharjee 30 Cal 758.**

57A—S 169——Winding up of a company—Appeal from winding up order Appeal—Limitation Extension of time—Applicability of Ss 5 and 12 Limitation Act, to period prescribed by S 169—Claim for balance of money due to contractor—Charge upon buildings—Limitation Act, Art 132.

According to S. 169, a person filing an appeal

Appeal-*Contd.*

(3) Acts—*Contd.*

against an order made in the matter of the winding up of a company must file his appeal with such promptitude as to render service of notice upon the respondent at least *possible* within the three weeks allowed by the section (*Per* Johnstone, J)

The notice required by the section need not be notice of *hearing of appeal* The appellant should add in his memorandum of appeal a separate petition asking in view of the section aforesaid that a special notice be at once issued to the respondent intimating that an appeal has been filed

Although S 169 allows an extension of time that extension should not ordinarily be given in such a way as to extend the three weeks limitation for filing the appeal Extension for service of notice under the section should only be given where delay has been caused not by appellant's *laches*, but by the conduct of the respondent, raising up an equity in favour of the appellant, or by accident, such as mistakes in the office of the appellate Court, &c Except in circumstances of that sort no extension should be granted where such extension is asked for after the expiry of the three weeks

In a suit by a contractor against a company for the balance of money due to him under a contract for the erection of a building which expressly provided that the contractor should have a lien on the building for any money due to him from the company under the contract it was held that the period of limitation for the enforcement of such claim was 12 years under Art 132 of the Limitation Act 37 L J Ch 51 22 Ch D 484, Ref 7 All 502, Dist **Daulat Ram v The Woollen Mills Co, Ltd. 95 P R 1908**

57B—S 169—Notice of appeal not given within three weeks, effect of—Extension of time—Sufficient cause—Carelessness of pleader—Leniency by Court, when to be shown

An appeal against the order or decision of a District Judge under the Indian Companies Act cannot be heard, unless notice of the same has been given within three weeks of the date of such order or decision as required by S 169 of the Companies Act.

The carelessness or ignorance of a pleader is not sufficient for extending the time fixed by S 169 of the Companies Act.

Appeal-*Contd.*

(3) Acts—*Contd.*

As leniency in extending time in such cases cannot be shown to one party except at the expense of the other party Courts should not show it but for sufficient cause 95 P R 1908 Fol 118 P R 1908 relied upon **Hira Lal v. Himalaya Glass Works Co 176 P L R 1911.**

570—S 169—Practice—Companies—Winding up—Notice of appeal—Limitation

S 169 Companies Act, while allowing appeals from any order or decision in the matter of winding up of a company provides further that no appeal will be heard unless notice of the same is given within three weeks after the order complained of has been made in the manner in which notices of appeal are ordinarily given under the Code of Civil Procedure unless such time is extended by the Court of Appeal

The presentation of the memorandum of appeal within three weeks of the order complained of will not save limitation, if the notice of the appeal has been given after three weeks from the said order **Ghisu Mal v W K Porter. 8 A L J 719.**

(8) COURT FEES ACT VII OF 1870

58—Court Fees Act (VII of 1870) S 12 cl 1—Order fixing amount of Court fee chargeable upon a plaint

Any right of appeal given to plaintiff under sections 31 to 36 of Act VIII of 1859 is taken away by section 12, Clause 1 of the Court Fees Act, (VII of 1870) An appeal can only be entertained where the Court below has wrongly decided to the detriment of the revenue No appeal will lie against the order of a District Judge fixing the amount of the Court fee chargeable upon a plaint Vide also Printed Judgments of 1877, page 244 **Narayan Madhavrao Naik v. The Collector of Thana. P J (1877) 189 = 2 Bom 145.**

Notes:—Fol 2 Bom 219, 9 Bom 355 Dist 12 C L R 118 Ex 4 Mad 204 Ref: 4 M L J 183 F B 23 Bom 486

(1) ORDER REJECTING PLAINT FOR INSUFFICIENCY OF VALUATION

59—Order rejecting plaint for insufficiency of valuation

Appeal-*Contd.*

(3) Acts—*Contd*

Held, following *2 Bom 145*, that the decision of the Court of the first instance, rejecting a plaint for insufficiency of the valuation and stamp for the purposes of the Court Fees Act (VII of 1870) not being to the detriment of the revenue, is final, and no appeal lies from it.

Monohar Ganesh v. Bawa Ramcharandar. 2 Bom 219.

Notes:—Fol: 9 Bom 355. Dist: 12 C L R 148; 20 Bom 736. Ex: 6 C L J 427. Con: 10 Bom 610. *Ref:* 4 Bom 515 F B; 12 Bom 672; 17 Bom 56; 19 Bom 191; 23 Bom 486; 11 C W N 705.

60.—Civil Procedure Code, Act X of 1877, s. 1—Act XII of 1879, section 2—Court Fees Act, VII of 1870, section 12,—Stamp, rejection of plaint for insufficiency of—Appeal—"Decree"

Notwithstanding the provisions of section 12 of the Court Fees Act(VII of 1870) an order rejecting a plaint on the ground of its being insufficiently stamped, is appealable as "decree" within the definition of "decree" in the Civil Procedure Code as amended by Act XII of 1870. **Ajoodhya Pershad v. Gunga Pershad. 6 Cal 249=6 C L R 567.**

Notes:—Ap: 11 All 91 F *B*; 14 Mad 169. Ref: 12 C L R 148; 16 Bom 23; 23 *Bom* 486; 4 All 27.

61.—Court Fees Act (VII of 1870), S. 12, Clause II—*Appellate* Court rejecting appeal for failure to pay Court Fees required for first Court—"Decree"—Civil Procedure Code (Act XIV of 1882) S. 2.

The Lower Appellate Court dismissed under S. 12, Clause II of the Court Fees Act the plaintiffs' appeal to his Court upon their failure to comply with an order to file within a certain period Court fee stamps both for the Court of first instance and for the Appellate Court.

Held, that the order of the Lower Appellate Court was a "decree" within the meaning of S. 2 of the Civil Procedure Code, an order dismissing a suit or an appeal being an adjudication upon a right claimed, which decides the suit or appeal so far as the Court expressing it is concerned. **Mela Mal v. Harbhaj. P R 115 of 1884.**

Appeal-*Contd.*

(3) Acts—*Contd.*

(2) CIVIL PROCEDURE CODE 1859, S. 36.

62.—Civil Procedure Code, 1859, s. 36.

S. 12 of the Court Fees Act does not prevent a party from appealing to the High Court under s. 36 of the Civil Procedure Code and urging that the Court of first instance was wrong as to the particular article of schedule of fees by which the case was governed. **Gungamonee Chowdrain v. Gopal Chunder Roy. 19 W R 214.**

Notes:—Fol; 12 C L R 148; 1 All 360. Con: 4 M L J 183 F B. Ref: 4 Mad 204: 23 Bom 486.

(3) APPEAL AGAINST AN ORDER FOR PAYMENT OF ADDITIONAL COURT FEES.

63.—Appeal against an order for payment of additional Court-fees.

The member of a Malabar Tarwad brought a suit in a Subordinate Court to set aside an instrument affecting the whole of the tarwad property in which it was held by the Subordinate Judge that Court-fees were leviable, assessed on the value of the property and accordingly an order for payment of additional fees by the plaintiffs was made and as they failed to do so the suit was dismissed.

Held that, such an order for payment of additional Court-fees was appealable and S. 12 of the Court Fees Act did not prevent the High Court from revising it and reversing the decree.

Kanaran v Komappan. 14 Mad 169.

Notes:—Ap: 4 M L J 183 F B. Fol: 28 Cal 334. Ref. 23 Bom 486.

(4) ORDER AS TO VALUATION AND CLASS TO WHICH A SUIT BELONGS.

64.—Order in respect of the valuation and class to which a suit belongs—Decision as to such class.

An appeal lies against a decision of the lower Court as to the class under the Courts fees' Act under which a suit falls, though it does not lie against its valuation in that class. A decision of the Lower Court holding that a suit is one for specific performance of a contract of sale and liable to be valued according to the amount of the consideration-money and not for a deccere

Appeal-*Contd*

(3) Acts—*Contd.*

with consequential relief, is appealable.

Dada Bhan Kithu v. Nagesh Ramchandra. P J (1898) 346=23 Bom 486.

Notes:—Fol: 28 Cal 334. Ref: 27 Bom 140.

65.—Suit for removal of Mahant; for declaration of right to appoint a successor, and to enforce the provisions of a will—Value of relief sought—Jurisdiction—Course of appeal—Court-fees Act; Section 7, paragraphs iv (c), v, vi, ix and x (d)—Suits valuation Act, 1887, Section 8—Punjab Courts Act, Section 39.

The plaintiffs in their plaint valued the relief sought as follows:—

	Rs.
(1) Removal of defendant from the office of Mahant	1,000
(2) Declaration of plaintiffs' right to appoint a successor	500
(3) Enforcement of the provisions of a will	1,000

or Rs. 2,500 in all.

The District Judge having found on a preliminary objection raised by the defendant, that the value of the property attached to the institution in question was Rs. 2,53,037-13-11, directed the plaintiffs to file additional Court-fees and upon their refusal to comply with such order rejected the plaint under Section 54, Civil Procedure Code

The plaintiffs thereupon appealed to the Divisional Judge, who returned the memorandum of appeal for presentation to the Chief Court, holding that, though he would have had jurisdiction looking only at the claim as valued in the plaint, his jurisdiction had been taken away by the District Judge's decision that the true valuation was Rs. 2,53,038.

Held, that this view of the law was untenable, and that the appeal should be returned for presentation to the Divisional Judge. The suit being other than any of those referred to in Section 7, paragraphs v, vi and ix, and paragraph x, clause (d) of the Court Fees Act and the value for the computation of Court-fees and for purposes of jurisdiction being the same by virtue of Section 8 of the Suits Valuation Act, 1887; and such value being determinable according to the amount (in this case Rs. 2,500) at which the relief sought was valued in the plaint or memorandum of appeal, the Divisional Judge had jurisdiction to

Appeal-*Contd.*

(3) Acts—*Contd.*

entertain the plaintiffs' appeal, notwithstanding that the District Judge had decided that the true value of the relief sought was in excess of Rs. 5,000. **Bawa Mangal Das v. Mahant Narinjan Das. 58 P R 1893.**

66.—S. 12—'Valuation for purpose of determining the amount of court-fees'—Construction of-Question as to what class the suit belongs—Applicability of S. 12—Appeal-Bar.

S. 12 Cl. (1) of the Court Fees Act is no bar to an appeal when the question before the lower Court was to decide merely the class of the suit in order to ascertain under what schedule of the Act, it must be taken to fall for the purpose of fixing the amount payable on the plaint or memorandum of appeal. 12 C L R 148; 1 All 360: 4 Mad 204; 14 Mad 169; 23 Bom 486 app. of,

Studd v Mati Mahto. 28 Cal 334.

(T) COURT FEES ACT (VII OF 1870) S. 7

67—Court Fees Act (VII of 1870) Section 7 of (cl V) and 12-Year next before presenting the plaint decision of the first court-Finality of appeal. A decision of a court regarding the valuation is final under section 12 of the Court Fees Act and cannot be questioned in appeal. But where the valuation is made in respect of a year other than the year mentioned in cl V (c) of section 7, that valuation is quite immaterial and can be questioned in appeal. The year next before the date of presenting the plaint referred to in cl V (c) of the Court Fees Act should be reckoned according to British calendar, next 365 days before the date of presenting the plaint.

Ghasiram v Hargobind 3 A L J 244= (1906) A W N 66=28 All 411

67A—Court Fees Act Sch II, Art 17-Revision for order to pay 'ad valorem' Court-fee.

The Subordinate Judge decided that the suit did not fall within Art 17, Sch II of the Court Fees Act, but that an *ad valorem* fee was payable and directed the plaintiff to make good the deficiency within one week. *Held*, that the circumstance that his decision might be wrong did not bring it within the purview of s. 622, C P C. *Held*, further, that an appeal would lie in the case if the plaint was rejected and therefore no revision lay. **Dwarka Prasad v Oudh Commercial Bank Ld. 5 O C 319**

Appeal-*Contd.*

(3) Acts—*Contd.*

(U) GUARDIAN AND WARDS ACT (VIII OF 1890) S. 22

68—S. 23—Guardian—Nazir—Remuneration—District Court disallowing remuneration—Appeal—Practice—Procedure.

The Nazir of a District Court was appointed guardian of the property of the minors. When transferred, he handed over the charge of the estates to his successor and submitted accounts of his management, praying for remuneration. The District Judge refused to allow him any remuneration on the grounds that the accounts were irregularly and badly kept, that the estates had been mismanaged and that considerable unnecessary expense had been incurred. Against this order, the Nazir appealed:

Held, that no appeal lay against the order, because the Act, clearly gave the Judge a discretion in the matter and it allowed of no appeal against his order. **Gangadhar v Shivlingrao 1 Bom L R 547=24 Bom 95.**

68A—S. 31 (3) (d)—Order not appealable.

No appeal lies from an order passed under s. 31 (3) (d) of the Guardians and Wards Act, VIII of 1890. **Bhiva v Keshava 1 Bom L R 1.**

68B—Guardian & Wards Act Ss. 4, 7, 12, 47. The High Court as an appellate Court, has the power to make an interlocutory order appointing an *ad interim* guardian. *Per* Mookekjee, J.

The appellate Court, when it hears the appeal is competent to make, in substitution for the order passed by the inferior Court, such an order as, in its opinion, ought to have been passed by that Court; and, as ancillary to the power which the appellate Court thus possesses also the power to appoint a temporary guardian during the pendency of the appeal. The Court, in an appeal from the final order, has in this respect the same power which has been expressly conferred upon the Court of first instance. **Panchanan Singh Roy v Dwarka Nath 3 C L J 29.**

(1) S. 35.

69—S. 35—Administration bond—Assignment—District Judge.

No appeal lies from an order, passed by the District Judge, under s. 35 of the Guardians and Wards Act, declining to assign the bond.

It is competent to a District Judge to assign the bond, which is passed in his name to a third person. **Ganpat v Anna 7 Bom L R 803=30 Bom 164**

Appeal-*Contd.*

(3) Acts—*Contd.*

69A—S. 35—Administration bond—Assignment—District Judge.

No appeal lies from an order, passed by the District Judge, under s. 35 of the Guardian and Wards Act, declining to assign the bond.

It is competent to a District Judge to assign the bond, which is passed in his name, to a third person. **Ganpat v Anna 7 Bom L R 803,**

(1) (a) S. 39

70—Sec. 39—Removal of guardian—Appeal.

An appeal does not lie against an order refusing an application for the removal of a guardian who has been appointed by the Court, and also for the appointment of the applicant as the guardian. **Pran Bandhu Singh v Brahmamayi Dasya 1 C W N 693**

70A—No appeal lies from an order passed under s. 41, Guardians and Wards Act. **1 Bom L R 822**

(2) S. 43

71—Ss. 492 and 503:—Guardian and Wards Act VIII of 1890 s. 43—Petition to remove guardian—Injunction—Appointment of receiver—Jurisdiction—Appeal.

In proceedings instituted under the Guardian and Wards Act for the removal of the guardians of a minor, the Court has no power to attach the minor's estate and appoint a receiver to manage it.

Where in proceedings under Act VIII of 1890, the District Judge purported to issue an attachment and appoint a receiver under Ss. 492 and 503, Civil Procedure Code.

Held, that an appeal lay as if the order was really passed under those sections notwithstanding that no appeal was provided for against orders passed under the Act. **Abdul Rahiman Sahib and Bhanu Bibi v Ganapathi Bhatta 23 Mad 517**

Notes:—Fol: 28 Mad 127=14 M L J 436.

Appeal-*Contd.*

(3) Acts—*Contd.*

(3) S. 47

72—S. 47—Guardian—Refusal to remove a guardian.

Under the Guardian and Wards Act,(VIII of 1890) no appeal lies against an order of a District Judge refusing to remove a guardian. **Mohima Chunder Biswas v Tarini Sunker Ghose 19 Cal 487**

Notes:—Foll 23 Cal 201; 20 All 433. Dist: 19 All 131.

(4) REMOVAL OF GUARDIAN.

73—Removal of guardian—Order refusing to direct the removal of guardian.

An application was made to cancel a certificate of guardianship of the person and property of a minor. The District Judge ordered the certificate to be amended only in respect of the guardianship of the person by appointing the applicant as such guardian. He also ordered a monthly allowance to be paid to her for the education & maintenance of the minor. On the appeal of the applicant to the High Court:—Held, that the order appealed from was one refusing the removal of a guardian, and as such was not appealable under cls. (f) and (g) of s. 47 of the Guardian and Wards Act (VIII of 1890). I L R 19 Calc 487 followed. **Pakhwanti Dai v Indra Narain Singh. 23 Calc 201**

Notes:—Fol: 20 All 433.

74—Application by guardian for custody of minor—Appeal-Guardian and Wards Act, 1890, Sections 12, 25, 47 (c)—Revision—Right of guardian to custody of minor.

An application by a duly appointed guardian for custody of the minor was rejected by the Additional District Judge on the ground that the proper course for the guardian would be to bring a civil suit against the respondent if she refused to make over the minor to his custody. The guardian appealed to the Chief Court.

Held, that the order of the lower Court was not appealable.

But *held*, that the said order was open to revision on the ground that the lower Court should have directed the respondent to produce the minor with a view to his being made over to the petitioner, and that in failing to do so, the lower Court failed to exercise a jurisdiction vested in it by law. **Wadhawa Singh v Mussammat Malan 13 P R 1897**

Appeal-*Contd.*

(3) Acts—*Contd.*

75—Act No VIII of 1890, s. 47—Order refusing to direct the removal of a guardian.

An applicant for a certificate of guardianship applied(1)for removal of the existing guardian and (2) for her own appointment as guardian. The application was dismissed. *Held*, that no appeal would lie from the order of dismissal, such order being an order refusing to direct the removal of a guardian. (19 Cal 487,) (23 Cal 201), and (20 Bom 667) referred to. **Imtiazunnisa v. Anwarullah. 18 W N 97, 20 All 433**

(5) S. 48

76—Guardians and Wards Act VIII of 1890, Secs. 47 (g), and 48—Order refusing to remove a guardian—Not appealable—Appeal—Practice.

The effect of Secs. 47 clause (g), and 48 of Guardian and Wards Act VIII of 1890 is to allow no appeal from an order refusing to remove a guardian. **Bai Harkha, P J 1895, 256= 20 Bom 667**

Notes:—Fol: 20 All 433.

77—Civil Procedure Code, 1882, Sections 588 (24), 622 and 647—Appeal—Guardian and Wards Act, 1890, Sections 12 and 48—Order of District Judge fixing the fee of a custodian of the property of the ward appointed under Section 12—Revision—Punjab Courts Act, 1884, Section 70.

Held, that no appeal lies from an order of a District Judge fixing the fee of a custodian of the property of a ward appointed under Section 12 of the Guardian and Wards Act, 1890, but that such an order can be revised under the authority of Section 48 of that Act, Section 70 of the Punjab Courts Act of 1899 although it repealed, re-enacted in a modified form Section 622 of the Civil Procedure Code. **Mina Mal v Rai Bahadur Hardhian Singh. 48 P R 1901.**

(V) LAND ACQUISITION ACT X OF 1870 Ss. 3, 14, 15, 29.

78—Land Acquisition Act X of 1870, Parts III and IV Secs. 3, 14, 15, 38, and 39—Reference by the Collector to the District Judge—Persons claiming interest in the compensation—Apportionment.

Appeal-*Contd.*

(3) Acts—*Contd.*

A Collector having acquired land under the provisions of the Land Acquisition Act X of 1870, and a question having arisen as to the right to the compensation-each of two rival claimants claiming exclusive title the whole of the compensation awarded,—the Collector referred the question to the decision of the District Judge under Sec. 15 of the Act. The District Judge having decided the question in favour of one of the claimants, the other appealed to the High Court. In appeal it was contended that as the provisions of the Land Acquisition Act apply to cases in which there was no question as to the apportionment, and in which each of the claimants laid claim to the entire amount of the compensation, the order passed by the District Judge was not appealable under the provisions of the Act, as there was no question of apportionment to be determined.

Held, that looking to the language of Sec. 15 of the Land Acquisition Act X of 1870, which clearly contemplates the reference of such a dispute being provided for in the subsequent part of the Act, and as there is no other provision in the Act made for it the term "apportionment" in Part IV should be given a liberal construction as including the case where the Court has to decide between rival claimants of the entire compensation. The order of the District Judge was therefore, appealable.

Kashim v. Aminbi and the Collector of Belgaum, P J 1891, p. 286=16 Bom 525.

Note.—*Ref*: 28 Bom 383.

79.—Land Acquisition Act, 1870 section 29—Agreement of Judge and assessors as to compensation—Finality of decision.

In case the Judge and one or both of the assessors agree as to the amount of compensation in a reference made to the Court under the provisions of Part III of the Land Acquisition Act 1870, their decision thereon shall be final, and no appeal lies, even if they differ upon minor points not falling within the scope of their jurisdiction.

Imam Bakhsh v Collector of Muzaffargarh 36 P R 1892)

(1) S. 39.

80.—S. 39—Additional Judge—Appeal—S. 647 Civil Procedure Code (act XIV of 1882).

An Additional Judge appointed to hear cases under the Land Acquisition Act, 1870, is a District Judge within the meaning of S. 39 of that Act. An appeal lies to the High Court from the decision of an Additional Judge so appointed, under s 647 of the Civil Procedure Code. **Poresh Nath Chatterjee v Secretary of State for India 16 Cal 31.**

(2) LAND ACQUISION ACT (I OF 1894) SS. 18, 19, 32, 54.

81.—Land Acquisition Act (I of 1894), ss. 18, 19, 32, and 54—Reference by Collector to Judge as to disposal of compensation awarded for land—Appeal from Judge's order.

Held that, an appeal will lie to the High Court from an order of the District Judge made upon a reference by the Collector under ss. 18 and 19 of the Land Acquisition Act, 1894, as to the disposal of compensation awarded for land taken up by Government under the Act. I. L. R., 23 Calc 526, followed.

Held, also, that in an appeal from the order of the District Judge above referred to the memorandum of appeal must be stamped as an appeal from an original decree.

Sheo Rattan Rai v Mohri. 21 All 354.

Notes—(1899) W N 96 *Con:* 26; Mad 288; Fol: 24 All 189; *Ref*, 31 Cal 214; *Dist*; 32 Cal 921=2 C L J 595.

82.—Ss. 32, 54—Award—Order for refund of compensation money—Execution, mode of—Civil Procedure Code, Ss. 254, 260, 649.

Where in a proceeding under the Land Acquisition Act, money deposited by the Collector was paid out as compensation to a party by mistake, an order of the Court directing him to refund the money so paid out is not an award or part of an award within the meaning of S. 54 of the Act, neither does it come under any of the orders mentioned in S. 588 of the Code of Civil Procedure and no appeal therefore lies against such order. The Court has jurisdiction under Ss. 254 and 649 of the Civil Procedure Code to enforce its order for refund, by imprisonment of the party against whom the order is made or by the attachment and sale of his property in the manner provided in the Code or by both, even though S. 260 of the Civil Procedure Code may not be applicable.

Nobin Kali Debi v Ban-lata Debi. 2 C L J 595.

Appeal-*Contd.*

(3) Acts—*Contd.*

83.—Act I of 1894 (Land Acquisition)—Act VII of 1870 (Court Fees), s. 11—Scope—Appeal under Land Acquisition Act, 1894.

The amount awarded by a decree in appeals under the Land Acquisition Act must be limited to the amount which the appellant claims in the appeal memorandum and for which he has paid court-fees. **Mahomed Ali Amjad Khan. v Secretary of State for India. 30 Cal 501.**

Notes.—53 P R 1906 Ref:=103 P L R 1906.

84.—**Ss. 32, 54**—Compensation money paid to Hindu widow—Reversioner's application for reference—Order by judge in reference directing refund—Appeal—Revision—Civil Procedure Code S. 622.

Where a Land Acquisition Collector having awarded a certain sum as compensation for land acquired, paid it to, among others, a Hindu widow, and almost six months after the award her daughter asked for a reference to the Civil Court, and a reference having been made, the Judge ordered the lady to repay the amount withdrawn by her and the same to be dealt with according to the provisions of S. 32 of the Land Acquisition Act:—*Held*:—That until money was deposited in Court by the Collector, the Court could not proceed to deal with it under S. 32; that the Judge had no power to direct a refund of money already paid by the Collector; that the order was not one under S. 32, Land Acquisition Act, as the Judge was not in a position to make such an order and so no appeal lay from it and the High Court could properly interfere under S. 622, Civil Procedure Code. **Gobindarani Dassi v Brinda Rani Dassi. 12 C W N 1039 =35 Cal 1104.**

85.—Ss. 25, 27 and 54—Award of costs—Appeal—Civil Rules of Practice or Rules applicable to Presidency Small Cause Court to be applied in calculating vakil's fee.

By s. 25, the award is to state the costs incurred, and by S. 54 an appeal lies against any part of the award. So, it is not possible to say that the award of costs is not part of the award and it must be held that an appeal lies.

The effect of s. 27 of the Land Acquisition Act is not to leave the fixing of the amount for the vakil's fee in the discretion of the Court. In cases in which proper value can be attached to the suit, the Civil Rules of practice or else the rules applicable to the Presidency Small Cause Court should be applied in calculating the vakil's fee. **Ekambara Gramany v Muniswamy Gramany 31 Mad 328.**

Appeal *Contd.*

(3) Acts—*Contd.*

86.—**S. 16**—Claim heard by Assistant Judge under the Land Acquisition Act (1 of 1894)—Value of the subject-matter not exceeding Rs. 5,000-lies to District Court and not to High Court.

Where in a compensation case under the Land Acquisition Act, 1894, heard by an Assistant Judge, the amount does not exceed Rs. 5,000 the appeal lies to the District Court and not to the High Court. 10 Bom L R 924=32 Bom 634 Appl **Ranchhodbhai Valavbhai v The Collector of Kaira. 11 Bom L R 317=33 Bom 371 =2 Ind Cas 492.**

(w) MILITARY COURTS OF REQUEST ACT (XI OF 1841).

87.—Military Courts of Request Act, XI of 1841.

An appeal lay under Act XI of 1841. **Guntham Doss v Mooltan Mull 2 N W 229.**

88.—An appeal lay to the High Court of Judicature for the North-Western Provinces from the decree of a Military Court of Request held at Morar, Gwalior. **Mooltan Mull v Gunsam Doss. 3 N W 75.**

(x) REGISTRATION ACT (XX OF 1866)

89—Registration Act (XX of 1866).

No appeal lies to the High Court from an order passed under the Registration Act. **Rameesur Mahatah v Kullyanessuree Debia. 9 W R 283.**

Notes.—Ref: 7 Bom L R 723; 772.

(1) SS. 32, 83, 84, 52

90.—Ss. 32, 83, and 84

No appeal lay from an order by a Registrar refusing to exercise his discretion under s. 32, Act XX of 1866. Such an order came neither within s. 83 nor s. 84 of the Act. **Sarkies v Sangram Singh. 6 B L R 578. note: 14 W R 194**

91.—**S.** 52—Order refusing to allow amount of decree to be levied by instalments.

Appeal-*Contd.*

(3) Acts—*Contd.*

There is no appeal from an order refusing to allow the amount due under a decree passed upon an obligation specially registered under s. 52, Act XX of 1866, to be levied by instalments, and directing immediate enforcement of the decree. **Rash Behary Babu.** **7 W R 130.**

Notes.—*Ref*: 1 All 101:, 377

(2) SS. 52, 53.

92.—Ss. 52, 53—Order in execution of decree—Bond specially registered—Registration Act, XX of 1866, ss. 52, 53.

Held (Stuart, C. J., dissenting) that an appeal lay from an order passed in the execution of a decree obtained under the provisions of s. 53 of Act XX of 1866, upon a bond specially registered under the provisions of s. 52 of that Act. *I. L. R. 1 All* 377, overruled. 7 *W R* 130 and 18 W R 572 dissented from. **Wilayat-un-nissa v Najib-un-nissa.** **1 All 583.**

Notes.—*Fol*: 16 All 586 F B; 5 Bom 673 F B,

93.—S. 53.

An appeal lay from an order in execution of a decree made under s, 53 of Act XI of 1866. **Bhikambhat v Fernandez.** **I 5 Bom 673.**

Notes.—*Fol*: 12 Cal 511 F B; *Ref*: 10 Cal 196 P C; 6 Bom 54.

94.—No appeal would lie from decree nor from orders passed in execution of a decree under s. 53 of Act XX of 1866. **Bhurub Chunder v Golap Coomary.** **3 Cal 517.** **Purus Ram v Deo Koer** **4 N W 29.**

95.—No appeal lying against a decree made under s. 53, Act XX of 1866, the petition was directed to be returned, with a view to its being presented to the Court, if desired by way of motion. **Rash Behary Babu v Gurudass Babu** **7 W R 115.**

(3) SPECIALLY REGISTERED BOND.

96.—Bond, specially registered.

There is no second appeal to the High Court against an order passed on an application for execution of a decree made in a suit brought on a bond specially registered under s. 53 Act XX of 1866. Quære—Whether an appeal would lie at all against such an order passed in proceedings taken in execution of such a decree. **Shir Bullav Bhattacharji v Baburam Chattopadhya** **11 Cal 169.**

Appeal-*Contd.*

(3) Acts—*Contd.*

Notes.—*Ap*; 18 All 481 F B: *Ref*: 17 M L J 376; *Rel*: 30 Mad 212.

(4) SS. 54, 55

97.—Act XX of 1866 s. 54, 55-Order in execution proceedings.

No appeal lies against order passed in execution of a decree under Act XX of 1866, the procedure under that Act having been expressly saved by Act VIII of 1871, which repealed Act XX of 1866. **Ramanund v The Bank of Bengal.** **1 All 377.**

Notes:—Over; All 583 F B.

(5) S. 55.

98.—S. 55

An appeal is not barred by anything in S. 55 of Act XX of 1866 if it is from an order or decree passed in proceedings in execution of a decree made under S. 53 of that Act. **Shri Bullav Bhattacharji v Baburam Chattopadhya.** **12 Cal 511.**

99.—In cases in which s 55 of Act XX of 1866 bars an appeal, it does so equally in matters of execution as in respect of the decree passed. **Hurnath Chatterji v Futtick Chunder Samaddar.** **18 W R 512.** **Radha Kristo Dutt v Gunga Narain Chatterjee.** **23 W R 328.** **Huro Sunduri Debia v Punchuram Mondul.** **24 W R 225.**

(6) S. 84.

100.—S. 84—Order refusing to register document.

Held that, there was no appeal to the High Court from the decision of a District Court on a petition under s. 84 of Act XX of 1866, to establish the right to have a document registered; nor would the Court interfere with such a decision under Regulation XI of 1827, s, 5, cl. 2. **Dharamdas Bhavanidas.** **3 B H C 104.**

(X 7) ORDER OF DEPUTY COMMISSIONER.

101—Order of Deputy Commissioner-District of Chota Nagpore.

An appeal under s. 84, Act XX of 1866, from the order of a Deputy Commissioner in Chota Nagpore, must be made to the Judicial Commissioner, who exercises the powers of a Zillah Judge

Appeal-*Contd.*

3 Acts—*Contd.*

in all the districts of that division.
Budhu Mahatoon **8 W R 266.**

(8) ORDER OF DISTRICT COURT.

102—Order of District Court—

An order of a District Court under s. 84 of Act XX of 1866 was not appealable to the High Court. **Salgram Misser v. Janki Koer** **9 W R 122.**

(y) DECREE UNDER S.77, REGISTRATION ACT 1877.

103—Decree under s. 77 Registration Act 1877—Suit to compel registration.

An appeal lies from a decree undsr s.77 of Act III of 1877 in a suit to enforce registration. In such a suit there is no reason why either the registrar or Government should be a party and it should be brought in the Court of the lowest competent jurisdiction. **Shri Vishwambhar Pandit v. Prabhakarbhat P J (1884) 10= 8 Bom 269.**

Notes:—Dist: 11 Bom 519.

(z) STAMP ACT (X OF 1862 S. 17.)

104.—Stamp Act (X of 1862), s. 17—Order rejecting document tendered in evidence-Finality of order.

Held that an appeal lies to the High Court from the decision of a Judge in division Court rejecting a document tendered in evidence under s. 17 cl. 1, of Act X of 1862, on the ground that there had been an intention to evade the payment of stamp duty. The point upon which the decision of the Court is to be final, under s. 17 of the Stamp Act, is as to what is the proper amount of stamp duty which the document ought to bear, and not as to whether the Court ought or ought not to receive the document in evidence.
R oyal Bank of India v. Hormasji Khozedji **3 B H C 153.**

(Z 1) PROVINCIAL INSOLVENCY ACT.

105—S. 46 (4)—Appeal—Exclusion of time for copy—Limitation Act (IX of 1908), Ss. 12, 29.

The Provincial Insolvency Act was intended to be and is, so far as matters governed by it are concerned, a complete code in itself and retains its own limitation law. *Held*, that, in computing

Appeal-*Contd.*

3 Acts—*Contd.*

the period of ninety days prescribed for presenting an appeal to the High Court under the said Act, the time requisite for obtaining a copy of the order complained of cannot be excluded, and therefore an appeal from an order passed on 13th August, 1909, and presented on 1st December, 1909, is barred by time. **Jugal Kishore v Gur Narain.** **8 A L J 833.**

(Z 2) ACT XXVI OF 1867

106—Act XXVI of 1867—Order as to valuation of suit.

Under Act XXVI of 1867, the decision of a Court of first instance as to the valuation of the subject-matter of a suit is final. **Ishan Chandra Mookerjee v Lokenath Roy. 6 B L R Ap 12 =14 W R 451.**

Mofizuddin v Karimunnissa Bibee. **6 B L R Ap 11=14 W R 381**

Notes—14 W R 451.

(Z 3) SCH B ART 11 NOTE.

107—Sch B, Art 11 note-Order rejecting plaint for under-valuation—Act VIII of 1859, ss. 30 and 36.

Where a plaint is rejected under s. 30 of Act VIII of 1859 by the first Court, on the ground that it is under-valued, an appeal lies from such order under s. 36 of Act VIII of 1859, and this appeal was not taken away by the note to Art. 11, sch B to Act XXVI of 1867, the object of which was to prevent appeals only where the question merely related to the amount of stamp to be impressed upon the plaint. **Collector of Sylhet v Kali Kumar Dutt. 7 B L R 663=16 W R F B 10** *Contra* **Mudhusudan Chuckerbutty v Rymani Dasi. 7 B L R 664 note** **13 W R 415.**

Notes:—15 W R 291.

108—Pre-emption—Value of suit—Punjab Courts Act, 1864, Section 40 (8) (a).

A sued for pre-emption of certain property on payment of Rs. 400, the price stated in the deed of sale. The real value of the property sold was upwards of Rs. 2,000. The Courts below concurred in decreeing the claim. The defendant appealed, and a preliminary objection was taken to the hearing of the appeal on the ground that the value of the suit was below Rs. 1,000 and therefore no further appeal lay to the Chief Court.

Appeal-*Contd.*

3 Acts—*Contd.*

Held, that the appeal lay under Section 40 (1)(a) of the Punjab Courts Act, 1884, as the decree involved directly a claim to property of the value of over Rs. 1,000. **Lachman Das v Hakim Singh 94 P R 1890.**

109—S. 177, Cl (e). Question of proprietary right—Appeal.

In answer to a suit to eject the tenant as being a tenant from year to year the defendant pleaded that he held proprietary *malikana* rights in the land, and that he paid neither rent nor revenue. The court of first instance went into the question and found that the defendant and her predecessor in title had held the land free of rent:—*Held*, that an appeal lay in this case to the District Judge under S. 177, Cl (e). **Rai Bahadur v Jasodhia 1905 A W N 259=2 A L J 786.**

110—Punjab Courts Act, 1888, Section 40, clause (a)—Suits Valuation Act, 1887, Section 4—Valuation of subject-matter of suit in the Appellate Court.

In a suit for the possession of land, the value of which under the Rules framed under Section 4 of the Suits Valuation Act was less than Rs. 500, both the lower Courts concurred in decreeing the claim. The defendants thereupon, without obtaining a certificate for appeal, appealed to the Chief Court, alleging that the market value of the land was over Rs. 1,000, and that an appeal lay under the second branch of clause (a) Section 40 of the Punjab Courts Act.

Held, that the decree of the Divisional Judge confirming the decree of the first Court, which decreed the plaintiffs' claim to proprietary possession of land, which claim, valued according to the Rules framed under Section 4 of the Suits Valuation Act, 1887, did not amount to Rs. 1,000 in value, was a decree which did not fall under the second branch of clause (a) of Section 40 of the Punjab Courts Act, 1888, being a decree in which the claim to, or question respecting land was identical with the subject-matter of the suit, which was excluded from appeal under the first branch of that clause, because the value of the suit did not amount to Rs. 1,000. **Kanshi Ram v Sujan Singh 132 P R 1893.**

111—Appeal, course of—Provincial Small Cause Courts Act (IX of 1887), Schedule II, Article 4.

Appeal-*Contd.*

3 Acts—*Contd.*

A Suit for possession of immoveable property being excepted under Article (1) of the Second Schedule of the Provincial Small Cause Courts Act from the jurisdiction of a Court of Small Causes, a suit to recover Rs. 200, the price of materials of a house, and also to obtain possession of a small plot of building, is not a "small cause suit" within the meaning of Section 3 of the Punjab Courts Act, and not being a "land-suit" must be an unclassed suit, and under Section 39 of the Punjab Courts Act, the appeal from the decree of a Munsif lies to the Divisional Court and not to the Court of the District Judge. **Jowahir Mal and v Fattu Mal. 60 P R 1900.**

112—In this case the plaintiff's agent being unacquainted with the facts of the case the Court ordered him to produce some person qualified to represent the plaintiff.

A *karinda* of the plaintiff was accordingly brought to Court but he also proved to be unacquainted. The Court then ordered the agent to produce the plaintiff on the 1st May. On that the plaintiff pleaded illness as an excuse for non-attendance and the case was adjourned for the 12th. May, the plaintiff did not appear and the case was again adjourned for the 13th. On the 13th the plaintiff failing to appear, the Court dismissed the suit against the defendant who did not admit the plaintiff's claim. The District Judge in appeal held that the order of the Court was one under s. 125 of Act XVIII of 1873 read with s. 143 and the remedy against such order was not by way of appeal, under s. 128. *Held* that if the suit was dismissed, as suggested by the pleader for the appellant, under s. 136, the provision of s. 128 would be applicable and there was no appeal to the District Judge. **Janki Prasad v Mangli. 1 W N 92.**

113—"Land-suit"—Village graveyard—Further appeal.

The plaintiffs sued, alleging that 56 kanals, 3 marlas of land had been reserved as the village graveyard from the foundation of the village, and that the defendants had brought 6 kanals of it under cultivation two years previously, and made thorn enclosures and taken possession of certain portions.

Held, that the suit was not a land-suit, and that the suit being valued at Rs. 150, a further appeal to the Chief Court was not competent

Appeal-*Contd.*

3 Acts—*Contd.*

without a certificate from the Divisional Judge under Section 40, sub-section 1 (d), Punjab Courts Act. **Ilahi Bakhsh v Fatta. 20 P R 1892.**

114—Punjab Courts Act (XVIII of 1884), Section 40—Small Cause under Rs. 500 in value—Claim involving property exceeding Rs. 500 in value—Further appeal.

Held that the effect of proviso 2 to Section 40 of the Punjab Courts Act is to lay down as an absolute rule that no further appeal lies in small causes not exceeding Rs 500 in value, even though the decree may involve directly a claim to property exceeding Rs. 500 in value. **Mahant Abnashi Ram v Mahant Lakhmi Das 95 P R 1887.**

115—Punjab Courts Act, 1884 (as amended)—Suit for declaration of proprietary title to a share in a well—Land-suit—Provisions of the law for obtaining a final decision as to whether a suit is cognizable by the Civil or Revenue Courts.

S. K., a Nari Rajput, who had four sons and one daughter, married his daughter in the time of the Sikhs to Sale Khan, a Bhati Rajput, who came to reside with him.

N. K., one of S. K's sons, died without male issue, but leaving a daughter: the descendants of the other three sons of S. K. were defendants in the present suit.

Three sons were the issue of the marriage between Sale Khan and S. K's daughter, of whom only two, Kesar and Sharfu, had male issue.

Kesar married the daughter of N. K., and the issue of this marriage were also defendants in the present suit.

Sharfu had three sons who were the plaintiffs in the suit.

The plaintiff's case was that S. K. gave one-fourth share of a well and the land belonging to it to his son-in-law, Sale Khan, from whom it devolved on his two sons in equal shares; and plaintiffs asked for a declaration, as sons of Sharfu, son of Sale Khan, of their proprietary title to a one-thirteenth share in the well on the ground of gift of a share by S. K, to Sale Khan.

Held, that this was a land and not an unclassed suit. 62 P. R., 1891, followed.

Appeal-*Contd.*

3 Acts—*Contd.*

Attention drawn to the provisions of the law for obtaining a final decision, in cases of doubt, whether a suit is cognizable by the Civil or Revenue Courts, viz :—

Section 99, Punjab Tenancy Act, 1887.

Section 44, Punjab Courts Act, 1884 (as amended by Act XIII of 1888).

Section 617, Civil Procedure Code, 1882.—

Dhani Khanv Mahatab Khan 40 P R 1893.

116—Punjab Courts Act, 1884—Pre-emption suit—Value for purposes of appeal.—Punjab Laws Act, 1872, Section 9—Pre-emption—Sale of immoveable property—Exchange.

In a pre-emption suit, of which the value for purposes of jurisdiction was found to be less than Rs. 1,000, the decree of the first Court, affirmed upon appeal, was for possession of the land in suit on payment of the sum of Rs. 2,822, the plaintiff having claimed it on payment of *Rs.* 2,500, and the deed of sale showing the price to be Rs. 4,500 and one *ghumao* of land.

Held, that the decree involved directly some claim to or question repecting property of the value of Rs. 1,000 or upwards, namely, the price to be paid for the land in suit by the plaintiff in his character of pre-emptor, and that an appeal therefore lay under the second part of clause (a) of Section 40, sub-section (1), of the Punjab Courts Act, 1888, without a certificate.

Held also, that a permanent transfer of land in a village for a sum of money, *plus* something that is not money, does not, merely because of such addition, of necessity cease to be a sale within the meaning of Section 9, Punjab Laws Act.

P. R. III 12 of 1884, of 1885 and 54 of 1889, referred to. **Gul Muhammad Khan v Khan Ahmad Shah 29 P R 1893.**

117—Punjab Courts Act, 1884, Section 40 (i) (d) and (ii)—Further appeal—Application for revision treated as an appeal.

A further appeal lies to the Chief Court under Section 40 of the Punjab Courts Act, 1884, only from an appellate decree as distinguished from an order of the Divisional Court. Where a Divisional Judge in a case in which he had passed an order not open to appeal refused to certify the case as fit for appeal, *Held*, that an application

Appeal-*Contd.*

3 Acts—*Contd.*

for revision of this order could not be dealt with as a further appeal under clause (2) of the above section. **Goraon v Nanak (79 P R 1890)**

118—Right to use of water—Land-suit—Punjab Courts Act, 1884, Section 3—Appeal.

The plaintiff sued to establish his right to the use of water of the Dabgana Canal for irrigating land as defined in Section 4 of the Punjab Tenancy Act 1887: no claim was made to any share in the land occupied by the canal, or in the canal as a whole.

Held, (Roe, J doubting), that the suit was not a "land-suit" as defined in Section 3, Punjab Courts Act 1884 (as amended). **Sultan Ali Shah v Kadir Baksh (No 1 P R 1892 F B.**

119—Insolvency proceedings— Act IV of 1872 SS, 22, 25 28, 37.

Held, that no appeal lies to the Chief Court from the order under Sections 25 and 28 of the Punjab Laws Act of a Court exercising Insolvency jurisdiction under Section 22 of that Act, as in the absence of any provision in the Act making the orders of such Courts subject to appeal, Section 22 cannot be construed as investing the Local Government with the power to confer jurisdiction to hear appeals, nor can the rules for the better administration of insolvent estates which the Chief Court, with the sanction of the Local Government, is empowered to make by Section 31 of the Act, confer any such jurisdiction.

Simla Bank v. Tavenor (P. R. 65 of 1882 Civil.)

Notes;—Fol 33 P R 1883; 62 P R 1886

120—Civil Procedure Code, 1882, Section 622—Punjab Courts Act 1884 Sections 40, 70—"Rules and orders of the Chief Court," No LV, Rule IV—Unclassed suit of less that Rs. 100 in value—Appeal.

Section 70 of the Punjab Courts Act 1884 must be read specially in connection with proviso (ii) to sub-section (i) of Section 40 of that Act, and generally with the whole of the latter section. Its object is to provide that no application for revision under Section 622, Civil Procedure Code, should be entertained until the procedure laid down in clause (*d*) of sub-section (*i*) had been complied with, and a certificate refused by the Divisional Judge. Until this is done, it is not to be held that no appeal lies.

The use of Section 70 is now limited to cases in which an application for revision from the order refusing a certificate is not made within the time prescribed by sub-section (*ii*) of section 40 of the Punjab Courts Act, 1884.

In an unclassed suit of less than Rs 100 in value an appeal lies to the District Judge, and the Division Judge, though the superior Court is not competent to entertain an appeal *direct* from the first Court in such a suit. **Salig Ram v Municipal Committee, Sonepat (86 P R 1896).**

121—Punjab Courts Act, Section 39 (b) and (c)—Value of suit—Mesne profits - Course of appeal.

The plaintiffs sued for mesne profits alleged to have been realised by a Receiver. The plaintiffs, for the purposes of Section 50, Civil Procedure Code, valued the relief sought approximately, at Rs. 2,000. They were decreed Rs. 3405,-15-6, and they appealed for Rs.1,946 more. The defendants also appealed against the whole decree.

Held, that the appeal, from the District Judge's decree lay to the Divisional Court and not to the Chief Court.

63 P R 1891 referred to. **Sardar Kirpal Singh v Nawab Khan 40 P R 1892.**

122-126-Punjab Courts Act, Section 3-Jurisdiction—Appeal—Land suit—Claim for date trees.

A suit for date trees—no claim being made in respect of the land upon which the trees stand—is not a "land-suit" within the definition of that term contained in Section 3, Punjab Courts Act, 1884 (as amended). 15 P R 1892 (F B), referred to. **Yaro v. Adil (No 46 P R 1893).**

127—Order passed in execution of decree in small cause—Decree giving effect to compromise dealing with immoveable property—Course of appeal.

On an application for revision of an order passed in execution proceedings it appeared that the original decree in the suit was intended by the Court to give effect to a compromise made between the parties which had been fully recorded

Appeal-*Contd.*

3 Acts—*Contd.*

under Section 375, Civil Procedure Code, and which included a mortgage by way of "*lekha mukhi*" from defendant to plaintiff of certain lands for the payment of the sum acknowledged to be due, but that the suit in which such decree was made was one of a nature cognizable by a Small CauseCourt, and under Rs. 500 in value.

Held, that as any appeal from the decree in the original suit lay to the District court under clause (1) of Section 40 of the Punjab courts Act and not to the Divisional Court, the nature and value of the suit rather than of the decree determining the Court of appeal,it followed that the appeal from an appealable order made in execution of the decree lay to the same Court.

Tola Ram v Devi Ditta (55 P R 1887).

128—Appeal-"Land-suit"-Right in tank used for watering cattle and excavating earth to make brick.

Plaintiff sued for declaration of right in a tank, valued at Rs. 900 which was used for watering cattle and excavating earth to make bricks.

Held, that, as these were not agricultural purposes or purposes subservient to agriculture the tank was not" land" as defined in the Punjab Tenancy Act, and that, therefore, no further appeal lay. **Tej Ram v Tulsi (48 P R 1898).**

129—SS 188 & 189.—Final—Rehearing—Appeal—(Act XVIII of 1873) A suit for Rs. 108-12-4 arrears of rent was brought in the court of the Assistant Collector of the first class and was decided by him. After such decision one of the parties applied for the rehearing of the suit upon the ground that they had discovered new evidence. The Assistant Collector granted the application and made a new decree which was affirmed on appeal to the Distaict Judge. *Held* in second appeal, that as the suit was one in which the judgment of the Assistant Collector was not final, the Assistant Collector was not competent under s. 188 of Act No XVIII of 1873 to rehear the suit. His second decree and the decree of the District Judge affirming it were invalid and must be set aside. **Manik Rai v HariDas I W N 141.**

130—Financial commissioner.

Appeals filed in the Court of the Financial Commissioner and pending at the time of the passing of Act IV of 1866 could not be transferred to or determined by the Chief Court, the word "may"in Section 52 of that Act meaning"must"and conveying no option to the Financial commissioner to hear the appeals or transfer them to the Chief Court. **Nijabut Ali Khan v. Kootub-ood-din Khan (P R 41 of 1867, Civil).**

131.—Punjab Courts Act, 1884, section 40 (i) (a)—Pre-emption suit—Further appeal.

Plaintiff sued for pre-emption of certain land, the value of which, calculated at thirty times the revenue, was considerably below Rs. 1,000, upon payment of Rs 700, and defendants pleaded (*inter alia*) that Rs. 1,000 the price entered in the sale-deed, was fixed, in good faith, and was not in excess of the true market value. The suit having been dismissed by both lower Courts and a certificate refused by the Divisional Court on the 12th March 1894, plaintiff on the 21st April 1894 filed a further appeal in the Chief Court.

Held, that under Section 40(i) (a) of the Punjab Court Act, 1884, no further appeal lay as of right to the Chief Court, the true value of the suit being less than Rs. 1,000, and the decree, which merely dismissed the suit, not involving directly any question concerning the price to be paid by the pre-emptor.

Held, also that the decree did not involve directly a question concerning land of Rs. 1,000 in value, merely because the true market value of such land might be of that amount.

132 P R 1893 followed.

Nanha v. Kura, 3 P R 1896.

132.—Jurisdiction—Suit for redemption of mortgage—Course of Appeal—Punjab Courts Act 1884, Section 39.

Plaintiff sued for redemption of an 11/30th share of a mortgage of certain lands and houses for a total sum of Rs. 10,500, alleging that Rs 2,000, more or less, were due upon the said share, and prayed for a decree for redemption on payment of any sum which might be found to be due thereon after proper adjustment of the accounts. Defendants pleaded that about Rs. 10,000 were due upon the said share, and the first Court decreed redemption upon payment of Rs. 7,558. Plaintiff appealed to the Divisional Judge, who enter-

Appeal-*Contd.*

3 Acts—*Contd.*

tained the appeal, and, in modification of the decree of the first Court, allowed redemption upon payment of Rs. 3,850. The question referred to the Full Bench was whether the Divisional Judge had jurisdiction to hear the appeal.

Held, by the Full Bench, that the Divisional Judge had jurisdiction to hear the appeal, there being nothing upon the plaint to show that the value of the suit exceeded Rs. 5,000, and the question of jurisdiction having to be determined with reference to the claim made and not to the decision upon the claim.

44 P R 1888 (F B), 169 P R 1888, 91 P R 1889 and 63 P R 1891 cited 56 P R 1892 (F B), explained. **Muhammad Khan v Ashak Mohammad Khan** 106 P R 1895. F B.

133.—Punjab Courts Act (XVIII of 1884). Section 39—Order passed by Munsiff in execution of decree in suit not cognizable by Small Cause Court—"Decree"—Civil Procedure Code (Act XIV of 1882), Section 2—Course of appeal.

Held, that the appeal from an order of a Munsiff passed in execution of a decree in a suit other than a small cause, which order falls within the definition of a "decree" in Section 2 of the Civil Procedure Code lies to the Divisional Court, and not to the Court of the District Judge, under Section 39 of the Punjab Courts Act 1884. **Mukand Lal v Harbhaj Rai** 4 P R 1887.

134.—Act IV of 1871—Insolvency proceedings—

Held, that no appeal lies against an order passed in Insolvency proceedings under Act IV of 1872. P R of 1882 Civil P R 33 of 1893 Civil followed. **Ram Mal v Ladha Singh** P R 62 of 1886 Civil

135.—S 172—Civil and Revenue Courts—Jurisdiction—Appeal:—

Where in answer to a suit for ejectment as a trespasser brought by a lambardar, the defendant pleaded that he held the land from which it was sought to eject him not as a tenant but as a co-sharer; it was *held* that this plea raised a question of proprietary title and an appeal consequently lay to the District Judge. 1900 W N 46 ref to. **Indar Lal v Deojit** 1907 A W N 26= 4 A L J 1=30 All 25.

Appeal-*Contd.*

3 Acts—*Contd.*

136.—U P Tenancy Act S 175—No appeal from orders to execute decree orders—Decrees:—

An appeal does not lie from an order of an Assisstant Collector of the first class passed on an application to execute a decree of a court of Revenue, such orders not having the force of decrees (27 All 31, Overruled). **Mussammat Zohra v Manju Lal** 1906 A W N 203= 3 A L J 569 (F B)

137.—Succession Certificate Act S 19—Appeal—Agent to the Governor of Vizagapatam—General Clauses:—

An appeal lies under s 19 of the succession Certificate Act from the order of the Agent to the Governor of Vizagapatam (18 Mad 227 Diss). **Babubalendrani Guruvaraju v Babubalendrani Chandrasakara Raja.** 3 M L T 264= 18 M L J 252=31 Mad 362.

138.—Landlord and tenant-Ejectment for non-payment of rent-Application for, by landlord against tenant—Warrant of ejectment granted by Collector-Subsequent order of Collector cancelling the warrant and declining to order ejectment, if a Judgment-Right of appeal to the District Court-Rent Recovery Act (VIII of 1865 Madras) Secs 41,43, 69. *Held* by the Full Bench that an appeal lay to the District Court against an order of the Collector setting aside his previous order for the issue of a warrant for the ejectment of a tenant under section 41 of the Rent Recovery Act VIII of 1865 and declining to order ejectment. 5 M H C R 289 Considered 22 Mad 236: 25 Mad 453 Referred to. **Dontarauj Subbarayadu v Nehkalappudi Lingayya** 2 M L T 106= 30 Mad 473=17 M L J 129.

Z(4) PROBATE AND ADMINISTRATION ACT.

139.—S 16—Probate and Administration Act V of 1881 Ss. 86, 51, 52—District Judge—Assistant Judge deciding applications wherein the subject-matter does not exceed Rs. 5,000 in value—Appeal to District Court—No direct appeal to High Court—Power of local Legislature to amend an Act passed by the Supreme Legislative Council—India Councils Act 55 and 56 Vic C 14 S 5.—

The Probate and Administration Act 1881, being a law made by an authority in India, is sub-

Appeal-*Contd.*

3 Acts—*Contd.*

ject to the powers of repeal or amendment granted to the local legislature by S 5 of the Indian Councils Act, 1892 (55 and 56) Vic, C 14 Hence, the provisions of the Bombay Civil Court Act, (Act XIV of 1869) S. 16 by which a probate matter can be tried in the first instance by the Assistant Judge and by which the appeal in cases where the amount of the subject-matter does not exceed Rs 5, 000 will lie to the District Court, is one which the local Legislature was competent to make. **Laxmi Tatya v Aba Appaji 10 Bom L R 924=32 Bom 634.**

Z (5) PUNJAB COURTS ACT S 40

140.—Land suit—Punjab Courts Act XVIII of 1884. S. 40—Suit for possession of a part of a public road.

Held, that a suit for possession of a part of a public road, encroached on by the defendant who had built a wall on it, was a "land suit," although the wall was intended to be a boundary to an agricultural field and no further appeal lay under s 40 Punjab Courts Act. The Chief Court refused the Municipal Committee opportunity to apply for a certificate for further appeal.

The Municipal Committee Hoshiarpur v Ali Akbar Khan P L R 1900 p 440.

140A.—Punjab Courts Act Section 9—Appeal from decree of Judge in Chambers refusing probate of will.

An appeal lies under Section 9 of the Punjab Courts Act, 1884, from the decree of a Judge in Chambers refusing probate of will—**Thaddeus v Thaddeus 6 P R 1899.**

Z(6) PUBLIC DEMANDS RECOVERY ss 19, 33.

141.—Public Demands Recovery Act (I B C. of 1895 secs 19 and 33——Setting aside of sale—Review Revision.—Sub—Sec. 4 of sec 19 of the Public Demands Recovery Act—(I B C of 1895) in saying that any order made by the certificate officer under the section shall be final only means and intends that it shall not be open to appeal such as is provided by sec 32; the intention is not to make the order absolutely final so as to make it not open to review or revision. **Matangini Debi v Girish Chandra Chongdar 7 C W N 433=30 Cal 619.**

Appeal-*Contd.*

3 Acts—*Contd.*

(Z 7) U P RENT ACT S 189.

142.—S 189—Suit for rent-Appeal admissible whether the question has been whether any rent at all was payable by the defendant:—*Held*, that the words in S 189 of the U P Rent Act 1881, "in which the rent payable by the tenant has been a matter in issue and has been determined," include cases in which the question whether any rent at all is payable by the tenant has been a matter in issue and has been determined. 21 All 247 ref to.

Beni Prasad Kuari v Betulan Bibi 1901 A W N 75=23 All 283.

Z (8) PUNJAB TENANCY ACT S. 80. PROVISO III

143.—The correction of an error and consequent modification of the decree of a Court of first instance by the Collector on appeal gives a further appeal on the whole case to the Commissioner under Section 80, proviso (iii), Punjab Tenancy Act 1887. **Jaimal and Fattu v Maidhran 3 P R 1891 Rev.**

(Z 9) AGRA TENANCY ACT S 199.

144.—Agra Tenancy Act II of 1901 Local Ss. 199 and 200—Action in ejectment—Defence that defendant a sub-proprietor—Question of title-Decision of a Revenue Court same as decision of Civil Court—Appeal to Civil Court—Suit for declaration does not lie. When the defendant to an action for ejectment defends the suit on the ground that he is not a tenant but a subordinate proprietor, he raises a question of a proprietary title. The Reveuue Court can either try the question itself, or refer the parties to the Civil Court under the provisions of s.199 of the Act. When it follows the former course and decides against him and orders him ejectment, an appeal lies to the Civil Court, and it is not open to him to bring a suit in a Civil Court for declaration of his subordinate proprietary right. The legislature intended that the decison of a Revenue Court upon a question of title should have the same effect as the decision of a Civil Court. 2 A L J 334 Fol

Beni Pande v Raja Kausal Kishore Prasad Mal Bahadur 4 A L J 53=A W N (1907) 6=29 All 160.

Notes —Ref: 29 All 601.

Appeal-*Contd.*

3 Acts—*Contd.*

Z 10 BENGAL RENT ACT.

145.—Appeal from Collectors and Deputy Collectors lie to Judge in land cases——Act X of 1859.—In the matter of appeals from decisions of Collectors and Deputy Collectors in Act X of 1859, appeals from one and the same decision are not meant to be carried to different Courts. Appeal on questions of title to an interest in land or against any portion of the decree relating to it lies to the Judge. **Ram Autar Singh v Heeramun Pandey 1 N W P 36.**

146.—Cl 4 S 23 Act X of 1859—S 160 of Act X of 1859—Appeal from suit rejected by Revenue Court—Zillah Judge.

When a suit is rejected by a Revenue Courts as not cognizable under Act X of 1859, the appeal lies to the Zillah Judge, under s 160, and not to the Collector, under s 155 of the same Act.

Ram Narain v Sheo Narain Pooree 4 N W P 1.

(Z (11)) BOMBAY DISTRICT MUNICIPAL ACT. S. 160 Cl. 3.

147.—S. 160—Municipality—Acquisition of land—Compensation—Arbitration—Decision of District Court—Appeal—High Court—Construction of statutes.

No appeal lies from the decision of a District Court under cl. 3 of S 160 of the Bombay District Municipal Act, 1901.

Where a statute creates a right not existing at common law and prescribes a particular remedy for its enforcement, then, that remedy alone must be followed. (1859) 6 C B N S 336 Fol.

Chunilal v Ahmedabad Municipality, 13 Bom L R 958.

(Z (12)) LETTERS PATENT S. 15.

148.—Letters Patent, S. 15—Appeal—Order refusing to receive security for costs.—

An order refusing to receive a sum of money ordered to be paid as security for the costs of an appeal is a " judgment " within the meaning of Art. 15 of the Letters Patent, and consequently an appeal lies from the order **Vysachary v. Keshvacharya. 25 Mad 654=12 M L J 34.**

148A—Letters Patent. Art. 15—"Judgment" —Act IX of 1887, s. 25. application under—Dismissal by single Judge of High Court—Appeal.

Appeal-*Contd.*

3 Acts—*Contd.*

Where an application is made to the High Court to exercise its discretionary power under s. 25 of Act IX of 1887, and a single Judge merely dismisses the application, there is no sppeal under Art. 15 of the Letters Patent.

Puthukudi Abdu v. Puvakka Kunni Kutti 27 Mad 340.

Notes:—Ref: 27 Mad 510=1 Weir 788. 17 M L J 123=2 M L T 84=30 Mad. 311.

Z (13) LETTERS PATENT S. 15

148 B—Cl. 15—Judgment — Appeal from order of judge on original side extending time for prosecution under S, 195. Cl. 6. An appeal lay under Cl. 15 of the Letters Patent from the order of the judge on the original side granting such extension of time. **Kali Kinkar Sett v Dinobandhu Nundy. 9 C W N 321=32 Cal 379**

148 C—Letters Patent cl. 15—Where the Judge to whom an appeal is referred under the provisions of S. 575 of the Civil Procedure Code, agrees with one of the differing Judges as to the result of the appeal, but the agreement does not proceed on the identical lines of reasoning, there is no further appeal to the High Court against such decision under cl, 15 of the Letters Patent.

Jehangir M. Curseiji v Secretary of State. 6 Bom L R 230

148 D—C P C, O 25, r 1 (1) (3) (1882 S 380)—Security for costs from a woman-Suit "for money" includes a suit which results in a decree for money —Appeal lies against the order of a Judge sitting on the original side directing security from a woman—Letters Patent, cl. 15.

Suits which are not exclusively for money but which will result in a decree for money on the relief sought come within the purview of S. 380 of the Code of Civil Procedure.

An Appeal lies against an order passed by a Judge sitting on the original side of the High Court requiring security from a woman under S. 380 of the Code of Civil Procedure.

Such an order is a Judgment within the meaning of cl. 15 of of the Letters Patent. **Soonabai v Tribhovandas. N Malvi. 10 Bom L R 337 =33 Bom 39.**

Notes—Confirming 32 Bom 602.

Appeal-*Contd.*

3 Acts -*Contd.*

(Z14) PROBATE AND ADMINISTRATION ACT S. 86.

148 E—Probate and Administration Act Ss. 86, 90, 51—Order granting permission to dispose Of imomveable property. The word 'hereby' in S. 86 of the Probate and Administration Act means by the whole Act, and not merely by the chapter in which the section occurs. An order made by a District Judge granting permission to dispose of immoveable property under the Probate & Administration Act is appealable. **Uma Charan Das v Mahta Keshi Dasi 5 C W N 443= 28 Cal 149.**

(Z15) PROVINCIAL SMALL CAUSE COURT ACT S. 27.

148 F—Small Cause Court suit, trial of, as regular suit without returning of plaint for presentation to proper Court—

Appeal from Munsif's decree in suit instituted as Small Cause Court suit and tried as regular suit. A suit was instituted in the Munsif's Court as a Court of Small Causes. The Munsiff before delivering judgment formed the opinion that the suit was one excluded from the jurisdiction of a Court of Small Causes and directed that it be removed from the register of Small Cause suits and entered in the register of regular suits. He then tried the case as a regular suit and decreed the claim. *Held*, that the suit was tried as a Small Cause Court suit and under s. 27 of Act IX of 1887, no appeal lay from the decree of the Munsif. **Kandhai Gir v. Bhagwant Gir. 7 O C 144**

(Z16) PUNJAB LAWS ACT (IV OF 1872) S. 28.

148 G—Insolvency proceedings—Act IV of 1872, Section 28—Order rejecting objections to composition-deed—"Decree"—

Held, that an order of a Court exercising Insolvency jurisdiction under Act IV of 1872, rejecting under Section 28 of that Act a petitioner's objections to a composition agreed upon betweeen the debtor and the majority of the creditors, is not an adjudication upon any rights claimed so as to satisfy the definition of a 'decree' given in Section 2 of the Code, and accordingly no appeal lies from such order. (No 65 of 1882

C C 49

Appeal-*Contd.*

3 Acts—*Contd.*

Civil followed 6 5 P R 1882 Fol. **Thakur Das v Kidarnath 1 P R 33 of 1883 Civil**

Notes:—Fol 62 P R 1886.

(Z17) PUNJAB MUNICIPAL ACT S 2.

148 H—Remedy by appeal—Suit—Cause of action—Plea that appeal is inconvenient, whether justifies suit—Punjab Municipal Act XX of 1891 S. 2 [2]—Rules made under Act XIII of 1884, force of.

Where, under the rules in force, the remedy for a refund of customs-duty, originally leviable but subsequently refundable, is by way of appeal against the order of the Municipal Committe refusing such refund, a suit for compensation for refusal to refund is not maintainable.

The fact that the course of appeal is onerous or inconvenient is no justification for bringing a suit.

The rules made by the Lieutenant-Governor under S 154 *j* of act XIII of 1884 are by virtue of S 2 (2) of the Punjab Municipal Act of 1891 still in force. References:—12 Mad. 105, at p. 108, Fol 12 Mad 78 Dist. 2 Mad 362 Ref.

The Municipal Committe, Ambala v Mohendar Singh 118 P L R 1911.

(Z18) PUNJAB LAND REVENUE ACT S 16.

148 J—Ss 3 cl 3 and 19—order of Deputy Commissioner granting or refusing sanction to permanent alienation of land—Appeal—Revision—Punjab Land Revenue Aet S 16. An order by a DeputyCommissioner under S 3 (3) of Alienation of Land Act granting or refusing sanction to a permanent alienation of land required by s 3 (2) is not final, seeing that S 19 of the Act extends to the proceedings of Revenue officers under the provisions of Chapter II of the Punjab Land Revenue Act. The effect of the section is that such an order is,like other orders of Revenue officers, subject to appeal and revision, as laid down in that Chapter Such an order may, therefore, be cancelled by the Financial Commissioner in the exercise of his revisional jurisdiction under S. 16 (4) of the Land Revenue Act. **Rom Saran Das v. Sardara 4 P R 1908** (Rev)=**7 P W R 1908**

(Z19) Succession CERTIFICATE ACT S 7.

148 K—Succession Certificate Act 1889, Sections 19, 26-Investiture of inferior Courts with

Appeal-*Contd.*

3 Acts—*Concld.*

Jurisdiction of District Court—Punjab Government Notification No. 570, dated 4th November 1889-Punjab Courts Act, 1884 Section 23, proviso

Appeals from all orders under Section 7 of the Succession Certificate Act, 1889, whether passed by a District judge or a Subordinate judge in the Punjab lie to the Divisional Court and not to the Chief Court under Government Notifications, Nos. 570 and 571 of 4th November 1889—**Tikaya Mal v Launga Malik 124 P R 1890.**

148 K-S. 26-Grant of certificate on the applicant's furnishing security—Appeal

An order passed under the Succession Certificate Act, 1889, granting a certificate on the applicant's furnishing security, is an order appealable under S. 26 of the Act. Reference-19 Bom 790, Dist. **Bai Nandkore v. Maganlal Varajbhukhandas Shah 13 Bom L R 1208.**

(Z20) U. P. LAND REVENUE ACT S. 144

148 L—S. 144—Order of Assistant Collector for allowing perfect partition of lands—Appealing of—'Order for declaring the rights of parties'—An order allowing perfect partition of property is not an order 'declaring the rights of parties' within the meaning of S. 144 of U P Land Revenue Act of 1873 and so is not appealable under that section.— **Munwar Ali v. Shakirat-un nissa Bibi 1902 A W N 221=25 All 114.**

(4) ARBITRATION (1) ARBITRATION BY COURT.

149—Appeal from a decree in the nature of award-Reference of the dispute to the court—Award.

The parties to a suit referred the matter in dispute to the Subordinate Judge before whom the suit was pending, for a settlement of the dispute between parties. The Subordinate Judge passed a decree accordingly-

held,(1) that the judgment of the Subordinate Judge was in the nature an arbitrator's award against which an appeal could not be entertained.

(2) that the fact that the subordinate judge gave his award in the form of a decree would not make it a decree from which a regular appeal could lie. **Sayad Zain v, Kalabhai 1 Bom L R 366=23 Bom 752**

Appeal-*Contd.*

4 Arbitration—*Contd.*

150—Appeal—Decree in the nature of award—Case referred to decision of Court both parties agreeing to abide by same—

Where both parties to a suit referred the matter in dispute between them to the Court and agreed to be bound by the decision of the Court and agreed not to prefer an appeal: Held, that no appeal lay from the decree, the decision of the Court being in the nature of an arbitrator's award; that the Court had no power to review the same; and that the lower appellate Court having remanded the matter on appeal, its order was set aside as being made without jurisdiction. (23 Bom 752 Fol.) **Sita Nath v Baikuntha Nath. 9 Ind Cas 296.**

151—Arbitration—Agreement of parties to refer question to Court for decision—Decision if appealable—acting as arbitrator—Extra cursum curial—

In the course of a suit for recovery of possession of some land, the parties who owned different shares of a Pergunnah came to an agreement to the effect that they should ask the Court to decide the question of title on the basis of the thakbust map only, and the plaintiff said he would abide by that decision. The Court decided accordingly and held that "the thak map itself showed that the plaintiff's predecessor and his co-sharers were disputing about the land and the survey map showed that it was newly formed chur land and that, in such circumstances the thak map could not be held sufficient evidence of plaintiff's title".

Held—That in deciding the question on the basis of the thakbust map, in accordance with the agreement of the parties, the Court acted as arbitrator, and hence no appeal lay from that decision. **Kumar Saradindu Roy v Bhagabati Debya Chowdhurani. 10 C W N 835**

(2) JUDGMENT ON AWARD.

152—Judgment on award—Civil Procedure Code, 1859, Ss 325, 327—Finality of decree.—

On the application of one party to a reference to arbitration, without the intervention of a Court, to have the award filed and for judgment thereon, an objection of the other party, that the award had been come to after the arbitrators' authority

Appeal-*Contd.*

4 Arbitration—*Contd*

had been repudiated, was overruled, and judgment was passed by the Munsif in accordance with the award *Held*, (Paul, J., dissenting) an appeal lay from the decision of the Munsif. In another case the question was referred to a Full Bench, whether, when an award has been ordered to be filed, and judgment has been given in accordance with it under s.327 of Act VIII of 1859, is such judgment open to appeal ' The answer given (Paul, J., dissenting) was: It is open to an appellant to show that the paper which has been filed is not an award. If it is an award, and judgment is given in accordance with such award, such judgment is final. Per Paul, J.—The judgment is final **Sashti Charan Chatterjee v. Tarak Chandra Chatterjee; and Lala Iswari Prasad v Bir Bhanjan Tewari 8 B L R 315=15 W R F B 9. Babur Meah v. Jumun Meah. 2 C L R 362.**

Notes·—15 W R F B 9.

(1) FINDING OF DECREE.

153—Finality of decree — Civil Procedure Code, 1859. Ss. 324 and 325.—

A suit in the Munsif's Court was, after issues had been settled and evidence on such issues adduced by both parties, referred by consent of parties to arbitration. The arbitrator made his award, and on the next day an order was recorded by the Munsif that the parties were to file their objections to the award in one day,notwithstanding that S 324, Act VIII of 1859, allows the parties ten days for such purpose. The plaintiffs, in accordance with that order, filed a petition of objection to the award, and an order was endorsed by the Munsif on this petition, that it should be laid before the Court with the papers of the arbitrator. The Munsif then gave his judgment, in which he went into the evidence, and, overruling the objection of the plaintiffs, gave a decision on the merits, which decision was in accordance with the award. *Held*, that such judgment, though in accordance with the award, was not final under S. 325 of Act VIII of 1859. but was open to appeal. In order to make it final, it should appear that all the proceedings have been regular, and the directions of Act VIII of 1859 complied with. **Gunga Narain Ghose v. Ram Chand Bose, · 12 B L R 48=20 W R 311.**

154—Civil Procedure Code (Act VIII of 1859) Section 325 -Act X of 1877, Section 522—Reference to three arbitrators without provision for award of majority being binding, Effect of—Objections to award—Omission to dispose of—Decree—Appeal.—

Plaintiff and defendants executed a written agreement to refer their disputes to three arbitrators without making any provision that the award of the majority should be binding. Plaintiff applied to file the agreement under Section 326, Act VIII of 1859, and an order of reference was made and award filed by two out of three arbitrators on 30th August 1877. On 11th October 1877, the date fixed for the next hearing of the case, defendants filed a petition dated 1st idem, objecting to the award, and praying that it might be remitted, on the ground that the award of two out of three of the arbitrators was not binding. The Court ordered the petition to be filed, and gave judgment the same day in terms of the award, taking no notice of the objection beyond saying that it did not allege corruption. The defendants appealed to the Commissioner, who rejected the appeal as barred by Section 522, Act X of 1877.

Held, by the Chief Court, that a judgment in terms of an award has not the attribute of finality unless the proceedings immediately preceding the decree have been strictly regular and all the conditions required by law satisfied; and that, the decree having been passed without the Court considering the question raised by defendants, whether there was cause for remitting the award, the appeal was not barred under Section 325, Act VIII of 1859, or Section 522, Act X of 1877.

Held, further,that the legal effect of an agreement, where there is no provision that the award of the majority shall be binding, is that only a unanimous award is binding.— **Hardhyan v. Mehr Chand P R 57 of 1879.**

(2) C. P. C. 1859, S. 325.

155—Civil Procedure Code, 1859, S. 325.—

Judgment under S. 325, Act VIII of 1859, if given according to the award, is final; but such judgment, to be final, must be one in accordance with the provisions of s. 325,and where the Judge gave judgment without allowing sufficient time for objections to be made to the award or for the award to be set aside, the judgment was held to

Appeal-*Contd.*

4 Arbitration—*Contd.*

be not one within S. 325, and, therefore, subject to appeal. **Jaymangal Singh v. Mohanram Marwari, 8 B L R 319 note: 12 W R 397.**

Notes:-Affirmed by Privy Council.

Joymungal Singh v. Mohunram Marwari, 23 W R 429.

156—In a suit in the Munsif's Court seven issues were fixed for determination, and the suit was then referred by agreement to three arbitrators. In coming to an award the arbitrators took up specifically some of the issues framed in the Munsif's Court, and declined to enter into others They determined the matter in issue between the parties, and the award was signed by the three arbitrators. Two of the arbitrators subjoined to the award a suggestion which, if acted on, would prevent the necessity of carrying out the award. The Munsif dealt with this suggestion as surplusage, and gave the plaintiff a decree in accordance with the award signed by the three arbitrators. In appeal it was contended that the award was not a legal one, and it was sought to set the decree of the Munsif aside; but the Judge found that the decree was in accordance with the award, and that he was precluded by S. 325 from disturbing the decision of the Munsif. On special appeal it was contended that the award was incomplete, as all the issues were not decided, and that the decree was not in accordance with the award, as it did not embody the suggestion of two of the three arbitrators. *Held*, that the decree was in accordance with the award, and was, therefore, final under S. 325.

Sarboree Kanto Bhuttacharjee v. Anadya Kanto Bhuttacharjee, 12 B L R Ap 10= 20 W R 226.

Madhusudan Das v. Adoito Charan Das, 8 B L R 316 note: 12 W R 85.

157—Civil Procedure Code, 1859, S. 325.—

A suit was referred by the Munsif to arbitration under S 325, Act VIII of 1859. The arbitrators were of opinion that the case of the plaintiff was fictitious, but nevertheless gave an award in his favour. The Munsif refused to uphold the award, on the ground that the arbitrators had been guilty of misconduct in giving an award contrary to the evidence. The Judge revised their decision, on the ground that the Munsif had no jurisdiction to refer to the evidence taken before the arbitrators in order to determine whether they were guilty of misconduct or not: he gave judgment in accordance with the award. *Held*, that his decision was not final under S. 325, Act VIII of 1859: the provisions of that section refer only to the Court by which the case is referred to arbitration. The Munsif was entitled to refer to the evidence before the arbitrators in order to determine whether they had misconducted themselves or not. **Pareshnath Dey v. Nabin Chandra Dutt, 5 B L R Ap 77 note 12 W R 93.**

See Bykunt Nath Mookerjee v. Prionath Ghose, 22 W R 447.

158—Civil Procedure Code, 1859, S. 325.—

Where a suit is referred to arbitration by an order of Court, and the Court afterwards gives judgment according to the award made upon such reference, such judgment is final by virtue of Act VIII of 1859, s. 325, and no appeal lies therefrom. **Brojolal Baj Pye v. Umritolal Baj Pye, Marsh 163.**

Gour Chunder Bhuttacharjee v. Sodoy Chunder Nundee. 17 W R 30.

Surboree Kant Bhuttacharjee v. Anadya Kant Bhuttacharjee, 12 B L R Ap 10= 20 W R 226.

Notes:—Ref: 7 W R 401.

159—Irregular procedure in arbitration — Consent to award—Civil Procedure Code, 1859, S. 325.—

A judgment in accordance with an arbitration award is, under the express terms of S. 325, Act VIII of 1859, final, if the reference to arbitration has been conducted pursuant to the provisions of the Code. And where the matter in dispute in a suit was referred to arbitration, and the provisions of Act VIII were not strictly complied with.—*Held*, nevertheless that, as the appellants had consented to the arbitration and to the appointment of arbitrators, and took part in the proceedings, and after having made objections to the award (which objections were considered by the arbitrators), they assented to the award, the Principal Sudder Ameen was justified in passing a judgment in accordance with the award, and that the High Court would not interfere with that judgment. **Misser Deo Kishun v. Misser Bhugwan Doss, 3 Agra 199.**

Appeal-*Contd.*

4 Arbitration—*Contd.*

160—Civil Procedure Code (Act X of 1877), Section 506—Application in writing — Want of —Jurisdiction.—

Held, that, under Section 506, Act X of 1877, an application in writing by the parties is essential before a case can be referred to arbitrators, and that, where this is wanting, the reference by the Court and proceedings of the arbitrators are without jurisdiction, and a decree based on the award not final.

Held, further, that the consent of the parties to waive the condition required by the Act, that the application shall be in writing, can give no jurisdiction to the Court to delegate its own functions to arbitrators,and found a decree upon their award, and it is only upon a consent recorded in writing that the Court can make an order of reference so as to render the award ensuing thereupon capable of being turned into a final decree.

—Mir Amanullah v. Chota Mirza, P R 67 of 1879.

161—Decree in accordance with award.—

No appeal lies against a decree made in accordance with an award upon a submission to arbitration in the suit.**Ramireddy Narsareddy v. Mumareddy Papireddy, 5 M H C 404.**

Notes:—Ref· 7 M H C R 72.

162—Private arbitration—Award made a rule of Court—Appeal:—

When an award made in a private arbitration has been made a rule of Court and a decree passed thereon, no appeal will lie except so far as the decree is in excess of, or not in accordance with, the award. In this respect there is no difference between a decree based upon a private award and a decree based upon an award made through the intervention of the Court. 27 All 526, dist.— **Bahadur Singh v. Negi Puran Singh, 1908 A W N 54=30 All 151.**

163—The Second Schedule r. 16 (1882 Ss. 522, 521)—Award—Misconduct of arbitrator— Decree in accordance with award—Appeal—Civil Procedure Code (Act XIV of 1882), Ss. 521, 522.—

Where an award is actually prepared and filed in Court by the arbitrator an award which he intended should be acted upon and should form the basis of a decree and the Court, finding no misconduct proved, passes a decree in accordance with and not in excess of the terms of the award, no appeal lies against the decree.

Per Richards, J.—The Legislature intended that where parties of their own free-will submit their differences to arbitration, they should have the opportunity of attacking the award provided by S. 521 and no other opportunity. They must be taken to have notice of the provisions of the Code and cannot complain if in occasional cases a decree follows a doubtful or even a bad award. (29 Cal 167 P C follo enfra to 458 explained) **Behari Lal v. Chunni Lal, 4 A L J 455= 1907 A W N 117=29 All 457 F B.**

164—The Second Schedule r. 16 (1882 S. 522)—Appeal—Decree on award—Award, illegality of—Decree, finality of:—Where the reference to arbitration is illegal and there is an award, there is an appeal against the decree notwithstanding that it is in conformity with what purports to be an award. **Subbarami Reddi v Rajamannar Aiyangar. 12 M L J 396= 26 Mad 47.**

Notes—Not fol; 32 Mad 510; Ref; 17 M L J 394; 19 M L J 480.

(3) C P C 1859 S. 327.

165—Civil Procedure Code, 1859, s. 327—

In an arbitration case between a mahajun and his gomasta, an award was made to the effect that Rs 725 were outstanding and due to the kuti, of which Rs 483 were due to the mahajun and Rs 241 to the gomasta; and that the gomasta should point out the parties owing the Rs 483, or in default make good the amount. The mahajun applied to the Subordinate Judge of Bhaugulpore, under Act VIII of 1859, s. 327, to file the award. The Subordinate Judge held that it was not proved that the gomasta had done as required by the award, and ordered him to pay the deficit. The gomasta appealed to the Judge, who held that no appeal lay from the judgment of the Subordinate Judge enforcing the award. *Held*, on special appeal, that the Subordinate Judge's judgment decided a question of fact not determined by the award, and that an appeal would lie, **Rambhanjan Bhukut v Srikishen Bhakat. 2 B L R A C 260=11 W R 140.**

166—*Held* by the Majority of the Court (Pearson, J, dissenting) that no appeal lies from

Appeal-*Contd.*

4 Arbitration—*Contd.*

an order passed under s. 327 of Act VIII of 1859, whether granting or refusing the application.

Jokhan Rai v Bucho Rai. 3 Agra 353.

(4) C P C 1859 S 520.

167—C P C (1877) Ss. 520, 521-Where on a suit for the filing of an award made on a private reference to arbitration, the Court of first instance, holding that there was no reason to remit such award to the reconsideration of the arbitrator, under the provisions of section 520 or to set it aside under section 521 of that Act, did not proceed to give judgment according to such award followed by decree, but merely directed that such award should be filed, *held* that its order was not appealable as a decree, or as an order. **Ramadhin v Mahesh 2 All 471.**

Notes:—Ref. 7 Bom 316.

168—Failure of arbitrator to consider plea of limitation—

Where in an arbitration under chapter XXVII of the Code of Civil Procedure the arbitrators omitted to determine a material point of limitation which arose in the case referred to them, and the Court did not think it necessary to remit the award under s. 520 of the Code for reconsideration by the arbitrators. *Held* that no appeal would lie from the decree on such award, it being in accordance with and not in excess of the award. (*I L R 6 All* 174) discussed. **Kirpa Ram v Laljit. 12 W N 151.**

(5) DECREE CONFIRMING AWARD.

169—Civil Procedure Code Act XIV of 1882 Section 522—Appeal from judgment on award—Award—Second appeal.

Where an award has been made, judgment passed upon such award is final, unless the award be invalid. See 8 B R L (F B) 315.

A question in a suit having been referred to the arbitration of five persons, it being provided that if two of the arbitrators should be absent, the other three might make the award. Two of the arbitrators appointed, who had acted as pleaders in the suit with the consent of both parties ceased to act and the award was made by the remaining three arbitrators The Court of the first instance held that the award was valid and gave a decree in accordance with it. On appeal the lower appellate Court *held* that the award was invalid.

Held that a second appeal lay and that under the circumtances the award was valid.

Debendra Nath Shaw v Aubhoy Churn Bagchi. 9 Cal 905=12 C L R 525

Notes:—Ap 11 Cal 37 Ref. 25 Cal 141: 15 Mad 348; 17 Bom 357; 20 Bom 596.

170—The Second Schedule r. 16 (1882 S 522)—Decree made in accordance with an award—Appeal against the decree depends on the validity or otherwise of the award. As soon as an award has been made and filed in Court, the powers of the arbitrators come to an end; they become *functus officio*, and it is not open to a dissentient arbitrator to come in, afterwards, and sign the award, nor has the Court any power to allow him to so sign it. The award, if so signed, subsequently, becomes illegal and invalid on that account.

The question, whether, under S. 522 of the Code, an appeal lies against a decree made in accordance with an award, depends upon whether the award itself is valid and legal. The said section pre-supposes a valid and a legal award, and not an award, upon which no decree could be pronounced. (13 All 300=18 I A 55, 23 All 383 25 Cal 141 Ref. 29 Cal 167=29 I A 51 Ref.)

Ramesh Chandra Dhar v Kalanamoyi Dutt. 33 Cal 498.

(6) C P C 1877 S. 522.

171—Civil Procedure Code, 1877. s. 522—

S. 522 of the Code of Civil Procedure, 1877, which provides that no appeal shall lie from a decree upon an award, except in so for as the decree is in excess of, or not in accordance with, the award, assumes that the award has been regularly and properly passed by arbitrators duly appointed. **Pugardin Ravutan v Moidinsa Ravutan. 6 Mad 414.**

Notes:—Foll: 18 Cal 324. Ref. 11 Mad 220 F B: 15 Mad 348, 17 Mad 498 6 A L J 351.

172—Appeal from an award. An appeal does not lie from a decree propounded under S. 522 of the Civil Procedure Code, except in so far

Appeal-*Contd.*

4 Arbitration—*Contd.*

as the decree may be in excess of or not in accordance with the award. **Ghulam Jilani v Muhammad. 4 Bom L R 161= 6 C W N 226=12 M L J 77=29 Cal 167= 29 I A 51 P C=25 P R 1902 P C.**

Notes—Ref. 5 C W N 390; 30 Cal 218; 7 C W N 180; 12 O C 40; 27 Bom 287; 29 Bom 285=6 Bom L R 1132; 2 C L J 61; 11 O C 116; 10 C W N 601=2 C L J 153; 33 Cal 498; 7 C L J 486; 31 Mad 479=18 M L J 485=4 M L T 328; 9 O C 205; 19 M L J 480; 32 Mad 510; 4 L B R 130; 1 S L R 86 Con. 33 Cal 757 F B=10 C W N 609=3 C L J 450; 11 C W N 240 Dist. 28 All 21=2 A L J 450=(1905) W N 165; 2 C L J 80; 26 All 205 Fol; 14 M L J 356=27 Mad 255; 2 C L J 142; 29 Mad 303; 33 Cal 11; 899; 8 C W N 916; 29 All 457 F B=W N (1907) 177=4 A L J 455; 9 Bom L R 259; W N (1907) 117; 1 S L R 149 Appl. 35 Cal 648 P C= 18 M L J 266=10 Bom L R 581=12 C W N 585=7 C L J 520.

173—Appeal—Arbitration—Decree in accordance with an award-Civil Procedure Code, 1882 Section 522—*Held*, that an appeal does not lie from a decree passed upon a judgment given according to an award except in so far as the decree may be in excess of or not in accordance with the award. **Sita Ram v Dhani Ram. 92 P R 1903.**

174—Civil Procedure Code (1882), s. 522—Order determining validity of an award—Decree in accordance with an award—

Objection was unsuccessfully taken before a District Munsif to the validity of an award on the ground of the arbitrator being interested, and a decree was passed in accordance with the award. The plaintiff appealed to the High Court- *Held* that no appeal lay to the Subordinate Court as to the validity of the award. **Krishnan Chetti v Muthu Palandi Vacha Mokali Tever. 22 Mad 172.**

Notes-Ref. 27 Mad 255 F B; 14 M L J 356.

175—Appeal—Arbitration—Decree on judgment in accordance with an award—Revision—Civil Procedure Code, 1882, Sections 522, 622—

Where an application had been made to set aside an award on the ground of the arbitrator's misconduct and refused after judicial determination, and a decree was, in accordance with and not in excess of the award, passed under Section 522 of the Code, *held*, that the Chief Court had no authority to interfere with the decree either by way of appeal or revision.

(25 P R 1902 P C) cited and *13* All 800 P C) distinguished. **Hansraj v Ganga Ram 88 P R. 1902 F B.**

176—Civil Procedure Code (1882) s. 522—Decree in accordance with an award—

A suit having been referred to an arbitrator, he made an award and a decree was passed, in accordance with it, in favour of defendant On an appeal by the plaintiff, it appeared that the award was *prima facie* legal and proper—*Held* that no appeal lay against the decree.

Kombi Achen v Pangi Achen. 21 Mad 405.

Notes—Fol 22 Mad 172; Ref. 27 Mad 255 F B; 14 M L J 356.

177—Sch. II r. 16 (1882 S. 522)—Arbitration reference to, through Court—Award—Decree in accordance with award—Appeal, if lies—C P C (Act XIV of 1882) S. 522. No appeal lies from a decree which is not in excess of, but is in accordance with an award made by an arbitrator appointed through the intervention of the Court, 29 Cal 167 Fol. **Haranund Naskar v Doyal Chand Naskar. 2 C L J 142.**

Notes—Fol. 33 Cal 899.

178—Civil Pro. Code S. 522-Award.—Appeal against decree corresponding to extension of time for presenting an award—Evidence.

When a decree is made corrosponding to the terms of an award under s. 522 of the Code, it is appealable if there was no award in fact or in law. **Suppu v Govinda Charyar. 11 Mad 85.**

Notes-Ex. 15 Mad 384; Ref. 25 Cal 757 F B; 18 Mad 423 F B, 17 Bom 357; 20 Bom 596; 9 Bom L R 757 P C.

179—Decree in accordance with the award—illegality—appeal—Civil Procedure Code s. 522.

A suit was brought to wind up a partnership. After issues had been framed, both the parties

Appeal-*Contd.*

4 Arbitration—*Contd.*

agreed to refer the matter to an arbitrator, who submitted an award, referring ot parties to a separate suit with respect to two properties not comprised in the property of the company A decree was passed in accordance with the the award. *Held* an appeal lay from the decree which was in accordance with the award, only when the award was not legal. There was nothing illegal in the procedure of the arbitrator in referring parties to a fresh suit regarding properties out side the subject-matter of the suit. **Venkayya v Venkatappayya. 15 Mad 348.**

Notes—Ref. 22 Mad 172; Ref 25 Cal 141; 18 All 422 F B.

180—Sch. II r. 16 (1882 Ss 522, 525)-Award application to file—Award not pronounced at date of application—Appeal. When an award had not been pronounced either orally or in writing at the time an application was made under S. 525, C. P C., to file the award, *held*, that the application was premature and that it should fail, because there was no award which could be "filed" within the meaning of S. 525, at the date of the application. An appeal lies to the District Court, notwithstanding that the first Court passed a decree in accordance with such an award. 12 Mad 331; 25 Cal 757 (F. B.) Ref. 38 P. L. R. 1906. Dist **Gopal Chand v Mukhan Singh 80 P R 1909.**

181—Decree in the terms of the award-Appeal. When an award has been filed in Court as provided by S. 525, Code of Civil Procedure, the judgment and decree based thereon must be drawn up specifically in terms of the award If the decree merely decrees in general terms the claim of one party or of the other it cannot be said that such decree is in accordance with the award, and not being in accordance with the award, an appeal will lie therefrom. **Ummi Fazl v Rahim-un-nissa 13 All 366 = 11 W N 129.**

Notes—Ref: 10 C W N 601=2 C L J 153.

182—The Second Schedule r. 16 (1882 S. 522) Appeal-Arbitration—Decree in accordance with award—Legality or validity of award

In a suit, in which there were several defendants, one of the defendants alone appeared and the others did not enter any appearance at all. The plaintiff and the defendant that appeared applied for a reference of the case to arbitration and the suit was accordingly referred and a decree was passed in accordance with the award. *Held*, the defendants, who did not appear, could not challenge the decree by way of appeal on the ground that they were not parties to the reference and that, consequently, there was no legal and valid award. It was also decided in this case, that it was unnecessrry to go into the question, whether the award was or was not valid by reason of the fact that some of the defendants did not join in the reference. 29 Cal. 167=29 I. A. 51 (P. C.) Fol. 2 C. L J. 153 and 2 C. L. J. 142, Appr. 9 C. W. N 873, Diss. **Chairman of the Purnea Municipality v Siva Sankar Ram 33 Cal 899.**

183.—The Second Schedule r 16 (1882—Ss. 522, 521)—Appeal—Petition to Court that parties will abide by the decision as final—Court acting as arbitrator

Where the District Munsiff passes a decree on both the parties agreeing to abide by its decision as *final*, the Court is merely acting as an arbitrator, and no appeal lies from its decree except under Section 522, C P C

Nidamarthi Mukkanti v Thammana Ramayya. 26 Mad 76.

184.—Sch. II r. 16 (1882 Ss. 522, 521) Arbitrators—Award—Decree—Allegation of misconduct on the part of arbitrators—Appeal.

No appeal lies from a decree which follows an award made according to law, even where the Court passing the decree disallows the application by one of the parties who seeks to attack the award by reason of the arbitrator's alleged misconduct. **Walji v Ebji. 6 Bom L R. 1132. =29 Bom 285.**

Notes—Appl. 10 C W N 601.

(7) AWARD DECREE IN ACCORDANCE WITH

185.—Appeal—Arbitration—Award-Decree in terms of award—Award by three out of four arbitrators—Illegal award.

Where a decree has been passed in terms of an award, appeal lies only where the question is whether the award was illegal, being void *ab initio*. **Nandram v Nemchand. P J 1892 P. 146=17 Bom 357,**

Notes—Fol: 24 Cal 469. Ref: 18 Mad 423 F B: 18 All 422 F B; 6 Bom L R 1132. Ap: 29 Bom 285.

Appeal-*Contd.*

4 Arbitration—*Contd.*

185A.—Ss. 510, 520, 521, 522, 523—Agreement to refer to arbitration—Consent of arbitrators not taken—Refusal of some arbitrators to act—Appointment by Court of new arbitrators—Award passed by old and new arbitrators—Decree in accordance with award—Invalid award—Appeal.

An agreement to refer matters in dispute to five arbitrators was filed under S. 523, of the Code of 1882. Two arbitrators, who had never consented to act, refused to act and subsequently died. The Court appointed new arbitrators in their stead. The three of the old and the two new arbitrators made an award, and the Court passed a decree in accordance with it: *Held*, by the Full Bench, that no appeal lay against the decree, though the award, not having been made by the tribunal constituted in accordance with the agreement of the parties, was invalid.

Per White, C. J.—If an arbitrator once consents to act and then refuses or dies, etc., the Court can appoint a new arbitrator under S. 510, independently of the wishes of the parties, but not otherwise.

An award made by a tribunal of arbitration not constituted in accordance with the provisions of the Code, is invalid.

A defect in the constitution of a tribunal of arbitration is no ground for remitting an award under Section 520 or for setting it aside under Section 521.

Per Krishnaswami Aiyar, J.—When a decree is in accordance with the award, no appeal lies except in so far as the decree is in excess of or not in accordance with the award, even if the award was invalid for want of submission, or for any irregularity in the reference, or for any other cause whatsoever, and whether an application to set it aside was not made or was made and refused.

But if the arbitrators refuse to reconsider an award remitted to them, it becomes void. Therefore, a decree passed in accordance with such award is not a decree under Section 522 and is appealable. **Tallapragada Surya Narayana Rao v Tallapragada Sarabaya. 9 Ind Cas 173 (F B)=9 M L T 251.**

C C 50

Appeal-*Contd.*

4 Arbitration—*Contd.*

186—Non-compliance with provisions of law-Reference to arbitration—Finality of award.—A decree based on an award is not final, if the reference was not made according to the provisions of law. If the parties had agreed to refer the matter to private arbitration, they will be bound by the award, unless it comes under any of the just exceptions, (4 P. R. 1882, F. B. R.) **Hakam Raila v Janda. 130 P. R. 1883.**

(8) ORDER CONFIRMING AWARD.

187—Award—Civil Procedure Code, 1877, s. 521,522.

On appeal from a decree setting aside an award the District Judge reversed the decree of the first Court and made a decree in accordance with the award. *Held* that, s. 522 of the Civil Procedure Code did not take away the right of second appeal against the latter decree. **Rughoobur Dyal v Maina Koer 12 C. L R.,564**

Notes— Diss 10 All 8. Fol: 8 C W N 390; 2 C L J 80; Ref.28 All 408=3 A L J 168=(1906) W N 64.

(9) N. W. P. RENT ACT REFERENCE TO ARBITRATION UNDER.

188—Applicability of the provisions of C. P. C.

The provisions of the Code of Civil Procedure relating to awards are not applicable to suits under the N. W. P. Rent Act, 1881, the matter in dispute in which have been referred to arbitration, as section 96 (a) of that Act specifically imports into it the procedure of the N. W. P. Land Revenue Act with regard to arbitration. Where the Court trying a suit under the Rent Act the matters in dispute in which have been referred to arbitration, has refused an application to set aside the award, and has decided the case in accordance with the award of the majority of the arbitrators no appeal lies from its decision **Fahinunnissa v Ajodha Prasad. 6 All. 170=4 W. N. 15**

(10) MISCONDUCT OF ARBITRATOR

189—Misconduct of arbitrators—A judgment of a Court given in accordance with an award of arbitration is final, even if there has been corruption and misconduct on the part of the arbitrators. **Ramanoogra Chobey v Putmoorta Chobayan. 7 W R 205.**

Appeal-*Contd.*

4 Arbitration—*Contd.*

Sreenath Ghose v. Raj Chunder Paul 8 W.R, 171
Elaheebuksh Hajoo 14 W.R, 33
S C. Ilahee Buksh 5 B L. R, AP., 75

Notes—Ref 8 W R 171; 18 All 422 F B

190—Arbitrator's misconduct.

Where an award is objected on the ground of misconduct of arbitrator and the objection is overruled by the Court, and a decree is passed in terms of the award, no further appeal lies from such decree. **Hansraj v. Sunderlal (10 Bom L R 581=12 C W N 585=7 C L J 520=138 P L R 1908=35 Cal 648 P C=35 I A 88=80 P R 1908=99 P W R 1908=18 M L J 266=4 M L J 25=14 Bur L R 146**

Notes:—12 O C 40 Ref: 1 Ind Cas 693 Appl

191 S 521—Decree made on award, if appealable on the ground of misconduct of arbitrator. There is no appeal from the award of an arbitrator (in accordance with which a decree has been made) on the ground of misconduct of the arbitrator. 6 C W N 226: s c L R 29 Cal 167 (1901) followed. An award made and signed but not submitted to the Court within the time allowed for delivering the same in Court is valid in law. 13 Bom 119 (1898) and 22 Mad 22 (1898), relied on.
Debendra Nath Chatterjee v. Sarbamangola Debi, 8 C W N 916.

192—Arbitration—Lower Appellate Court giving judgment in accordance with award—Civil Procedure Code (Act X of 1877). S 522—Appeal—

Held, that a further appeal lies from an order of a lower Appellate Court, who after reversing the finding of the first Court upon the question of misconduct imputed to one of the arbitrators, proceeds to pass judgment in terms of the award of the majority of the arbitrators. **Mussammat Bano v Nasar.** P R 5 of 1880 Civil.

193—Conclusion of arbitrators.

With reference to S. 522 of the Code of Civil Procedure no appeal lies from a decree of a Court of first instance dismissing objections to an arbitration award on the ground of collusion and passed in accordance with the award.
Muhammad Ismail Khan v Imamali Khan 8 W N 131

194.—Arbitration—Appeal from order setting aside an award.

Appeal-*Contd.*

4 Arbitration—*Contd.*

An appeal lies from an order of a Court setting aside an award for misconduct or corruption; that is, when a party appeals on the merits, he is entitled also to urge that the lower Court should not have set aside the award, and the Appellate Court can determine the question and uphold the award if it considers it was set aside for insufficient cause. **Mussamat Bhoi v Sher Baz Khan.** P R 59 of 1875, Civil.

194A—Misconduct of arbitrators (Act X of 1877).

An agreement to refer a certain difference between the parties thereto to the arbitration of certain persons was, on the application of one of the parties, A K, registered and numbered as a suit by the Court of the Subordinate Judge of Bareilly. The Subordinate Judge caused the agreement to be filed and made an order of reference thereon. The award was remitted to the arbitrators for reconsideration under S. 520 of the Code of Civil Procedure and the arbitrators reconsidered it and delivered a fresh award. The Subordinate Judge after disallowing certain objections taken to the award on the ground that they were not of the nature mentioned in s 521 made a decree in favor of the plaintiff in accordance with the award. The defendant appealed to the District Judge who set aside the award on the ground that the arbitrators had been guilty of misconduct. *Held* that, the District Judge was not competent to hear an appeal from the decree of the Subordinate Judge made in accordance with the award. (W N 1882 P 34) followed

Asadullah Khan v Ahmadullah Khan. 2 W N 95

(11) C P C 1822 S 522

195.—Irregularities in procedure.

An appeal will not lie from a decree passed upon a judgment given according to an award merely because there may have been some irregularities in the procedure of the arbitrator, those irregularities not being of such a nature as to render the award no award in law. (W N 1894, p 60); (16 Calc, 482) (6 All 174) referred to.

Ramdhan Singh v Karan Singh. 18 All 414=16 W N 116.

Notes:—Ref 18 All 422 F B.

Appeal-*Contd.*

4 Arbitration—*Contd.*

196.—Appeal from refusal to remit.

The omission of a Court to remit an award which determines matters not referred to arbitration, cannot be urged on appeal. Section 223, Civil Procedure Code, is permissive, not obligatory. **Choohur Singh v Jeet Singh. P R 64 of 1870,**

197.—Arbitration— Award——Corruption—Civil Procedure Code, 1859, Sections 323,324 and 325).

Held, that there can be no appeal from the judgment of a Court passed according to the award of arbitrator, except on the ground of disregard by the Court of the provisions of the Act relating to arbitration. The plea of corruption having been rejected by the Court of First Instance, cannot be taken up by the Appellate Court. Sections 323, 324 and 325 of Act VIII of 1859 are addressed to the Courts that make the reference to arbitration. **Madho Singh v Bhagwan Singh. C 18thC's June C's 1864.**

198.—Civil Procedure Code (1882), Ss. 525 and 526—Arbitration without intervention of Court—Application for decree in terms of award —Denial of submission to arbitration and genuineness of award.

An appeal lies against a decree passed upon an award under Civil Procedure Court Ss. 525 and 526, when the cause shown against the filing of the award has denied the submission to arbitration and the genuineness of the award. **Husananna v Linganna 18 Mad 423.**

Notes:—Fol 25 Cal 757 F B; 20 Mad 490. Ex 33 Cal 757 F B; Ref: 20 Mad 89; 22 Mad 172, 10 C W N 601=2 C L J 153.

199.—Order filing an award—Appeal.

When an application is made to a Court to file an award, an order granting the prayer and an order refusing the prayer are both decrees; and an appeal lies therefrom. **Thirnvengadathatayangar v Vaidinatha Ayyar. 29 Mad 303.**

200.—Section I, Art I Sch. ii, Art. 11-Order directing an award to be filed—C. P. C. Sec 526—Order having the force of decree—Appeal.

The present appeal was brought against a judgment and decree directing that an award, made on a reference to arbitration by the parties without the intervention of a Court of justice, be filed under *S.* 526 of the C P C. The decree was for recovery of a sum of money. The appeal memorandum was stamped with a stamp of Rs. 2, as for an appeal falling within Art, II of Sch. II of the Act. *Held*, that an order directing an award to be filed is an order having the force of a decree and is in effect a decree and that, consequently the appeal memorandum ought to bear an *ad valorem* fee calculated on the amount decreed to be recoverable as provided by Art 1, Sch. I of the Court fees Act. 29 Cal. 167, Fol. 5 All. 353, approved and 23 Cal. 723, Dist.) **Hari Mohan Singh v. Kali Prasad Chaliha 33 Cal 11**

201—Civil Procedure Code (1882). ss, 521 and 522—Award—Decree on judgment in accordance with an award.—

Where a decree has been made upon a judgment given upon an award and is not in excess of, and is in accordance with the award, an appeal from such decree will lie on the ground that the so-called award upon which the judgment and decree are based is from one cause or another no award in law. Where an application to set aside an award on the ground of the misconduct of an arbitrator has been made under s. 521 of the Code of Civil procedure, and such application has been refused after judicial determination, and a decree made under s. 522 of the Code, which is in accordance with and not in excess of the award, no appeal based upon any similar ground will lie from the decree so made. 4 All., 283, 23 W. R, 429. 17 Bom.. 357, 6 All., 174, referred to. **Ibrahim Ali v. Mohsin Ali 18 All 422 =16 W N 137**

202—Sch. II (Ss. 522, 520)—Decree in accordance with revised award—No appeal on the ground that prior remittal was wrong, maintainable.—

The provisions of S. 522, C. P. C. as to appeals from decree on awards should be strictly construed. No appeal lies from a decree passed, in accordance with an award revised after remittal of a prior award under S. 520 C. P. C. on the ground that the remittal order was erroneous. *Semble:*—No appeal lies against decrees passed in accordance with awards on the ground that an order under S. 520, C. P. C. was either improperly made or improperly refused— **Subbiahlyer v. Subramania Iyer. 18 M L J 485; 31 Mad 479**

Appeal - *Contd.*

4 Arbitration—*Contd.*

203—Appeal—Award—Decree on judgment based upon an award.—

Where, after judicial consideration of objection to an award filed in Court, judgment is given according to the award and a decree passed upon such judgment, no appeal will lie from such decree except in so far as it is in excess of, or not in accordance with, the award. Under such circumstances, the High Court refused to entertain an appeal in objection to an award to the effect that two out of five arbitrators did not, as a matter of fact, take part in the arbitration proceedings, when such objection had not apparently been raised before the lower appellate Court. 18. All 422 and 6 C. W. N. 226 ref. to—

Bacha Pande v. Ganesh Pande. 1902 A W. N. 195 also **1907 A. W. N. 117=4 A. L. J. 455=29 All 457**; F. B. also **8 C. W. N. 916=6 Bom. L. R. 1132=29 Bom. 285=19 M. L. J. 480=29 Cal 167=29 I. A. 51**: P. C. also **Hansraj v. Sundar Lal=7 C L J 620=12 C W N 785=18 M L J 266=10 Bom. L. R. 581 =35 Cal 648=35 I. A. 88**; P. C.

204.—Appeal—Decree on private award.

A private award having been filed by one of the parties under S. 525, Civil Procedure Code, the other party objected and his objections were overruled. *Held*, that no appeal lay from a decree made in accordance with the award. Geidt, J.—The only questions that can be brought before an appellate Court in proceedings under Ss. 525 and 526 of the C. P. C. are (1) Whether any matter has been referred to arbitration without the intervention of the Court and an award made thereon; (2) Whether the decree ultimately made, is in excess of or not in accordance with the award. (6 C W N 226 and 10 C W N 609 considered.) **Abdul Ali v Anwar Ali. 11 C W N 220.**

205.—Sch. II r. 16 (1882 Ss. 522, 525, 526)—Arbitration award, private—Decree—Appeal.

When a Court has ordered a private arbitration award to be filed under s. 526 C. P. C. and has drawn up a decree in accordance with the award, no appeal lies against such decree except in so far as the decree may be in excess of or not in accordance with the award.

Quaere: Whether this rule is not limited to cases of misconduct and has any application when the cause shown against the filing of the award has denied the submission to arbitration or the genuineness of the award.

S. 526 should be read with S. 522, the provisions of which are, by implication made applicable to cases under the former section; the Court must proceed to give judgment according to the award and upon the judgment so given, a decree shall follow from which decree, no appeal lies, except in so far as the decree is in excess or not in accordance with the award.

The decision of the Full-Bench in *Mahomed Wahiduddin v Hakiman* (2), in so far as it affirmed the decision in *Kali Prosanno Gosh v Rajani Kant Chatterjee* (3), has been over-ruled by the Privy Council in the case of *Ghulam Jilani v Muhammad Hussan.* (4).

Semble: An order of refusal by a Court of first instance to file an award under S. 526 C. P. C. is a decree against which an appeal lies.

The bar as to appeal provided by S. 522 C. P. C. is applicable only when a decree has been made in accordance with the award by the Court of first instance and not when a similar decree has been made by a Court of Appeal in reversal of the order of the first Court setting aside the award. **Chintamoni Aditya v Haladhar Maiti. 2 C L J 153=10 C W N 601. s. c, 3 C L J 450=33 Cal 757 F B. also 7 C L J 486**

206.—Arbitration—Act X of 1877. Section 522—Judgment given in accordance with award before expiry of ten days allowed for application to set it aside.

The decrees from which no appeal will lie, unless on the grounds specified in section 522 of the Civil Procedure Code, are only the decrees passed upon judgments in accordance with an award given under the provisions of that section.

Where therefore judgment was given in accordance with an award before the ten days allowed for an application to set aside the award had expired, *held*, that such judgment could not be regarded as one under Section 522, and was therefore appealable. **Hurdeo v Thana. P. R. 48 of 1882. Civil.**

207.—Arbitration—Act X of 1877, S. 522—Judgment in accordance with award—Misconduct.

Appeal-*Contd.*

4 Arbitration—*Contd.*

Where the Court of first instance passed a decree in accordance with an award of arbitrators, after disallowing objections on the ground of corruption put forward by one of the defendants, and on the said defendant's appeal, the lower Appellate Court set aside the award and remanded the case for decision on the merits on the ground that he was not satisfied that the arbitrators had acted honestly in making their award, and he was therefore not prepared to accept it, *held*, that as, under the last clause of S. 522 of the Civil Procedure Code, no appeal lies from a decree passed in accordance with an award except so far as it is in excess of, or not in accordance with, the award, and no objection of this nature was taken to the decree in the appeal to the lower Appellate Court, the judgment of that Court was therefore passed without jurisdiction and could give no jurisdiction to the Court of first instance to re-open the case. **Dewa Singh v Ganda Singh. P R 17 of 1883.**

208—Decree in terms of award—Slight modification—Award illegal—Civil Procedure Code (1882) S 522. In a suit which was defended by an agent (am-mukhtar) for the defendant, the agent applied to refer the matter to arbitration though he was not so empowered under the Am-Mokhtarnamah. The award having been submitted, objection was taken on behalf of the defendant that the agent was not authorized to apply for or consent to the reference. The objection having been overruled, the Court made a decree in terms of the award with a slight modification in the defendant's favour—*Held*, in answer to an objection that no appeal lay under s 522 of the Civil Procedure Code. except in so far as the decree was in excess of or not in terms of the award, that an appeal would lie if the award was shown to be illegal and void *ab initio*. I L R 17 Bom 357 followed. **Saturji Pertap Bahadoor Sahi v Dulhin Gulab koer. 24 Cal 469.**

Notes—Fol. 1 Bom L R 261; Dist. 28 Cal 303; 5 C W N 268; 7 C W N 343.

209—S. 54—Acquisition of inalienable charity properties—Award directing investment in Government securities, maintainability of appeal. The land taken up by Government in this case was the endowment of a family charity and as such inalienable and the award made directed the compensation-money to be invested in Government secuirities. It was the appellant's contention that no order for investment should have been made, the land being alienable. *Held*, an appeal lay against the award so far as regards the direction for the investment, but the land in question was *prima facie* not alienable and the order for investment appealed against was therefore, rightly made. **Shiva Rao v Nagappa 29 Mad 117**

Appeal-*Contd.*

4 Arbitration—*Contd.*

210—Judgment in terms of an award—Ss. 521—522 of the Civil Procedure Code (Act XIV of 1882)—

If the award upon which the decree is based is not a valid and legal award then only an appeal will lie against a decree given in terms of the award under s. 522 of the Code of Civil Procedure. 9 Cal 905. 11 Cal 37; 16 Calc 482, 6 All 147 15 Mad 348 referred to. **Kali Prosanno Ghose v Rajani Kant Chatterjee 25 Calc 141.**

Notes—Fol. 25 Cal 757 F B; 39 Cal 278; Over. 29 Cal 167 P C=6 C W N 226= 29 I A 51. Not Fol. 10 C W N 601. Ref. 29 Bom 285; 33 Cal 498; 6 Bom L R 1132.

211.—Sch. II, para 16 (2)—Arbitration, reference to—Award ——Decree in accordance with award—Appeal.

Held that no appeal lay to the Court below from a decree passed upon an award which was in accordance with it and not in excess of it, the Court of first instance having heard the objections thereto and modified the award so far as it was in excess of the actual reference. **Narain Das v Ram Prasad. 9 A L J 258.**

212.—Sch II (S 522)—Appeal—Trustee—Removal—Reference to arbitration—Jurisdiction to refer:—No appeal lies against a decree passed upon a valid award except on the ground that the decree is either in excess of, or not in accordance with the award. Misconduct in rejecting evidence is no ground. It is not *ultra vires* to the District Judge to refer a suit for the removal of a trustee to arbitration. **Nambi Aiyangar v Narayana 11 M L J 337.**

(12) C P C (1882), S 525.526

213.—Award—Denial of reference—Jurisdiction of Court-Determination of factum of reference —Ss 525,526 of Civil Procedure Code (1882)—

Appeal-*Contd.*

4 Arbitration—*Contd.*

Held by the Full Bench that an order under S.525 determining that there has been no valid reference to arbitration and rejecting the application is a "decree" within the meaning of s 2 and is as such appealable 25 Cal *141* followed **Mahomed Wahiduddin v Hakiman** **25 Cal 757 = 2 C W N 529.**

Notes:—Fol; 23 Mad *101*: Ref 27 Mad *255* F B; 29 Cal *278*; 6 C W N *235*; *28* Bom 257; 14 M L J *356*; 31 Cal *516*; *28* All *621* = (1906) W N *136*. 2 C L J 80; 2 C L J *431*, *441*; 33 Cal 757 F B = 10 C W N *601*. 609 = 3 C L J *450*; 7 C L J *486* 9 C L J *563* = *13* C W N *654*; *36* Cal *713*; 29 Bom *621* F B. Over: 29 Cal *176* P C = 9 C W N *226* = 29 I A *51*.

214.—Arbitration—Appeal against award filed under Section 526, Act of X *1877*—Ground for such appeal.

Held, that an award which omits to determine matters referred, or which professes to determine matters not referred or which is so indefinite as to be incapable of execution as a decree of Court, is, for the purposes of S *525* and S *625* of the Code, no award, and appeal lies against a decree giving effect thereto. **Lala Dharm Dass v Ajudhia Pershad** **P R 70 of 1881.**

(13) JUDGMENT NOT IN ACCORDANCE WITH AWARD.

215.—Judgment not in accordance with award —

An appeal lies from a judgment given on an arbitration award, on the ground that the judgment is contrary to the award. **Deb Narain Singh v Rajmonee Koonwar** **3 W R 168.**

Notes:—Ref: 8 W R *171*.

216—Arbitration—Civil Procedure Code (Act X of 1877) Section 522—Award too indefinite to be capable of execution—Decree not in accordance with award.

In a suit for $\frac{1}{8}$th share in certain property left by the widow of one M S., in which the defendants pleaded *inter alia* that the houses included in the suit were their own property, the parties agreed to refer the matters in dispute to the decision of four arbitrators, who eventually awarded the plaintiff a $\frac{1}{8}$th share in all the houses left by the deceased. The arbitrators on being examined by the Court stated that out of 12 houses in the village, which the defendants claimed as their own, eight belonged to M. S, and the remaining four descended to the defendants from their father whereupon the Court passed a decree to the effect that plaintiff was entitled to a $\frac{1}{8}$th share of the houses left by M. S.

Held, that the case did not come before the Court as one governed by Section 522 of the Code, in which no appeal lay, as there was no award in the sense in which that term is used in the Code of a complete adjudication of the points referred to the arbitrators for decision and one capable of execution and that therefore an appeal lay both on that ground and also on the further ground that the decree strictly speaking was not in accordance with the award as pronounced.

Kala Singh v Dhanno Singh **P R 47 of 1883.**

217—S. 522 C. P. C.—Decree in accordance with award—Appeal—No award in law or fact.

Held, that an appeal lies from a decree passed in accordance with an award when such decree is impunged on the ground that there is no award in law or in fact, upon which judgment and decree could follow under s. 522 of the Code of Civil Procedure. (3 Suth P C C 145); and (4 L R 4 All 283) observed on. **Lachman Das v Brij Pal** **6 All 174 = 4 W N 16.**

(14) ADDITION TO AWARD.

218—Addition to award.

The addition in a judgment according to an award of a trifling direction upon a matter not referred to the arbitrators, which was quite separable from the other parts of the award, and did not affect the decision on the matter referred, was held to come within the concluding part of Act VIII of 1859, s. 325, and not to affect the finality of the judgment. **Hur Soonduree Dabee v Sreedhur Bhuttacharjee.** **17 W R 352**

(15) ORDER VARYING AWARD AS TO PAYMENT UNDER DECREE.

219—Order varying award as to payment under decree.

Appeal-*Contd.*

4 Arbitration—*Contd.*

An appeal will lie from a decree which varies an award by containing a direction for payment by instalments which is not contained in the award. **Phiran v Bahoran. 7 N W 367**

(16) DOUBT AS TO VALIDITY OF AWARD.

220—Doubt as to validity of award.

An appeal lies where the reality of an arbitration award is questioned on the ground of there having been no valid submission to arbitration. **Jungli Ram v Ram Heet Sahoy 19 W R 47**

221—Appeal—Award—One of the arbitrators signing blank paper—Arbitrator, absence of one part of hearing—C. P. C. (Act XIV of 1882), S. 516.

An appeal lies, when there is no award in fact or when there is a void award.

When there was no proper compliance with the requirements of S. 516 of the Code, the award was ineffectual and in fact void, and an appeal lay from the decree or judgment based upon the award made by the arbitrators.

S. 516 of the Code contemplates an award in writing properly signed by the persons who make it.

Where an award had already been made and a judicial decision arrived at, a subsequent embodiment of the decision of the arbitrators in certain papers which already bore the signature of one of them and was signed subsequently by the others, did not vitiate the judicial act of the arbitrators.

The absence of one of the arbitrators from a part of the hearing vitiates the judicial character of the proceeding. Where the absent arbitrator signs a blank paper on which the decision is written out by the other arbitrators, the award is void. **Benode Lal Pakrasi v Pran Chandra Pakrasi. 14 C L J 143.**

222—Appeal-Time for setting aside an award not expired—Decree passed—Whether final.

Where a decree was passed in accordance with an award before time for taking objections to the validity of the award had expired:—*Held* that, an appeal lay against the decree. Before passing such a decree it is necessary for a Court to stay its hands until the time for making an application to set aside the award had expired. 19 W R 422, 23 W R 429, ref to. **Najam-ud-din Ahmad v Albert Puech 4 A L J 450=1907 A W N 184=29 All 584.**

(17) C P C 1859. S. 325.

223— Arbitration—Judgment according to award—Act VIII of 1859 Ss. 325, 327—Application to have an award filed in court—Appeal.

Where there has been an award, and the decree passed by the Court below is in accordance with that award, that judgment is final. But where it can be shown that there was not in fact any award on which a judgment could be based, there is no final decree, and an appeal will lie.

The fact that the arbitrators themselves clearly doubt the correctness of their decision in a strong objection to the finality of an award It is one which tends to show that the award is not valid; and on this ground an appeal will be against an order granting an application to have an award filed in court. (21 W R 248; 15 W R 9 F B 8 B L R 315 Diss). **Bunyad Mahton v Nathoo Sahoo 1 C L R 455=3 Cal 375.**

Notes:—Appl: 3 All 427. Dist: 6 Mad 414. Expl: 7 Cal 166. Ref: 13 C L R 14; 10 Cal 74; 4 All 283; 18 All 422 F B

224—Award Act VIII of 1859, Section 325—Irregularity—Appeal from judgment on award.

There is no appeal from a judgment under Section 325 of Act VIII of 1859 upon an award. 23 W R 420, 12 B L R 48; 3 Cal 375 distinguished. **Wazir Mahton v Lulit Singh 7 Cal 166=8 C L R 505.**

Notes:—Dist: 9 All 253

225—The Second Schedule r. 14 (1882 Ss. 520 521, 522, 525, 526)—Arbitration out of Court—Objection to validity of submission-Appeal. If an objection to the validity of the submission is made and the Court disallows it, no distinction can be drawn between such a case and one where an objection is taken, which is specifically mentioned in S. 520 or 521. The intention of the Code seems to be that, in the one case as much as in the other, if an objection to the validity of the submission is made and the court disallows it, no appeal shall lie, except on the ground men-

Appeal-*Contd.*

4 Arbitration—*Contd.*

tioned in S. 522. The principle of finality appears to be equally applicable. 10 C W N 609. Fol: U B R. (1904-1905), Civil Procedure,, 40, 29 I A 51 (P C) 10 C W N 601. Ref. **Nga Hmaung v Nga Kyaw Ya** **U B R (1906) C P 52**

226—Award, judgment in terms of—Defendants not all joining in reference—Appeal.

The question whether under s. 522 of Civil Procedure Code an appeal will lie against a decree given in terms of an award, is dependent upon the question whether the award on which the decree is based is a valid and legal award. In a suit, a plaintiff and only some of the defendants applied to refer the suit to arbitration; an award was given and a decree was made in terms of such award. The plaintiffs objected to the award being valid, on the ground that all the parties to suit had not joined in reference to arbitration : the objection was disallowed and judgment given in terms of the award—*Held* that an appeal would lie from a decree disallowing the objection and confirming the award. **Joy Prakash Lall v Sheo Golam Singh.** **11 Cal 37.**

Notes:—Appl: 16 Cal 482, Ref: 24 Cal 908 F B; 25 Cal 141; 757 F B: 27 Cal 61; 20 Bom 596; 9 C W N 873.

227—The Second Schedule r. 1 (1882 Ss 506 522)—All parties—Reference by some Appeal. An award on a reference under S. 506 C P C not agreed to by all the parties to the suit is invalid in law. An appeal and a second appeal lie from a decree passed upon such an award. **Parsedh Narayan Singh v Ghanshyam Narain 9 C W N 873.**

Notes.—Diss 33 Cal 899. Ref 17 M L J 394. 10 C L J 41; 14 C W N 75

228—Second Schedule r. 1 (1882 Ss. 505, 522)—Reference to arbitration by some only of the parties to a suit—Award and decree in terms—Appeal. An award passed on reference to arbitration made on the application of only some of the parties to a suit, the others being the representatives of a deceased party and not yet brought on the record is void and an appeal lies from a decree though in conformity with such an award. **Indur Subbasami Reddy v Kundadai Rajamannar Ayyangar 26 Mad 47**

Notes—Not fol 32 Mad 510. Ref: 17 M L J 394; 19 M L J 480

Appeal-*Contd.*

4 Asbitration—*Contd.*

229—Appeal—Revision—(Act X of 1871.)

In execution of a decree by P, one of the two decree-holders, the judgment-debtor pleaded that the decree had been satisfied. The matter was eventually referred to arbitration. Before the award was delivered the other decree-holder, R, applied to the Court that her interest in the decree should not be affected by the arbitration, as she was not a party thereto. The arbitrator decided that the decree had been satisfied and the Court made an order accordingly overruling the objection of P. But it also provided that the order should not affect the other decree-holder R. On appeal by P the lower appellate Court set aside the award on the ground that the case had been referred without the consent of all the parties. The judgment-debtors applied for a revision of this order to the High Court. *Held* that as an appeal lay to the High Court, the application for revision was inadmissble. **Ramphal** **1 W N 24.**

230—Arbitration—Reference by one out of three plaintiffs and the defendants—Finality of award—Act X of 1877, Section 522—Ratification by parties who did not join in reference—Estoppel.—A suit by three plaintiffs, a father and his two sons having been dismissed by the Court of first instance, all three plaintiffs appealed and the respondents joined in a reference to arbitration, on which an award in the respondents' favour eventually followed, in accordance with which a decree was passed. On second appeal, the two plaintiff appellants, who did not join in the reference to arbitration, urged that the award did not bind them.

Held, that as the reference did not purport to have been made by all the appellants, the award was not final against any of them, though it was admissible in evidence against the plaintiff who was a party to the reference. P R 4 of 1882, F B) cited.

Held further, that to bind the appealing plaintiffs it was necessary to show that they ratified their co plaintiff's act in referring the appeal to arbitration, or by their conduct induced the defendants to believe that they were consenting parties to the arbitration, though they had not formally joined in the reference and were therefore estopped from contending that they were not parties to the arbitration: otherwise the reference to

Appeal-*Contd.*

4 Arbitration—*Contd.*

arbitration must be set aside as regards them. (No 67 of 1879 Civil) (53 of 1880, Civil) **Dhera Mal v Mussammat Karmdevi (PR 109 of 1883 Civil)**

231—Arbitration-Act X of 1877, Sections 506, 508, 522—Reference without consent of all the parties to the suit—Award and judgment in accordance therewith—Right of appeal by party consenting to reference—Jurisdiction—Effect of award following on submission to arbitration by some only of the parties to the suit.

Held, by the Full Bench that as by the Provisions of Section 506 of the Code of Civil Procedure the consent of all parties to a suit is a condition precedent to the jurisdiction of a Court to make an order of reference under Section 508, therefore if only some of the parties consent, an award made upon such an order is not an award that renders a judgment or decree passed in accordance with it final as regards appeal under Section 522 and it is open in such a case to any of the parties who consented to the reference to appeal from the decree on the ground that the award was passed upon an order of reference made without jurisdiction because consent of some of the parties cannot give the Court a jurisdiction not given to it by law.

But *held* further, by the Division Bench (Plowden and Brandreth, JJ.), that where some only of the parties to a suit submit to arbitration (the submission not being conditional upon the consent of the other parties), and an award follows on such submission, the proceedings are not void nor the award a nullity, but the award is good as evidence on behalf of the party in whose favour it is made, and such party is entitled to have a decree which has followed on such award upheld, unless the opposite party can satisfy the Court that the award is invalid that is to say, one to which as it stands the Court cannot or ought not to give effect **Cheto Mull v. Mahoo Mull P R 4 of 1882 Civil**

Notes—Note; 57 of 1885.

232.—Arbitration-Decree in accordance with award-Appeal by defendants on ground that they did not join in reference—Finality of judgment in accordance with award—*Act* X of 1877, Ss. 506, 508, 522.

A decree having been passed in accordance with the award of the majority of arbitrators appointed in the case, some of the defendants appealed, urging *inter alia* that they did not join in the application for reference to arbitration not having been present when the application was presented, and that their names were entered without their sanction.

Held, that, if the above allegation was correct, there was no reference to arbitration such as is contemplated in Chapter XXXVII of the Code, and an appeal would therefore not be barred. (P. R 4 of 1882, F B) followed.

Ahmad v Mussammat Bhagbari. P R 170 of 1883.

(18) ORDER SETTING ASIDE DECREE.

233.—Civil Procedure Code (1882) Section 521—Decree upon award—order setting aside decree.

A suit was referred to arbitration. An award was duly filed and a decree passed in terms of the same. The plaintiff then applied to the Court to have the decree set aside on the ground that he had no notice of arbitration and of the filing of the award and that though the award was alleged to have been made with the consent of the parties, he, the plaintiff had not consented to it. The court passed an order setting aside the decree and the award and ordering the case to be set down for the hearing :—*Held* that no appeal lay from such order. 4 Calc 231 dissented from. 14 W R 327 followed.

Ambica Dasi v Nadyar Chand Pal. 11 Cal 172.

Notes:—Ref : 22 Mad 202 : 31 Mad 345 = 18 M L J 228.

(19) C P C S. 521 (1882).

234.—Appeal—Arbitration Civil Procedure Code (1882) Section 521. Legality of order giving back award for re-consideration.—

It was stated, in an award given by the arbitrators to whom all matters in dispute had been submitted, that "defendant has not produced any witness in support of his contention raised in issues nos. 1, 2, 5, 6, hence we have only to deal with issues Nos. 3, 4, and 7", and the arbitrators gave their finding only on the latter issues. The award was remitted as the arbitrators had not determined the issues Nos. 1, 2, 5 and 6.—*Held* —(1) In an appeal against a decree ultimately

Appeal-*Contd.*

4 Arbitration—*Contd.*

passed the legality of an order giving back the award for reconsiderations to the arbitrators, may be challenged (2) That the award should not have been remitted. There was nothing illegal on the face of it and as regards the whole matter in issue between the parties there was a decision. 14 W R 327. I L R 11 Cal 172; I L R 2 All 181; *3* All 643. referred to.

George v Vastian Soury. 22 Mad 202.

Notes:—Ref: (1908) W N 242; 31 Mad 345=18 M L J 225, 5 A L J 644; 18 M L J 485=31 Mad 479.

235.—Passed by appellate Court—Finality.

This suit (for possession of certain *zamindari* share) was instituted in August,1884. On the 10th January following the matter was, by consent of the parties, referred to arbitration. On the 19th January, 1885, the defendants put in an application paying that the suit be tried by the Court on the merits. The Court answered that the proper time for objection was when the award had been returned. The award was made on the 16th February, 1885, and the defendants presented a second application containing their objections to the award charging the arbitrators with misconduct and corruption. These objections the Court allowed without going into the evidence on the allegations. It therefore went into the merits of the case and gave a partial decree to the plaintiffs. The plaintiffs preferred an appeal. The lower appellate Court remanded the case under s. 566 for inquiry as to whether the award was open to the objections raised by the defendants under S. 521. The Court of first instance found that it was not (the defendants producing no evidence to substantiate their allegations). Upon receipt of this finding the appellate Court held that, the award was not open to any legal objection and gave a decree in conformity with the award. *Held* that no second appeal would lie from such decree; the Code throughout gives to appellate Courts all the powers that the Courts of first instance have in connection with litigation in general and with reference to arbitration in particular.

Naurang Singh v Sadaphal Singh 11 All 8=7 W N 240.

Appeal-*Contd.*

4 Arbitration—*Contd.*

236.—Civil Procedure Code, 1882, Sections 522, 582—Finality of decree in accordance with decree—Appeal.

A Court of first instance, upon objections made to it, wrongly set aside an award. The Court of first appeal set aside this order and passed a decree in accordance with the award—*Held*, that, under the combined effect of Sections 522 and 582 of the Civil Procedure Code, the latter decree was final and not open to further appeal. **Nawab v Ahmad Khan. 26 P R 1890.**

(20) AWARD.

237.—Award—Objection to its filing—Finality of decree on award—Private arbitration—Civil Procedure Code (1882), Sections 520, 521, 525 and 526.

An arbitrator to whom certain disputes between parties were referred under a written agreement made his award in due course. An application was made by the plaintiffs to file the award under section 525 to the Subordinate Judge. The following are the chief grounds on which the defendants objected. (1) That the application should have been made to the Munsif's Court instead of the Subordinate Judge as the value of the property was Rs. 500 only. (2) That the agreement of submission was very vague and did not clearly specify the matters in dispute. The objection was overruled by the Subordinate Judge without taking evidence and the award was directed to be filed and a decree was passed thereon. The plaintiff appealed. The defendants' contention was that no appeal lay, and that, if it did, it lay to the District Judge, and not to the High Court:—*Held*, that, assuming that in a proceeding under Sections 525 and 526 the Court has power to consider such objections as are mentioned in Sections 520 and 521 the above objections did not fall under either Section, and therefore no appeal would lie.

Bindessuri Pershad Singh v Jankee Pershad Singh. 16 Cal 482.

Notes:—Ref: 21 Cal 213 F B; 25 Cal 141; 20 Bom 596: 18 All 414.

238.—Appeal—Arbitration—Award—Decree on judgment in accordance with award.

During the pendency of a suit in the Court of

Appeal-*Contd.*

4 Arbitration—*Contd.*

a Subordinate Judge the matters in dispute between the parties were referred to arbitration. In due course a document purporting to be the arbitrator's award was received by the Court through the post. Objections were filed by one of the defendants to the suit: but these objections were, after hearing, disallowed by the Court, which proceeded to pass a decree in accordance with the award. The arbitrator himself admitted in his evidence that he did not intend to make it. *Held* that, an appeal would lie from such a decree upon the ground that the so-called award was never delivered nor intended to be delivered at all by the arbitrator and was in fact and in law no award at all.

Sham Lal v Misri Kunwar.
(1907) A W N 115=29 All 426.

(21) C. P C 1859, SS. 327,325

239.—Civil Procedure Code, 1859, ss. 327 and 325—Finality of judgment on award.

S. 327, Civil Procedure Code, incorporates the provision in s. 325 as to the finality of the judgment given according to the award, and puts the award filed under s. 327 in the same position as the award filed under s. 325. Where a Court files an arbitration award and passes a decree, that decree is final. *Semble*—The word " date " in s.327 does not mean the day written in the award as when it was made, but the time when it is handed over to the parties, so that they may be able to give effect to it. **Sreenath Chatterjee v Kylash Chunder Chatterjee 21 W R 248.**

(22) AGREEMENT TO REFER NOT PROVIDING FOR DISAGREEMENT OF ARBITRATORS.

240—S. 523 C. P. C —Unauthorized appointment of umpire by Court—Award—Appeal.

In an agreement to refer certain matters to arbitration which was filed in Court under s. 523 of the Code of Civil Procedure, and on which an order of reference was made by the Court, no provision was made for difference of opinion between the arbitrators, by appointing an umpire, or otherwise the arbitrators being unable to agree upon the matters referred, the Court, on the application of one of them appointed an umpire and directed that the award should be submitted on a particular date. And award was made by the umpire and one arbitrator, without the concurrence of the other arbitrator, and submitted to the Court,

Appeal-*Contd.*

4 Arbitration—*Contd.*

which passed a decree in accordance with its terms On appeal by the defendant in the case, the District Judge reversed the decree. *Held* that, an appeal would lie to the Judge from the decree of the first Court, where there had been no legal award such as the law contemplated. (I. L. R. 6 All.. 174) referred to. *Held* that, in the present case, there had been no legal award such as the law contemplated, inasmuch as the agreement to refer gave the Court no power to appoint an umpire, and required that the award should be made by the arbitrators named by the parties. *Held* that s. 509 and the other sections preceding s. 523 of the Code of Civil procedure, relating to the power of the Court to provide for differences of opinion among the arbitrators. were only made applicable to cases coming under s 523, so far as their provisions were consistent with the agreement filed under that section. *Held* also that the defendant was not precluded from appealing to the Judge from the first Court's decree because he had not applied to set aside the award within the ten days allowed by Art. 158, sch. II of the Limitation Act, inasmuch as that article applied to applications referred to in s. 522 of the Code of Civil Procedure, *i. e.*, applications to set aside an award on any of the grounds mentioned in s. 521, and the defendant did not contest the award on any of those grounds.

Muhammad Abid v Muhammad Asghar.
8 All 64=6 W N 2.

Notes—Dist· 29 Cal 36; 8 C L J 475.

(23) POWERS OF ARBITRATORS

241—Powers of arbitrators—Payment by instalments—Civil Procedure Code, ss. 518, 522.

The arbitrators, to whom the matters in difference in two suits for money were referred to arbitration, made an award for payment to the plaintiff of certain sums by the defendant, and further directed that these sums should be paid by certain instalments. The plaintiff preferred objections to the award in so far as it directed payment by instalments, and the Court, holding that the arbitrators had no power to make such a direction, modified the award to that extent, under s. 518 of the Civil Procedure Code. On appeal, the District Judge, while allowing the power of the arbitrators to direct payment by instalments, reduced the number of instalments, which had been fixed. *Held* that, the decree of the first Court not being in accordance with the award. an appeal lay to

Appeal-*Contd.*

4 Arbitration—*Contd.*

the Judge, with reference to s. 522 of the Code. *Per* Mahmood, J.—The word " award " used in that last sentence of s. 522 of the Code must be understood to mean an award as given by the arbitrators, and not as amended by the Court under s. 518. The words " in excess of, or not in accordance with, the award," used in s. 522, were intended to enable the Court of appeal to check the improper use of the power conferred by s.518.

Jawahar Singh v Mul Raj 8 All 449.

(24)EVIDENCE GIVEN BY PARTY ON OATH PROPOSED BY OPPOSITE PARTY.

242—Evidence given by party on oath proposed by opposite party—Award in accordance with such evidence-Judgment in accordance with award—Validity of award-Act X of 1877 (Civil Procedure Code), ss. 520, 521, 522-Act X of 1873 (Oaths Act).

The plaintiff in a suit, which had been referred to arbitration, offered before the arbitrator to be bound by the evidence of the defendant given on a certain oath. With the arbitrator's consent the defendant accepted such offer, and gave evidence on such oath. The arbitrator made an award in accordance with the evidence so given. The plaintiff objected to the award, not on any of the grounds mentioned in ss. 520 and 521 of the Civil Procedure Code, but on the ground that the Procedure of the arbitrator had been illegal. The Court disallowed this objection, and gave a judgment and decree in accordance with the award. *Held* by Straight, J., that such decree, being in accordance with the award, was not appealable. *Held* by Stuart. C. J. that the award not being open to objection on any of the grounds mentioned in ss. 520 and 521 of the Civil Procedure Code, and the decree being in accordance with the award, the decree was not appealable. *Held* by Oldfield J., that the procedure adopted by the arbitrator being illegal, not being warranted by the Oaths Act, and there being in reality no award within the meaning of the Civil Porcedure Code, the decree therefore was appealable. *Per* Stuart, C. J., that the Procedure of the arbitrator did not require to be warranted by the Oaths Act, as he was entitled by virtue of his office to proceed as he did.

Bhagirath v Ram Ghulam 4 All 283.

Notes—Ap: 18 All 422 F B. Dist: 9 All 253. Con: 6 All 174 F B. Ref: 5 All 500.

Appeal-*Contd.*

4 Arbitration—*Contd.*

243—(1908) Sch. II——Invalid reference and award—Appeal from decree passed in accordance with such award. Where there is no valid reference to arbitration and no valid award, the decree passed in accordance with it cannot be maintained and an appeal lies against such decree.-6 A L J 383 Ref. **Shib Lal v. Chaturbhuj 6 A L J 496=2 Ind Cas 363=31 All 450.**

244—Section 521—And Sections 522, 582—Arbitration—Award—Decree of Appellate Court in accordance with award—Finality of decree—Further appeal.

Held, that when a Court of first instance wrongly sets aside an arbitration award and passed a decree against the terms thereof, and a Court of appeal dealing with the merits of the case comes to the conclusion that the award was not open to any such objections as are contemplated by Section 521 of the Code of Civil Procedure and upon that finding passed a decree strictly in accordance with the terms of the award, such appellate decree is entitled to the same finality as a decree of the first Court would have had under the last paragraph of Section 522, and cannot be made the subject of a further appeal. (12 W R 93) (14 W R 327) (12 C L R 564) (22 W R 447) considered and dissented from. (26 P. R. 1890) (10 all, 8) (25 P R1902 P C) cited and followed.

BaharBakhsh v. Inayat Ali (89 P R 1904).

245—Sch. II r 1 (1882—S. 506)—Arbitration—Appeal—Revision—Tearing original and making fresh award—Taking evidence in absence of parties— Corruption of misconduct—C P C 1908 second Schedule paras, 15 and 16. *Held*, that a decree passed in accordance with an award, after finding that there was no misconduct or corruption of the arbitrators, to whom a case is referred for arbitration on the application of the parties, is neither subject to appeal nor to revision and that an Appellate Court's action to interfere with it in any way even with the consent of the parties is *ultra vires ab initio*.

Held, also, that on the objection of any party, the arbitrators can reconsider their award after it is made, but before it is submitted to the Court. Thus a fresh award is valid and legal even if it is different in its terms from the original one

Held, further that it does not amount to misconduct of an arbitrator if he takes evidence in the

Appeal-*Contd.*

4 Arbitration—*Contd.*

absence of the parties with their express or implied consent. 92 P R 1908; 25 Cal 141: Fol C P R-66=148 P W R 1907; 18 Bom 299 Ref. **Dial Chand v Khuda Baksh 73 P W R 1910**

246-Suit barred by limitation (Act X of 1877); The suit which was for money lent, was referred to arbitration by the lower appellate Court. The award was in favour of the plaintiff and the lower appellate Court gave judgment in accordance with the award. On appeal by the defendant to the High Court it was contended that the suit was barred by limitation. This defence had not been set up in the lower Courts. The Court observed that the judgment of the lower appellate Court was not appealable being in accordance with the award. **Jagmandar Das v Piare Lal 1 W N 17**

(3) APPLICATION TO FILE AWARD.

247—Civil Procedure Code (Act XIV of 1882) Ss. 525, 520, 521—Award—Application to file—in a case where if applied to the Court to file an award under S. 525 of the Code of Civil Procedure and its filing is objected to on any of the grounds mentioned in s.520 or 521 the proper course for the Court to pursue is to dismiss the application and leave the applicant to bring a regular suit to enforce the award in which all the objections to its validity may be properly tried and determined. No appeal lies against an order of the Court to file an award if no objection in made to the filing of the award. **Hurronath Chowdhry v. Nistarini Chowdrani 10 Cal 74**

Notes.—Diss· 25 Cal 757 F B;16 All 231. Ref 16 Cal 482: 21 Cal 212 F B, 6 All 186 F B.

248—Award private—Application to file—Objections under S 520—Matters left undetermined—Disallowance of objection—Decree directing award to be filed—Appeal—S 522 when applies—Practice—Mofussil Courts—Original side—Revisional power, of High Court—*Exercise suo moto—Per Curiam (Rampini and Pratt JJ contra).*

An appeal lies from an order passed under S. 526 C P C merely directing the filing of an award made on a submission to arbitration without the intervention of a Court of justice. Upon an application under S. 525 C P C to have a private award filed, the opposite party objected that the arbitrator had left undetermined certain matters referred to him for decision. The objection was overruled and the award was ordered to be filed and the following decree was drawn up containing the arbial direction:—" It is ordered that the arbitration award in this case be filed in Court. " This decree was set aside on appeal, the lower appellate Court holding the objection to be a valid one —*Held, Per Curiam Maclean C J and Sale,J ,contra*) that no appeal lay from the decree of the first Court and the lower appellate Court had no authority to interfere with it Per *Maclean, C J* and *GhoseJ.*—When an award has been ordered to be filed under S.526 C P C., the party, in whose favour it is, must proceed to obtain a judgment and consequent decree under S 522 C P C., and if that decree is according to the award then there is no appeal from it. Per *Ghose Rampini* and *Pratt JJ.*:—The decree in this case was substantially a decree in accordance with an award as contemplated by S. **526** read with S. 522, C P C. Per *Sale*,J—No decree expressly incorporating the terms of the award is required to be drawn up in pursuance of the order to file the award made under S. 526, C P C nor is the clause restricting the right of appeal in the case of a decree made under S. 522, C P C applicable to an order to file an award made under S. 526, C P C. Per *Rampini* and *Pratt JJ.*—No appeal lies from an order directing an award to be filed under S. 526 C P C, except when the decree is in excess of or not in accordance with the award, although an order refusing to file the award is appealable Per *Maclean* C J.—An order directing as well as one refusing the filing of an award stand on the same footing as regards appealability. 6 C W N 266; s. c. 29 Cal 767; 29 I A 57— **Janokey Nath Guha Roy v Brojo Lol B F Guha 10 C W N 609= 33 Cal 757; F B.**

249—Res—judicata—Order refusing to file award—Suit to enforce it—Whether barred.

An order of a Court refusing to file an award does not operate as res judicata in respect of a subsequent suit brought to enforce it, inasmuch as no appeal lies from the order refusing to file it. (28 All 26; 32 All 484 Ref) **Shib Charan Das v. Ramchandar Sarup 8 A L J 315.**

250—S. 525—Appeal from order refusing to file award.

An appeal lies against an order refusing to grant an application to file an award under S. 525, C P C 29 C. 167 ref. to: 3 C L J 450; 33 Cal. 757 foll : 6 All 186; 26 All 205 not foll.

Sheo Sahai Mahton v Kirtarth Bhagah 7C L J 486.

Appeal-*Contd.*

4 Arbitration—*Contd.*

the Judge, with reference to s. 522 of the Code. *Per* Mahmood, J.—The word " award " used in that last sentence of s. 522 of the Code must be understood to mean an award as given by the arbitrators, and not as amended by the Court under s. 518. The words " in excess of, or not in accordance with, the award," used in s. 522, were intended to enable the Court of appeal to check the improper use of the power conferred by s.518.

Jawahar Singh v Mul Raj 8 All 449.

(24)EVIDENCE GIVEN BY PARTY ON OATH PROPOSED BY OPPOSITE PARTY.

242—Evidence given by party on oath proposed by opposite party—Award in accordance with such evidence-Judgment in accordance with award—Validity of award-Act X of 1877 (Civil Procedure Code), ss. 520, 521, 522-Act X of 1873 (Oaths Act).

The plaintiff in a suit, which had been referred to arbitration, offered before the arbitrator to be bound by the evidence of the defendant given on a certain oath. With the arbitrator's consent the defendant accepted such offer, and gave evidence on such oath. The arbitrator made an award in accordance with the evidence so given. The plaintiff objected to the award, not on any of the grounds mentioned in ss. 520 and 521 of the Civil Procedure Code, but on the ground that the Procedure of the arbitrator had been illegal. The Court disallowed this objection, and gave a judgment and decree in accordance with the award. *Held* by Straight, J., that such decree, being in accordance with the award, was not appealable. *Held* by Stuart, C. J. that the award not being open to objection on any of the grounds mentioned in ss. 520 and 521 of the Civil Procedure Code, and the decree being in accordance with the award, the decree was not appealable. *Held* by Oldfield J., that the procedure adopted by the arbitrator being illegal, not being warranted by the Oaths Act, and there being in reality no award within the meaning of the Civil Porcedure Code, the decree therefore was appealable. *Per* Stuart, C. J, that the Procedure of the arbitrator did not require to be warranted by the Oaths Act, as he was entitled by virtue of his office to proceed as he did.

Bhagirath v Ram Ghulam 4 All 283.

Notes—Ap: 18 All 422 F B. Dist: 9 All 253. Con: 6 All 174 F B. Ref: 5 All 500.

Appeal-*Contd.*

4 Arbitration—*Contd.*

243—(1908) Sch. II——Invalid reference and award—Appeal from decree passed in accordance with such award. Where there is no valid reference to arbitration and no valid award, the decree passed in accordance with it cannot be maintained and an appeal lies against such decree.-6 A L J 333 Ref. **Shib Lal v. Chaturbhuj 6 A L J 496=2 Ind Cas 363=31 All 450.**

244—Section 521—And Sections 522, 582—Arbitration—Award—Decree of Appellate Court in accordance with award—Finality of decree—Further appeal.

Held, that when a Court of first instance wrongly sets aside an arbitration award and passed a decree against the terms thereof, and a Court of appeal dealing with the merits of the case comes to the conclusion that the award was not open to any such objections as are contemplated by Section 521 of the Code of Civil Procedure and upon that finding passed a decree strictly in accordance with the terms of the award, such appellate decree is entitled to the same finality as a decree of the first Court would have had under the last paragraph of Section 522, and cannot be made the subject of a further appeal. (12 W R 93) (14 W R 327) (12 C L R 564) (22 W R 447) considered and dissented from. (26 P. R. 1890) (10 all, 8) (25 P R1902 P C) cited and followed.

BaharBakhsh v. Inayat Ali (89 P R 1904).

245—Sch II r) (1882—S. 506)—Arbitration—Appeal—Revision—Tearing original and making fresh award—Taking evidence in absence of parties— Corruption of misconduct—C P C 1908 second Schedule paras, 15 and 16. *Held*, that a decree passed in accordance with an award, after finding that there was no misconduct or corruption of the arbitrators, to whom a case is referred for arbitration on the application of the parties, is neither subject to appeal nor to revision and that an Appellate Court's action to interfere with it in any way even with the consent of the parties is *ultra vires ab initio*.

Held, also, that on the objection of any party, the arbitrators can reconsider their award after it is made, but before it is submitted to the Court. Thus a fresh award is valid and legal even if it is different in its terms from the original one

Held, further that it does not amount to misconduct of an arbitrator if he takes evidence in the

Appeal-*Contd.*

4 Arbitration—*Contd.*

absence of the parties with their express or implied consent. 92 P R 1908; 25 Cal 141, Fol C P R-66=148 P W R 1907; 18 Bom 299 Ref. **Dial Chand v Khuda Baksh 73 P W R 1910**

246-Suit barred by limitation (Act X of 1877); The suit which was for money lent, was referred to arbitration by the lower appellate Court. The award was in favour of the plaintiff and the lower appellate Court gave judgment in accordance with the award. On appeal by the defendant to the High Court it was contended that the suit was barred by limitation. This defence had not been set up in the lower Courts. The Court observed that the judgment of the lower appellate Court was not appealable being in accordance with the award. **Jagmandar Das v Piare Lal 1 W N 17**

(3) APPLICATION TO FILE AWARD.

247—Civil Procedure Code (Act XIV of 1882) Ss. 525, 520, 521—Award—Application to file—in a case where if applied to the Court to file an award under S. 525 of the Code of Civil Procedure and its filing is objected to on any of the grounds mentioned in s.520 or 521 the proper course for the Court to pursue is to dismiss the application and leave the applicant to bring a regular suit to enforce the award in which all the objections to its validity may be properly tried and determined. No appeal lies against an order of the Court to file an award if no objection in made to the filing of the award. **Hurronath Chowdhry** v. **Nistarini Chowdrani 10 Cal 74**

Notes.—Diss· 25 Cal 757 F B;16 All 231. Ref 16 Cal 482: 21 Cal 212 F B, 6 All 186 F B.

248—Award private—Application to file—Objections under S 520—Matters left undetermined—Disallowance of objection—Decree directing award to be filed—Appeal—S 522 when applies—Practice—Mofussil Courts—Original side—Revisional power, of High Court—*Exercise suo moto—PerCurim (Rampini and Partt JJ contra).*

An appeal lies from an order passed under S. 526 C P C merely directing the filing of an award made on a submission to arbitration without the intervention of a Court of justice. Upon an application under S. 525 C P C to have a private award filed, the opposite party objected that the arbitrator had left undertermined certain matters referred to him for decision. The objection was overruled and the award was ordered to be filed and the following decree was drawn up con tain-

Appeal-*Contd.*

4 Arbitration—*Contd.*

ing the arbial direction:—" It is ordered that the arbitration award in this case be filed in Court. " This decree was set aside on appeal, the lower appellate Court holding the objection to be a valid one —*Held, Per Curiam Maclean C J and Sale,J ,contra*) that no appeal lay from the decree of the first Court and the lower appellate Court had no authority to interfere with it Per *Maclean, C J* and *GhoseJ.*—When an award has been ordered to be filed under S.525 C P C., the party, in whose favour it is, must proceed to obtain a judgment and consequent decree under S 522 C P C., and if that decree is according to the award then there is no appeal from it. Per *Ghose Rampini* and *Pratt JJ.*:—The decree in this case was substantially a decree in accordance with an award as contemplated by S. **526** read with S. 522, C P C. Per *Sale*,J—No decree expressly incorporating the terms of the award is required to be drawn up in pursuance of the order to file the award made under S. 526, C P C, nor is the clause restricting the right of appeal in the case of a decree made under S. 522. C P C applicable to an order to file an award made under S. 526, C P C. Per *Rampini* and *Pratt JJ.*—No appeal lies from an order directing an award to be filed under S. 526 C P C except when the decree is in excess of or not in accordance with the award, although an order refusing to file the award is appealable. Per *Maclean* C J.—An order directing as well as one refusing the filing of an award stand on the same footing as regards appealability. 6 C W N 266; s. c. 29 Cal 167; 29 I A 57— **Janokey Nath Guha Roy v Brojo Lol B F Guha 10 C W N 609= 33 Cal 757; F B.**

249—Res—judicata—Order refusing to file award—Suit to enforce it—Whether barred.

An order of a Court refusing to file an award does not operate as res judicata in respect of a subsequent suit brought to enforce it, inasmuch as no appeal lies from the order refusing to file it. (28 All 26; 32 All 484 Ref.) **Shib Charan Das v. Ramchandar Sarup 8 A L J 315.**

250—S. 525—Appeal from order refusing to file award.

An appeal lies against an order refusing to grant an application to file an award under S. 525, C P C 29 C. 167 ref. to: 3 C L J 450, 33 Cal. 757 foll : 6 All 186; 26 All 205 not foll.

Sheo Sahai Mahton v Kirtarth Bhagah 7C L J 486.

Appeal - *Contd.*

4 Arbitration — *Contd.*

251—Civil Procedure Code Ss. 520-521—Appeal-Objection—Jurisdiction—Award.]

An objection falling within the scope of S 520 or 521 Civil Procedure Code cannot form the basis of an appeal. An objection which is outside the scope of those sections does not take away the jurisdiction of the court to order an award to be filed and affords ground for an appeal. (25 Cal 757; 16 All 231; 17 All 21; 4 Mad 319; 18 Mad 423 20 Mad 89, 9 Bom 254; 17 Bom 674; 20 Bom 596 Ref:) **Bastaram v Govind Ram 13 C P L R 53.**

(1) ORDER REJECTING APPEAL

252—Civil Procedure Code S. 525—Filing of award—Matters to be decided on application—Court fee.

No appeal would lie from an order upon an application to file an award under s. 525 of the Civil Procedure Code. Upon an application to file an award, the court to which the applications made has no jurisdiction to make enquiries as to whether the defendant has agreed to the terms of the deed referring the matter to arbitration, or whether there is any fraud. When such objections are made, it is the duty of the Court to reject the application under s 525, and refer the parties to a regular suit. **Bijadhur Bhagut v Monohur Bhagut. 10 Cal 11**

Palut Bhagut v Monohur Bhagut 13 C L R 171.

Notes:—Diss: 25 Cal 757 F B. Ref: 17 Bom 674; 6 All 186 F B; 17 All 21 F B. Fol: 25 Cal 757 F B.

253—254—Unauthorized amendment—Appeal—(Act X of 18877).

The appellants applied to the Munsif under s. 525 of Act X of 1877 that an award might be filed in Court. After the first hearing of the case the Munsif ordered the appellants to amend their plaint, misunderstanding the provisions of s 525. By the amendment the case was taken out of the scope of Chapter XXXVII of the Code of Civil Procedure. *Held* that under the circumstances, the Judge had jurisdiction to hear the appeal preferred to him from the Munsif's decree. **Ganesh Lal v Narain Das 1 W N 29**

(4) REFUSAL TO FILE AWARD IN COURT.

255—Order refusing application to file—Appeal.

Appeal-*Contd.*

4 Arbitration—*Contd.*

Held (Oldfied, J., dissenting) that an appeal does not lie from an order disallowing an application to file an award under s. 525 of the Code of Civil Procedure. (*I L R 3 All 427*) distinguished by Stuart J. The same case followed by Oldfield.

Bhola v. Gobind Dayal 6 All 186 = 4 W N 31.

Per contra Janki v. Gayan, 3 All 427 = 1 W N 4

Notes—Ref 16 Cal 482; 26 All 205 Fol 28 All 21 = 2 A L J 50 = (1905) W N 165. Not Fol 7 C L J 486.

256— Sch. 11 (S. 525 5)—Order refusing to file an award, decree—Appeal.

An order made on an application to file an award under S. 525 C P C is a decree within the meaning of C P C and an appeal lies from an order refusing to file the award and setting it aside. 3 Mad 68 overruled 29 I A. 51, foll. 18 Cal 414, declared not, inconsistent with 29 I A 51. **Ponnusami Mudali v Mandi Sundara Mudali 14 M L J 356 = 27 Mad 255**

Notes:—Contra 26 All 205.

257—Private award—Order refusing to file, if decreed and appealable-Award, decree made in terms of, by appellate Court, if appealable-Appeal—Final, when decree made upon private award by first Court.

An order under s. 526 of the Code of Civil Procedure refusing to file an award made without the intervention of the Court is a decree and consequently appealable. When a Court of first instance to which an application has been made under s. 525 C P C refuses to file the award, and such order is reversed on appeal and a decree made in accordance with the award, the decree is appealable. The finality which attaches to a decree made in accordance with an award as provided by S. 522. C P C., refers only to a case in which such decree is made by the Court of first instance, and does not apply to a case in which such decree is made for the first time by the appellate Court in reversal of the order of the first Court. **Abdul Taher v Azmut Bibi 2 C L J 80.**

258.--Appeal—Award-Order rejecting application to file award made out of Court—Appeal.

No appeal will lie from an order refusing to file an award made between the parties without

Appeal-*Contd.*

4 Arbitration—*Contd.*

the intervention of a Court and such order cannot have the force of *res judicata*. (26 All 186 and W N (1903) 34 Fol. 29 Cal 167 Dist; 18 Cal 414 Ref.) **Basant Lal v Kunji Lal (1905) A W N 165=28 All 21 Contra 2 C L J 658= 10 C W N 601.**

259.—C P C, 1882, Sec. 525—Order refusing to file private award—Whether appeal lies.

No appeal lies from an order refusing to file an award made without the intervention of a Court. **Katik Ram v Babu Lal. 26 All 205 =A W N 1903 234.**

Notes:—(6 All 186 Foll; 29 Cal 167, Dist) Diss. 10 C W N 601=2 C L J 153.100 P R 1907 =17 P L R 1908; Disappr, 88 P W R 1907=126 P R 1907=50 P L R 1908; Fol. 28 All 21=2 A L J 450=A W N 1908,165; R33 Cal 757=3 C L J 450=10 C W N 609, 9 O C 205, 11 O C 116, 1 P R 1908=58 P W R 1907.

259A—The Second Schedule r.20 (1882 S 525) Arbitration—Award refusing application to file —Appeal Civ. Pro. Code (Act v of 1908). S. 104. cl. (f)—Proceedings—Securing attendance of witness—Procedure—Rules of evidence. An appeal lies against an order refusing to grant an application to file an award under S. 525 of the Code of 1882.

There is no provision of law which requires private arbitrators to adopt any special procedure. The rules of evidence cannot be strictly applied to such proceedings. It is the duty of private arbitrators to examine the persons produced before them by the parties to give evidence. 7 C. L. J. 486, Fol: 28 All. 21; 2 A. L. J. 450; A. W. N. (1905), 150, *diss.* **Ram Dhabi Sahu v. Ram Charitar Sahu. 7 Ind Cas 333.**

259B—Ss. 104, 105—Interpretation of statute —Retrospective effect—Appeal—Order refusing to file an award made in 1909—Application in 1908.

The Code of Civil Procedure, 1882, granted no appeal to a higher tribunal from an order refusing an application to have an award made a rule of Court, but the Code of 1908 does grant such an appeal, *vide* s. 144 (*f*). Where, therefore, an application was made on the 19th September. 1908, to make an award a rule of Court, and the application was rejected on the 18th June, 1909, *held* that the provisions neither of S. 154 nor of S. 104 of the Code applied, and the appeal was not maintainable.

A Court will not ascribe retrospective effect to new laws affecting rights, unless by express words or necessary implication it appears that such was the intention of the legislature. (6 Q B 23, Ref.) **Gajraj Lal v Ramdin Lal 7 A L J 1070.**

Appeal-*Contd.*

4 Arbitration—*Contd.*

(1) ACT VIII OF 1859 Ss. 325 & 327.

260.—Act VIII of 1859 Ss. 325 and 327.

An application was made under Section 327 of 1859 to file an arbitration award, and the Court, after calling on the opposite party to show cause why it should not be filed, rejected the application:—*Held* that the case did not come within the meaning of S. 325, and that the order, being simply one "rejecting an application to file an award" was final.

Rajkumar Singh v Kali Charan Singh. 1 B L R Ap 20=11 W R 57

(2) ORDER REJECTING APPLICATION TO FILE.

261.—Order rejecting application to file—Act VIII of 1859, Section 327.

No appeal lies from an order rejecting an application to file an award (Mitter J dubitante).

Roy Priyanath Chowdhry v Prosonno Chunder Roy Chowdhry 2 B L R A C 249. Presonath Chowdhry v Ramdhun. 11 W R 104. Chintaman Sing v Uma Kunwar. B L R Sup Vol 505. 2 Ind Jur N S 1 : 6 W R Mis 83.

261A—Civ. Pro. Code, 1882, Ss. 520, 521, 522 523 and 525—Arbitration—Award — Agreement to refer to arbitration — Appeal — Appeal on grounds other than the decree being in excess of, or not in accordance with the award.—

Held, by the Full Bench: (1) that an appeal lies from an acceptance or rejection of an application under S. 525, Civil Pro. Code, when the award is illegal *ab initio* and (2) that an order rejecting an application under s. 523, Civ. Pro.

Appeal-*Contd.*

4 Arbitration—*Contd.*

Code is appelable. **Jhangi Ram v Mussamat Pudho Bai. 84 P R 1901,**

Notes:—(Ref 100, P R 1907=17 P L R 1908, 46 P R 1909. 1 P R 1908=58 P W R 1907 F B; Disappr, 25 P R 1902 P C Cited and Foll 126 P R 1907=88 P W R 1907.

(3) ORDER GRANTING OR REFUSING

262—Order granting or refusing,

Held by the majority of the Court (Person, J.. *dissentiete*) that no appeal lies from an order passed under s 327, Act VIII of 1859, whether granting or refusing the application. **Jokhan Rai v Bucho Rai. 3 Agra 353; Agra F B Ed 1874 156**

Notes:—Fol: 1 All 156. Dist: 3 All 427.

(4) WANT OF CONSENT OF PARTIES

263— Want of consent of parties— Private award.

An appeal on the allegation of want of consent of parties lies from the order of a lower Court under s. 327, Code of Civil Procedure, directing a private award of arbitration to be filed and enforced **Hulodhur Santal v Gonesh Santal 6 W R 60**

Notes-Ref: 7 W R 81 Over 8 B L R 315.

264—Cl 15—Order of a Judge refusing to decide whether arbitrators are going beyond the scope of their authority—Judgment—Appeal—Construction of submission to arbitration—Insurance against fire—Liability of company for further loss. An order of a Judge dismissing a petition to revoke a submission to arbitration, on the ground that the arbitrators are going beyond the scope of the reference, is a judgment within meaning of cl. 15 of the Letters Patent and as such is appealable. Such an order compels a party to submit to the jurisdiction of arbitrators, though he complains that no such jurisdiction exists.

It decides a question of right, namely, whether or not he is, by the terms of reference to arbitration, deprived of his right at common law to have the dispute decided in the ordinary way in a Court of law. It goes to jurisdiction and is not passed as an exercise of discretion.

Per *Chandavarkar* J.—When a submission to arbitration is being construed, a cardinal principle

Appeal-*Contd.*

4 Arbitration—*Contd*

to be applied is that by a submission to arbitration a party deprives himself of the right at common law to have the dispute to which the submission relates decided by a Court of law. It must therefore appear clearly from the terms of the submission that with reference to any point the party has so deprived himself.

The loss or damage by fire, which is insured against in a policy of insurance cannot include loss caused by deterioration of the property insured consequent on neglect (if any) of the Insurance Companies to take care of it, if they have taken possession. A loss so caused is not an inevitable or direct consequence of the mischief by fire. It is only where mischief arises from fire (in fire insurance cases) and from perils of the sea (in marine insurance cases) and the natural and almost inevitable consequence of that mischief is to create further mischievous results, that underwriters become responsible for the further mischief so incurred (1851). 6 Ex 468 ref. to.

Per Batchelor, J.—The loss insured against is limited to the loss by fire (which includes the loss by water in extinguishing the fire) and cannot conveniently embrace all possible damages, however remote, which could, by ingenuity be traced up to some connection with the fire as the ultimate *cause sine qua non*. It is impossible to hold that damages arising from the alleged negligence of Insurance Companies while in possession are properly claimable in pursuance of the contract of insurance, for, whereas this contract refers only to loss by fire, those damages would arise from an origin totally different and wholly distinct and separable from the fire, namely, a neglect of some duty imposed on the Companies after the loss by fire or water had become an accomplished fact.

The Bombay fire Insurance Co. v Ahmed bhoy Habibhoy. 11 Bom L R 1= 1 Ind Cas 14=34 Bom 1.

265.—Arbitration—Act X of 1877, Section 522—Judgment in accordance with award-Appeal on ground that defendants did not consent to arbitration.

Held, that where the first Court has passed judgment in accordance with what purports to be an award of arbitrators. an appeal by the defendants on the ground that they did not consent to the arbitration is admissible.(PR 53 of 1880) cited.

Hussan Ali v Ghulam Mustafa Shah P R 33 of 1881.

Appeal-*Contd.*

4 Arbitration—*Contd.*

(5) ORDER REFUSING APPLICATION.

266.—Order refusing application—Civil Procedure Code 1859 s. 327.—No appeal lies against an order disallowing an application under s. 327 of Act VIII of 1859 to file an award. **Vyankatesh Ramchandra Jogekar v Balajerav Bin Anandrav** **1 B H C 184.**

Notes:—Ap, 8 B H C R 17; 7 Cal 490 Fol 2 B H C R 91; 3 Bom 18 Ref; 7 W R 401.

267.-Order refusing application-Civil Procedure Code, 1859, s. 327.

Application to file an award under s. 327 of Act VIII of 1859 should be made to the Court of the lowest grade competent to receive it, and no appeal lies to High Court from an order by a District Court confirming on appeal an order of a subordinate Court declining to file such an award. **Balkrishna Bhasakar Gupte. 2 B H C 96: 2nd Ed 91.**

268.—Order refusing application—Civil Procedure Code, 1859 s. 327—*Quære.*

Does an appeal lie from the refusal of a Civil Court under Act VIII of 1859, s. 327, to order an award to be filed? **Raj Chunder Roy Chowdhry v Brojendro Coomar Roy Chowdhry 21 W R 182.**

Notes:—Ref: 10 Cal 74.

(6) C P C S 327 (1859)

269.—Denial of arbitration proceedings-Civ Pro 1859. s. 327].

Per Spankie, *J.*—This section is intended to provide for those cases only in which the reference to arbitration is admitted and an award has been made. Where the defendant denies referring any dispute to arbitration or that an award has been made between himself and the plaintiff, sufficient cause is shown why the award should not be filed. The plaintiff should be left to bring a regular suit for the enforcement of the award. **Husaini Bibi v Mohsin Khan. 1 All 156.**

Notes:—Ref: 17 All 21 F B. Dist 3 All 427

(7) ORDER REFUSING TO FILE AWARD

270.—C P C ss: 525, 588-Appeal Arbitration Refusal to file award,

There is no appeal from an order rejecting an appliction to file an award under section 525 of the Civil Procedure Code see B L R (F B), 505; 8 B L R 315 doubted Per Curiam:-It is desirable that there should be an appeal from an order made upon objections taken under sections 520 and 521 to the filing of an award under section 525 of the Civil Procedure Code.

Shree Ram Chowdhry v Denobundhoo Chowdhry **7 Cal 490=9 C L R 147.**

271.—S. 526—Private award—Order refusing to file such award—Appealability.

An order under s. 526 of the Code, refusing to file an award of arbitrators made out of Court, is appealable as a decree. 26 All 205, Diss 27 Mad 255 29 M 303 : 25 Cal 757 ; 33 Cal 787; 84 P R 1907 (F B) Foll; 25 P R 1907 (P C) at p 29; P R 1907 F. R. R **Mul Raj v Ladha Mal. 100 P R 1907= 17 P L R 1908.**

(7 (a)) Order directing award to be filed

271A.—Reference to arbitration without intervention of Court—Order of Assistant Collector, 1st Class, directing award to be filed—Whether appeal from such order lies to District Judge.

Held, that no appeal lies to the District Judge from an order of an Assistant Collector, first class, directing that an award made on a matter referred to arbitration without the intervention of the Court should be filed. **Gobardhan Prasad v Gur Prasad Ram,** **8 A. L J. 1090**

(7 b) Order to enforce award.

272.—Order to enforce award Civil Procedure Code, 1859, S. 327—

An appeal from an order made in execution of an arbitration award filed under the provisions of s. 327 of the Civil Procedure Code. **Vasudeb Vishnu v. Narayan Jugannath Dikshit 5 B H C 129**

Humutoollah Chowdhry v Herrun 13 W R 62

(7(C)) Order refusing to enforce illegal award

273.—Civil Procedure Code, 1859, s. 327,—

An order refusing to enforce an obviously illegal award of arbitrators under s. 327, Act VIII of 1859, is not a decree, and therefore not appealable. **Digamburee Dossee v Poornanand Dey** **7 W R 401**

Notes:—Ref: 8 W R 257.

Appeal-*Contd.*

4 Arbitration—*Contd.*

(7(D))Order enforcing award-Private award

274—An appeal lies from the order of a Court directing the enforcement of an award of arbitrators, when the matter was referred to arbitration without the intervention of a Court. **Anund Chunder Singh v Gopal Chunder Dass 3 W R 154.**

Lakshman Shivajl v Rama Esu 8 B H C 17

Notes—(W V D) Ex. 18 W R 77.

275—Private award—Civil Procedure Code 1859 ss. 325, 327.

When an award has been filed under the provisions of Section 327 of Act VIII of 1859. the judgment and decree based thereon are not appealable. **Vishnu Bhau Joshi v Ravji Bhau Joshi P. J. (1878) 180=3 Bom 18**

Notes—Dist: 3 All 427 Ref: 10 C W N 601= 2 C L J 153.

276—Quære—Whether an appeal lies against the order of the Court directing a private arbitration award to be filed and a decree to be passed in accordance therewith. 26 W R 10=3 I A 209 Ref. to **Nadiar Chand Shaha Bonik v. Gobind Chander Shaha Bonik 2 C L J 61**

Notes—10 C W N 601=2 C L J 153=33 Cal 757 F. B.

277—Sch. 11 r. 16 (1882 Ss 522, 525, 526) Arbitration award, private — Decree— Appeal. When a Court has ordered a private abitration award to be filed under S. 526 C. P. C. and has drawn up a decree in accordance with the award. no appeal lies against such decree except in so far as the decree may be in excess of or not in accordance with the award.

Quœre· Whether this rule is not limited to cases of misconduct and has any application when the cause shown against the filing of the award has denied the submission to arbitration or the genuineness of the award.

S. 526 should be read with S. 522,the provisions of which are, by implication made applicable to cases under the former section; the Court must proceed to give judgment according to the award and upon the judgment so given, a decree shall follow from which decree, no appeal lies except in so far as the decree is in excess of or not, in accordance with the award.

Appeal-*Contd.*

4 Arbitration—*Contd*

The decision of the Full-Bench in *Mahomed Wahiduddin v Hakiman* (2), in so far as it affirmed the decision in *Kali Prosanno Gosh v Rajani Kant Chatterjee* (3), has been over-ruled by the Privy Council in the case of *Ghulam Jilani v Muhammad Hussan* (4).

Semble, An order of refusal by a Court of first instance to file an award under S. 526 C. P. is a decree against which an appeal lies.

The bar as to appeal provided by S. 525 C. P. C. is applicable only when a decree has been made in accordance with the award by the Court of first instance and not when a similar decree has been made by a Court of appeal in reversal of the order of the first Court setting aside the award.

Chintamoni Aditya v Haladhar Maiti 2 C L J 153—10 C W N 601.

278—Cl. the Second Schedule r.21 (1882 S. 526 —Appeal against order enforcing private award. grounds of—Award—Arbitrator's misconduct—Decree. *Held* that, an order under S. 526, C P. Code, 1882, directing an award to be filed and ordering its enforcement, is a decree within the meaning of the Code.

Held, further, that in such a case, no appeal will lie, except in so far as the decree is in excess of or not in accordance with the award. The question whether arbitrators have been guilty of misconduct cannot be considered in such an appeal. 29 Cal 167 and 12 C W N 585. Ref.

Chauhraja Bakhsh v. Sri Narayan Singh. 12 O C 40=1 Ind Cas 693.

(a) C. P. C. S. 525, (1877)

279—Civil Procedure Code, S. 525 — Filing private award in Court— Amendment of plaint. Ch. XXXVII of Civil Procedure Code, 1877.—

By the amendment of the plaint, a case under S. 525 of Act X of 1877 was taken out of the scope of Chapter XXXVII of that Act. *Held*,that, this being so, the decree of the Court of first instance was appealable. **Juala Singh v. Narain Das, 3 All 54.**

(8) ORDER REFUSING TO ENFORCE AWARD.

280—Order refusing to enforce award—Civil Procedure Code, 1877, Ss. 2, 540—Filing private award in Court—Order rejecting application,—

Appeal-*Contd.*

4 Arbitration—*Contd.*

Per Spankie, J.—An order refusing an application to file a private award in Court is appealable as a decree. 3 Agra 353. 1 All 156, impugned and distinguished. 3 Bom 18, distinguished. Per Stuart, C J.—An order refusing an application to file a private award in Court on grounds not mentioned in Ss. 520 and 521, is a decree and appealable as such. **Janki Tewari v. Gayan Tewari, 3 All 427.**

Notes:—Dist 5 All 333 F B; 6 All 186 F B.

(9) ORDER ENFORCING AWARD.

281—Order enforcing award-Civil Procedure Code 1859, S. 327.—

Plaintiff sued for confirmation of an award delivered by arbitrators appointed by agreement of parties to decide upon his claim to a share of ancestral property. Defendant objected that the award was illegal, principally upon the ground that he had cancelled his submission some time before the award was passed The District Judge ordered the award to be filed, on the authority of 3 Mad 183, affirmed in 12 Moore's I A 112. The defendant appealed. *Held*. that no appeal lay. **Santanja v. Ramaraya, 7 M H C 257.**

Notes:—Ref 8 M H C R 46.

282—Act VIII of 1859, Section 327.—

An appeal lies from an order under Section 327, Civil Procedure Code (relating to filing in Court an award when the matter was referred to arbitration without the intervention of the Court), if there has been no reference to arbitration of the matter determined or if the award does not follow the reference, unless the parties have ratified the award as made. *Query* — Whether an appeal lies when there has been a reference and an award on such reference.

The exercise of the powers conferred by Section 327, Civil Procedure Code, is a matter in the discretion of the Court, and a Court should refuse to exercise the powers and refer the applicant to a regular suit, when there is a serious dispute as to the fact of a submission having been made or an award delivered.— **Chittu Mal v. Bhai Gopal Singh, P R 93 of 1876.**

(10) ARBITRATION AWARD.

283—Arbitration award—Act VIII of 1859, S. 325.—An appeal lies from an order enforcing execution of an arbitration award or from a decree under S. 325 of Act VIII of 1859. **Wali Alam v. Bibi Nasran, 3 B L R Ap 104 =12 W R 50.**

Notes:—Diss 8 B L R 315 F B.

284—Order refusing to file an award—Civil Procedure Code 1877, S. 622.—

An application was made under S. 525 to file an award which was rejected. The order of refusal is non-appealable as it is an order and not a decree. But the High Court can consider this matter under S. 622. **Mana Vikrama v. Malicherry Krispean Nambudri, Maharaja of Calicut, 3 Mad 68.**

Notes:—Con: 22 Mad 299; 7 M L J 10. Fol: 27 All 526=2 A L J 416=(1905) W N 86. Over: 27 Mad 255 F B; 14 M L J 356. Ref: 2 C L J 80; 7 Bom 316; 341 F B.

285—Order enforcing award—Final order—Civil Procedure Code, 1877, Ss. 522, 526.—

The power to file an award includes the power to enquire if there was a submission to arbitration, and this question is concluded by the decree, which is final under Ss. 526 and 522 of the Code of Civil Procedure. **Micharaya Guruvu v. Sadasiva Parama Guruvu. 4 Mad 319.**

Notes.—Ap: 20 Mad 89. Con: 18 Mad 423 F B. Ref: 16 Cal 482; 22 Mad 172; 20 Bom 596.

286—Arbitration—Award—Appeal.—

Where plaintiff applied that a private award by arbitrators might be enforced, and the first Court gave judgment in exact accordance with the award, it was held that the judgment was final, and that the lower appellate Court acted without jurisdiction in entertaining an appeal therefrom.

Madhusudan Das v. Adaita Charan Das, 8 B L R 316, Note=12 W R 85.

Notes—Ref: 10 Cal 74,=13 C L R 14.

(12) CURTAILMENT OF TIME FOR TAKING OBJECTION TO AWARD.

287—Review of an order curtailing time for taking objections to an award. The order curtailing time allowed to take objections to an award is not appealable but it can be reviewed by the Court of the first instance. **Monji Premji Set v. Maliyakel Koyassan Koya Haji, 3 Mad 59.**

Appeal-*Contd.*

4 Arbitration—*Contd.*

(13) ORDER SETTING ASIDE AWARD.

288—Order setting aside award—Misconduct of arbitrators.—

An order of a Civil Court setting aside an arbitration award, being an interlocutory order, is not open to an appeal immediately; but when the Court sets aside the award on the ground of misconduct on the part of the arbitrator, and, after hearing the case on its merits, makes its decree in favour of the plaintiff, it is competent to the defendant to appeal against that decree.

Mathooranath Tewaree v. Brindabun Tewaree, 14 W R 327.

Notes:—Fol: 11 Cal 172. Ref: 12 C L R 564; 7 Cal 490; 20 Mad 202; 18 M L J 228=31 Mad 345.

289—Objection to award-Misconduct of arbitrators-Omission to inquire-Finality of decree.—

A Court being incompetent to pass judgment without inquiring into an objection based on the misconduct of the arbitrators, a judgment passed without such enquiry may be appealed against.

Mussammat Fatteh v. Fattoo, 184 P R 1882.

290—Setting aside award—Civil Procedure Code, 1859, S. 313.—

A regular and not a summary appeal lies to set aside an award of arbitrators passed under S. 313, Act VIII of 1859. **Ram Coomar Chowdhry v. Nobin Chunder Chowdhry, W R 1864, Mis 33.**

291—Objection to award—Award set aside—Appeal.—

Held, that no appeal lies from an order under S. 521 of the Code of Civil Procedure setting aside an award. (8 C W N 390 Fol: 10 All 8 Overr.) **Ganga Prasad v. Kura, 1906 A W N 64=3 A L J 168=28 All 408 also 1907 A W N 110=4 A L J 256.**

292—Award — Second appeal — Decree in accordance with appellate Court.—

A second appeal lies from a decree of a lower appellate Court made in accordance with an award by an arbitrator to whom the case had been referred by the first Court and whose award the first Court had set aside. 10 All 8; 12 W R 93 Fol: 12 C W N 564 dissented from.

Shyama Charan Pramanik v. Proshad Durwan, 8 C W N 390.

Appeal-*Contd.*

4 Arbitration—*Contd.*

(14) ORDER DIRECTING SUBMISSION TO BE FILED.

293—Order directing submission to be filed—Civil Procedure Code, 1859, S. 326.—

No appeal lies from an order directing that an agreement to submit matters in dispute to arbitration should be filed under the provisions of S. 326 of the Civil Procedure Code.

Pestonjee Nusserwanjee v. Maneckjee and Co. 3 M H C R 183.

Affirmed on appeal by Privy Council.

12 Moore's I A 112.

Notes:—See 12 M I A 112.

294—Civil Procedure Code, Sections 326, 327—Intervention of Collector—Sanction of Civil Court—Appeal.—

Held, that though it is open to either the decree-holder or the judgment-debtor to appeal to a superior Civil Court from the order of a Civil Court authorising or refusing to authorise the Collector to make an arrangement under Section 326 of the Code, no appeal lies to the superior Civil Court from any order made by the Collector when acting under Section 326 of the Code.— **Darya Singh v. Mahtab, 25 P R 1894.**

295.—Act VIII of 1859 S. 326.

An appeal does not lie from an order passed under s. 326, Civil Procedure Code—(relating to filing in Court agreements to refer.)

Peer Buksh v. Jumal. P R 80 of 1870

(15) ORDER REFUSING TO FILE SUBMISSION.

296—Order refusing to file submission—Civil Procedure Code 1859 s. 326—

An order disallowing an application under s. 326 of the Code of Civil Procedure, 1859, is unappealable, **Bhugvan v Purmeshree 5 N. W. 179.**

(16) APPLICATION TO FILE COMPROMISE

297—Compromise application to file—Decree on compromise—Withdrawal s. 375 of the Civil Procedure Code (1882) A suit was brought against several defendants one of whom was an infant. A compromise was entered into by the adult parties and they applied to file the compromise. The appli-

Appeal-*Contd.*

4 Arbitration—*Contd.*

cation which contained the terms of compromise also stated that the court would also be prayed by the guardian of the infant defendant to carry out the compromise on his own behalf. Ten days after the filing of the application of compromise the plaintiff and first defendant applied to the court, withdrawing from the compromise and praying that the suit should proceed. The second defendant presented also another application to have the compromise recorded and a decree made in its terms. The Court made a decree in accordance with the prayer of the second defendant's application. On the first defendant's appeal held that an appeal lay, s. 375 of the Civil Procedure merely covering cases in which all parties consent to have the terms entered into carried out and judgment entered up. 7 Bom 340 questioned.

Hara Sundari Debi v Kumar Dukhinessur Malia 11 Cal 250

Notes—Diss 16 Bom 202, Disap 20 Bom 304 Con 24 Cal 908 F B. Ref 9 Mad 103.

(16A) ORDER REFUSING TO SET ASIDE AWARD OBJECTED TO

298—C. P. C. (Act V of 1908), S. 2—Arbitration—Award—Objections against-Order disposing of objections—Appeal—Revision—Order—Decree.

The plaintiff preferred objections to an award in a case referred to arbitration through Court. The Court, by an order dated the 15th February, 1910 having considered the objections, passed an order in these terms "I refuse to set aside this award". The case was adjourned to several dates for arguments on other aspects of the dispute, but before any order was passed the plaintiff appealed against the order refusing to set aside the award. In reply to the plea that the order was not appealable it was contended that the order was a 'decree' within the meaning of S. 2, cl. 2 of the C. P. C, and it was also urged that the appeal may be treated as a revision.

Held, that the contention was not valid and an appeal was not competent against the order ; for it could not be held to be a decree.

Held, also that the appeal could not be treated as a revision ; for where in arbitration proceedings an appeal is not allowed, revision would be still more objectionable. 25 P. R. 1902. (P C), Foll.

Narpat Rai v. Devi Das, 1 P L R 1911 = 9 Ind. Cas. 385=12 P W R 1911.

Appeal-*Contd.*

4 Arbitration—*Contd.*

(16B)ORDER FILING AN AWARD MADE IN ARBITRATION WITHOUT INTERVENTION OF COURT.

299—300—S. 104 (f) Sch. II cl. 21 (1) and (2)—Appeal—Order filing an award—Decree based thereon—Provisions of the Code, whether antagonistic—Intention of Legislature.

An appeal lies, under S. 104 (f) of the Code of 1908, form an order filing an award made in an arbitration without the intervention of the Court, in spite of the fact that the Court has, under cl. 21 (1) of the second Schedule to the Code, proceeded to pronounce judgment according to the award.

Per Reid, C. J. and Kensington, J.:—The language of S. 104 (f) is very clear and the fact that a later provision of the Code, cl 21 (2), Sch. II, bars an appeal from a decree based on an award does not cancel the earlier provision. The two provisions of the Code are not antagonistic. If the order filing an award is set aside, there is no award on which judgment and decree can be based. The absence of any ground, such as is mentioned or referred to in cl. 14 or cl. 15 of Sch. II, is a condition precedent to passing an order filing the award.

Per Rattigan, J.:—The two provisions of the Code are all for practical purposes in direct conflict. The result of allowing an appeal from order filing an award is tantamount to allowing an appeal from the decree based on the award. The intention of the Legislature expressed in cl. 21 (2) Sch. II, is to all intents and purposes nullified by the provision in cl. (f) of S. 104.

The intention of the Legislature is to allow an appeal from the order filing an award merely when such order dealt with the objection that the matter had not been referred to arbitration or that no award had in fact been passed. References:— 33 Cal. 727=3 C L J 450=10 C W N 609, 27 P R 1910 Cr.=69 P L R 1910=22 P W R 1910 Cr=6 Ind Cas 736; 1 P R 1908 (FB)=58 P W R 1907 Dist **Ram Ditti v Amar Singh 172 P L R 1911.**

(16C) DECISION OF COURT IN SUPPERCESSION PROCEEDINGS

301—The parties to a suit applied for a reference to arbitration, and provided that in the event of a difference of opinion between the arbitrators, an umpire should be appointed, either by the arbitra-

Appeal-*Contd.*

4 Arbitration—*Contd.*

tors themselves, or by the Court ; or that the Court itself might decide the case. The arbitrators not agreeing, the Court adopted the last alternative. *Held*, that under the circumstances, the decision was not final under Section316, Act VIII of 1859. The result of theproceedings was that the arbitration was inoperative, and the decision passed by the Court was open to appeal. **Kanh Singh v Ruttun Singh P R 96 of 1868.**

(16D) PROPRIETY OF DECISION SETTING ASIDE AWARD.

302—Arbitration-Award set aside by Munsiff -Decision on the merits—Appeal—Award restored by the District Judge jurisdiction.

Held that, on appeal the District Judge can go behind the decision of the Munsiff and to decide as to the propriety or otherwise of his decision setting aside an award. (3 All 636; 5 All 293; 11 Cal 172; 14 W R 327; 8 C W N 392; 26 Bom 551; 22 Mad 202 Fol; 28 All 408, 4 A L J 256 Diss.

K. Achuthayya v N S Thimmayya. 3 M L T 315=18 M L J 228=31 Mad 345.

(16E) DECREE IN THE NATURE OF AWARD.

303-305—Appeal—Decree in the nature of award—Case referred to decision of Court. both parties agreeing to abide by same.

Where both parties to a suit referred the matter in dispute between them to the Court and agreed to be bound by the decision of the Court and agreed not to prefer an appeal.

Held, that no appeal lay from the decree, the decision of the Court being in the nature of an arbitrator's award; that the Court had no power to review the same; and that the lower appellate Court having remanded the matter on appeal, its order was set aside as being made without jurisdiction. (23 Bom 752, followed.) **Sita Nath v Baikuntha Nath 9 Ind Cas 296.**

(16F) ORDER DIRECTING PROPERTY TO BE TAKEN OUT OF GUARDIAN'S CUSTODY.

306—. 46—Removal of guardian-Consent of guardian—Arbitrator's power—District Judge's jurisdiction, *extra cursum curiæ*-Appeal:

Appeal-*Contd.*

4 Arbitration—*Contd.*

An arbitrator has no power to take property out of the custody of a guardian appointed by Court and placing it in charge of another, or to declare a legally appointed guardian a nominal one. Nor has a District Judge, as such, jurisdiction to remove a guardian under the Guardians and Wards Act. The consent of the guardian cannot enable the Judge or the arbitrator to exercise such powers. A Court cannot, while acting *extra cursum curiæ*, do that which the parties cannot legally authorise an arbitrator to do. If it does, such acts or orders would not be regarded as those of an arbitrator merely because the parties had consented. Such order would therefore be appealable. [1 H L Sc 47, 1 H L Sc 70, L R 7 Ch 45 (1896) A C 136 ref to] **Inder Narain Singh v E E Adlan 8 C W N 37.**

(16G) JUDGMENT IN THE NATURE OF AWARD.

307—Arbitration -Suit part-heard—Agreement of parties to be bound by Court's decision after local inspection—Judgment of Court—Nature—Award-No review—No appeal—No second appeal—Power of High Court to revise-S. 622, C P C. 1882 (=S. 115, C P C., 1908).

Where, in a part-heard suit before a Munsif, both the parties agreed to be bound by any decision of the Court which it may arrive at after an inspection of the locality in dispute, and also agreed not to raise any objection to the same or to prefer an appeal, and where the Court, after making a local inspection, gave a certain judgment:

Held, that the Munsif's judgment was in the nature of an award, and that it was not open to the Munsif to alter that award when made or to review his decision.

Held, also, that no appeal lay to the District Judge and that the District Judge acted without jurisdiction when he entertained the appeal and made an order of remand.

Held, also, that no second appeal lay to the High Court but that the High Court was competent to interfere *suo motu* under S. 622, C P C., 1882 (=S. 115, C P C., 1908). (9 Cal 575, Ref: 23 Bom 752.) **Baikantha Nath Goswami v Sita Nath Goswami. 38 Cal 421.**

Appeal-*Contd.*

4 Arbitration—*Contd.*

(16H) FINALITY OF DECREE BASED ON AWARD.

308—Civil Procedure Code, Sections 25, 508 522—Withdrawal—Trial—Arbitration-Order of reference—Validity of award—Absence of reasons for award—Finality of decree based on award.

The suit out of which this appeal arose was instituted in the Court of Mr C., District Judge. After the issues had been settled, Mr C., on the representation of both parties, consented to act as an arbitrator. Application was then made to the Divisional Judge to withdraw the case from the District Court and to refer the same to Mr. C. for decision. The Divisional Judge referred "all matters in difference between the parties, irrespective of the issues drawn in the case," and Mr C., after inquiry, delivered the following award: "That the plaintiff's suit be dismissed and that the parties bear their own costs." Plaintiff then filed objections to the award, which were overruled, and judgment passed in accordance with the award. Plaintiff appealed to the Chief Court. It was contended on his behalf, (I) that withdrawals under Section 25, Civil Procedure Code, can only legally take place where the withdrawing Court intends to try the suit itself and not where the avowed object is to make over the case to an arbitrator for decision; (II) that the order of reference was materially defective as it did not specify the particular matter referred to the arbitrator (III) that the award was bad inasmuch as it assigned no reasons for, and gave no details of, the decision and (IV) that the objections on the ground of legal misconduct urged against the award in the original Court were valid.

Held (1) that a Court which withdraws a case for trial before itself under Section 25 of the Civil Procedure Code, may, after such withdrawal, proceed according to any of the recognized methods of procedure laid down in the Civil Procedure Code.

(2) That the reference to arbitration in the present case did not contravene the provisions of Section 508, Civil Procedure Code. as a reference of the whole matter in dispute between the parties in a particular case may be a reference of a particular matter within the meaning of the above section,

Appeal-*Contd.*

4 Arbitration—*Contd.*

(3) That the award was not bad in law because the arbitrator had not given his reasons for his decision or entered into details.

(4) That allegations of misconduct which have been duly heard and decided by a Court which has thereafter passed judgment in accordance with an award, cannot be re-opened on appeal to a higher Court, the decree which follows the judgment being final under Section 522, Civil Procedure Code. **Banarsi Das v Ram Kishen Das 167 P R 1889.**

(16. I) DISMISSAL OF SUIT ON MERITS IN SPITE OF SUBMISSION TO ARBITRATION.

309—Plaintiff sued in the Court of the Assistant Commissioner in June 1874, and before issues were framed the parties executed a submission to private arbitration. After this, in July 1874, the suit was transferred to the Deputy Commissioner with an amended plaint, the value of the claim being beyond the jurisdiction of the Assistant Commissioner. The suit was for immoveable property; and in the original plaint, plaintiff claimed possession; in the amended plaint, he claimed proprietary right. In August 1874, plaintiff applied to the Court to file the agreement under Section 326, Civil Procedure Code, or to refer the case under Section 312; this was objected to by the defendants, and the Court proceeded with the case, dismissing the suit on the merits From this plaintiff appealed to the Commissioner on the merits, making no allusion to the submission to arbitration. The appeal was dismissed, and then plaintiff appealed to the Chief Court, insisting that the case should have been referred to the arbitrators *Held* that, there was no ground of special appeal, and that the Chief Court could not revise the orders of the Courts below.

Chajju Mal v Kashi Ram. P R 57 of 1876.

(17) REVISION ARBITRATION

310—Arbitration—Award—Civ. Pro Code, Act XIV of 1882, ss. 520, 521, 522, 523, 524, 525 and 540—Revision—Distinction between ss. 526 and 523, C P C., as regards appeal.

An award was made by a private arbitration, appointed out of Court, in favour of N and S against S, M and D, and in favour of D against S, M. Then N, S and D applied under s. 525 C P C., to

Appeal -*Contd.*

4 Arbitration—*Contd.*

have the award filed in Court. S & M raised certain objections which were disallowed by the District Judge who ordered "the award to be filed and decree passed in accordance with the terms thereof". S & M appealed. At the hearing of the appeal two preliminary questions were raised: Whether an appeal lies against an order under s. 526, C P C., directing an award to be filed and if not, whether such an order is open to revision on the grounds urged in the appeal. *Held*, by the Full Bench unanimously that an appeal does not lie from an order under s. 526, C P C directing an awrrd to be filed, not from the decree passed in terms of the award as there is only one decree in the case, viz., the filing of the award and the consequences the decree being passed in terms of the award, flow from that order and no fresh order is required for those consequences to result but it is not so in proceedings under s. 523 C P C. *Held*, also, that no revision lies in such like cases on the grounds on which no appeal is allowed. *Held*, by the Division Bench that in the appeal no ground for interference on revision is shown. (84 P R 1901; 25 P R 1902; P C, 25 P R 1888 P C; 89 P R 1902 P C; 10 C W N 61 11 C. L J 153 Foll.; 33 Cal; 757; 27 All 526; 20 Mad 303 Diss.) **Shankar Mal v. Nathu Mal 58 P W R 1907** F B=1 P R 1908.

311—S. 104 sub-s 1 cl. (f), Second Schedule, S. 21—Order directing award to be filed appealable, but not decree following the award.

Where the District Judge orders that a certain award shall be filed, and gives the plaintiff a decree in accordance with that award, no appeal lies against the decree, *qua* decree under S. 21 of the Second Schedule. But an appeal lies from the order directing an award to be filed under S. 104 of the Code. In this case, therefore, though the appeal was filed as an appeal from the decree and the stamp is paid on that footing their Lordships treated it as an appeal against the order directing the award to be filed and overruled the preliminary objection.

Further, *held*, that, as there is no illegality apparent on the face of the award, and as the alleged irregularities were only the result of the informal character of the proceedings before the arbitrators, to which both parties consented, there is no ground for interference by the High Court. **Sita Ramiah v. Pitchayya 2 M W N (1911) 223.**

Appeal-*Contd.*

4 Arbitration—*Contd.*

(18) FINAL AWARD.

312—An appeal lies to the High Court under S 54 of the Land Acquisition Act, 1894, only from the final award of the Court No appeal lies from an award which merely determines the amount of the gross-sum payable as compensation, as preliminary to the further question to whom the amount so determined should be paid.

Ardeshir M Kharadi v. Assistant Collector of Poona (10 Bom L R 517).

(19) OBJECTIONS TO THE AWARD

313—Arbitration Act VIII of 1859 ss. 225, 320—Arbitrators—Objections.

A case remanded by the High Court was referred by the Zillah Judge to two arbitrators who went fully into the matters in dispute, and wrote and signed as their award, separate papers bearing different dates, which were filed in Court. The defendant then filed a petition of objections after which the Judge returned the papers to the arbitrators with an order that they should sign their award conjointly in a form which he prescribed. The award having been submitted, the Judge took up and disposed of the objections previously made, making a decree in accordance with the award. *Held* (1) that the two papers originally sent in were not an award, which under s. 320 Act VII of 1859 should be a single instrument complete in itself, and that the Judge was right in sending back the papers directing the arbitrators to sign their award conjointly and in the presence of each other; (2) that the objections made to the two papers were not objections to the award, and that under s. 325, the Judge had no power to pass judgment till all objections to the award had been fairly disposed of or within ten days after the submission of the award; (3) that an arbitrator has no right to allow documents entrusted to him by the Court, to be removed from the *nathi* by any one: and that when an award is returned to Court after remittal, it should be accompanied by all books, exhibits and proceedings pertaining to it.

Maharaja Jaimangal Sing v. Mohan Ram Marwari. 8 B L R 319 Note=8 B L R 130 Note=12 W R 397.

Appeal-*Contd.*

4 Arbitration—*Concld.*

(20) STATEMENT OF A SPECIAL CASE FOR THE OPINION OF THE COURT.

313 A—S. 104, Sch. II r. II—Indian Arbitration Act (IX of 1899) s. 10—Arbitrators—*Reference* to arbitration-Difference in opinion of arbitrators on a question of—Statement of a special case for the opinion of the Court— Appeal from the court's order.

The parties to a suit agreed to refer their disputes relating to the properties in suit to the arbitration of two persons; and a consent Judge's order was obtained. They further agreed to refer to the same arbitrators their disputes with regard to properties which were not the subject-matter of the suit. The agreements provided that, in case of disagreement between the arbitrators, which prevented them from making an award the matter in difference was to be referred to an umpire who should make the award. The two asbitrators differed on a question of law arising in the arbitration. There was no reference to an umpire. But the arbitrators each expressed his opinion on the question and referred it for opinion to the High court in the form of a special case under the C P C 1908 Sch. II r. II and the Indian Arbitration Act s.10. It was decided by the Chamber Judge. An appeal was preferred against his decision.

Held that no appeal lay since the special case was in no sense an award. There was no award which could be adopted by the Court by the mere expression of its opinion; but there was simply a statement of a question of law for the opinion of the Court. The case was not therefore, one which fell under r. 11 of the second schedule of the C P C 1908 but it fell under S.10 of the Indian Arbitration Act, in so far as it related to the second agreement. **Purshotumdas Ramgopal v Ramgopal Harila** 12 Bom L R 852

5 Bengal Acts.

(1) CHOTA NAGPUR LAND LORD AND TENANT PROCEDURE ACT (BENGAL ACT I OF 1879) SS. 37, (CL 4), 39, 137, & 139.

314—Chota Nagpur Landlord & and Tenant Procedure Act (Bengal Act I of 1879) Ss 37 cl (4) 39, 137, and 139—Rent—Suit—Appeal in cases where the aggregate amount is above Rs. 100.

An appeal from a decree passed by the Deputy Collector in a suit for rent, where the total amount of rent claimed under S. 39 of Bengal

Appeal-*Contd.*

5 Bengal Acts—*Concld.*

Act I of 1879 is above Rs. 100 would lie to the Judicial Commissioner and not to the Deputy Commissioner. **Priag Nath Lah Deo v Mura Munda.** 24 Calc 249= 1 C W N 181

Notes.—Over: 27 Cal 508 F B.

(2) SS 37, 137, 144.

315—Ss. 37, 137—Suit for ejectment and arrears of rent—Suits under Beng. Act I of 1879 for arrears of rent and ejectment, for non-payment of arrears of rent are not cases within S. 157 of the same Act and so a second appeal lies to the High Court. **Ramjan Khan v Raman Chamar.** 10 Cal 89

Dissented from by the Full *Bench* in. **Khedu Mahto v Buddun Mahto. 27 Cal 508**

316—Ss. 137, 144—Rent suit—Intervenor—Civil Procedure Code (1882) S. 622, 584.

The decision of a Deputy Collector as to whether intervenor under S. 87, Act I of 1874 (B C) had been actually and in good faith receiving and enjoying rent before and up to the time of the suit, is a decision upon the question whether the intervenor is entitled to collect rent; and therefore it is a decision upon a question relating to some interest in land as between parties conflicting claims thereto, and the appeal from the judgment of the Deputy Collector lies to the Judicial Commissioner under S. 144. It was further held, that an appeal lay to the High Court from the judgment of the judicial Commissioner and therefore S. 622 Civil Procedure Code was not applicable. **Lall Bhim Singh v Guman Ghanjhu.** 1 C W N 341.

6 Bombay Acts.

(1) BOMBAY CIVIL COURTS ACT SS. 8, 26, 36.

317—Bombay Civil Courts Act (XIV of 1869) ss. 8 and 26—Suit for account and for balance that may be found due.

The plaintiffs sued for an account of all the business done by the defendants as their commission agents from 1854 to 1867, and prayed that whatever was found due might be awarded with interest. The plaintiffs valued the relief sought approximately at Rs.510, and this was the only valuation stated in the plaint. The suit was filed in the Court of a first class Subordinate Judge, who rejected the plaintiff's claim. Against this decision the plaintiff's preferred an appeal

Appeal-*Contd.*

6 Bombay Acts—*Contd.*

to the High Court:-*Held* that, as the approximate amount of the claim was stated in the plaint to be Rs 510, that must be taken to be the value of the subject matter of the suit for purposes of jurisdiction. The appeal, therefore, lay under ss 8 and 26 of Act XIV of 1869, not to the High Court, but of the District Court. **Khushalchand Mulchandv Nagindas Motichand.12 Bom 675**

318—S. 36—Valuation of suit—Jurisdiction.

Where a suit wherein the subject-matter exceeded Rs 5000, was instituted in the Court of a Principal Sadr Amin but decided by a Subordinate Judge, first class, appointed under the Bombay Civil Courts Act XIV of 1869.—It was held that an appeal lay direct to the High Court under s. 26 of the Act. **Rayasangji Shivsangji v Gulam Rasul. 3 B H C 286.**

(A) APPLICATION BY CREDITOR FOR LESS THAN RS 5000 IN SUIT FOR ABOVE THAT AMOUNT.

319—Application by creditor for less than Rs. 5,000 in suit for above that amount.

Although the applicant, to have a sale set aside, was creditor for a sum less than Rs.5,000, still as the sale took place in a suit for a sum above Rs.5,000, an appeal lay to the High Court **Krishnarav Venkatesh v Vasudev Anant 11 B H C 15**

Notes:—Ap: 15 Cal 488 F B. Appl: 8 Cal 367. Ref. 10 C L R 441 ; 20 Cal 418 , 29 Cal 548.

(B) SUIT FOR DECLARATION OF RIGHT TO PROPERTY UNDER ATTACHMENT.

320—Suit for declaration of right to property under attachment.

In a suit for a declaration that the plaintiff had a right of property and possession in a certain house under attachment, being in effect suit for the removal of the attachment.—*Held*, that the judgment-debt in respect of which the house was attached being less than Rs.5,000, no appeal lay to the High Court. **Motichand Jaichand v Dadabhai Pestonji. 11 B H C 186**

Notes—Dist: 2 All 63 ; Ex : 4 Bom 515 F B. Ref: 4 Mad 131 ; 14 Bom 627.

(C) ADMINISTRATION SUIT

321—Administration suit—Suit filed in second class Subordinate Judge's Court—Decree in such a suit—Appeal from such decree to District Court.

The plaintiff filed an administration suit in the Court of a Subordinate Judge of the second class, valuing the relief claimed at Rs. 150. The Subordinate Judge found that the property in suit was worth over a lakh of rupees, that the liabilities came to Rs 5,729, and that the defendant was indebted to the estate in the sum of Rs.15,199. He drew up a preliminary decree, directing (*inter alia*) that the defendant should pay this amount into Court within two weeks. Against this order the defendant appealed to the District Court. The District Judge returned the appeal for presentation to the High Court on the ground that the subject-matter exceeded Rs. 5,000. *Held*, reversing the order of the District Judge, that the appeal lay to the District Court. **Shet Kavasji Mancherji v Dhinshaji Mancherji. 22 Bom 963**

(2) BOM MUNCIPAL ACT SS. 298, 299

322—Bombay Muncipal Act 9 Bombay Act (III of 1888), ss. 298, 299, and 301-Order of Chief Judge of Small Cause Court granting compensation for land—Act XII of 1888, s. 3.

An appeal lies to the High Court from a decision of the Chief Judge of the Small Cause Court of Bombay granting compensation to the owner of land taken by the Municipality in a case of a set-back under the Municipal Act, III of 1885, ss 298, 299, and 301. **Municipal Commissioner for the City of Bombay v Abdul Huq. 18 Bom 184.**

Notes:—Ref. 10 Bom L R 907

(7) Certificate of administration Acts XXVII of 1860 and VII 1889.

(1) ACT XXVII OF 1860 & XIX of 1841

323—Act XXVII of 1860 and Act XIX of 1841-Order granting certificate of possession.

The order granting a certificate under Act XXVII of 1860 and directing possession to be given to the certificate-holder under Act XIX of 1841, held not to be open to appeal or review.

Jusoda Koonwar v Guree Byjnath Pershad 1 Ind Jur N S 365

324—Orders under Act XXVII of 1860.

Held that an appeal from the order of a Deputy Commissioner granting a certificate under Act

Appeal-*Contd.*

7 Certificate of administration Act-*Contd.*

XXVII of 1860 lies to the Chief Court, and not to the Commissioner.—

P R 50 of 1868. But *held*, after the passing of the Punjab Appeals Act (VII of 1868) and following Book Circular No IX of 1869 that such appeal lies to the Commissioner. **Mool Chund v Lal Chund. P R 50 of 1871.**

(2) ACT XXVII OF 1860

325—Act XXVII of 1860-Order refusing to grant certificate under Act XXVII of 1860. **Vishvanath Hari 7 B H C A C 71**

326—Order refusing to grant certificate under Act XXVII of 1860--*Held*, that an appeal lies to the Chief Court from an order refusing to grant a certificate under Act XXVII of 1860 to any of the contending claimants. **Mussammat Gujri v Natha Singh. P R 117 of 1881.**

Notes:—Overr: 103 P R 1888 F B. Fol: 58 P R 1883 . Cited: 78 P R 1886

327—Act XXVII of 1860—Appeal from order refusing to grant certificate.—*Held* by the Full Bench that no appeal lies from an order of a District Judge under Act XXVII of 1860 refusing after due enquiry, to grant a certificate of administration to any claimant. (117 P R 1881 58 P R 1883), overruled. 78 P R 1886). cited. **Ram Chand v Mussammat Rukman Devi. 103 P R 1888 F B**

328—Act XXVII of 1860. ss. 3, 6—Appeal from order refusing to grant certificate.

Quære, whether an appeal lies from an order refusing a certificate under Act XXVII of 1860 (P R 117 of 1881,) and (58 P R 1883,) cited. **Muzaffar Hamid v Mussammat Rahiman P R 78 of 1886**

Notes—cited: 103 P R 1888 F B.

329—Act XXVII of 1860 S 3—Appeal from order refusing to grant certificate.

Held, following (P R 117 of 1881,), that an appeal lies from an order refusing to grant a certificate under Act XXVII of 1860 to any of the contending claimants. **Baga Singh v Khera P R 58 of 1883**

(3)ORDER REFUSING TO RECALL CERTIFICATE

330-Appeal-Certificate under Act XXVII of 1860. Order refusing to recall, not appealable.

Appeal-*Contd.*

7 Certificate of administration Act-*Contd.*

There is no appeal from an order by a District Judge refusing to recall a certificate granted under Act XXVII of 1860. **Nanuk Pershad v Lalla Nitya Lall 6 Cal 40=6 C L R 388**

331—Act XXVII of 1860 Ss. 3 6—Appeal from order granting certificate.—

No appeal lies against an order granting a certificate under S. 3 of Act XXVII of 1860, where the certificate has been granted before the appeal was filed: under S. 6 of the Act an appeal only lies to suspend the granting of the certificate; after it has been granted the only course open to the objector is a petition for a fresh certificate. **Makhan Mal v. Mussammat Prem Kor P R 76 of 1881,**

Followed in **Mussammat Premi v Wadhawa Singh P R. 34 of 1885,**

Cited under Certificate to Collect Debts. 2

(4) ORDER AS TO FORM OF CERTIFICATE

332—Order as to form of certificate—There are no general words in any part of Act XXVII of 1860 declaring that orders made by the Zillah Court under that Act as to the form of the certificate shall be subject to appeal to a High Court. **Baneemadhub Mookerjee v Nilambur Banerjee 8 W. R. 376.**

Notes—Fol: 24 W R 363. Ref: 1 Cal 127.

(5) CASE TRANSFERRED UNDER ACT XVI OF 1866 S. 19.

333 Case transferred under Act XVI of 1868, S. 19.—Where an application for a certificate under Act XXVII of 1860 has been transferred by the High Court, in the exercise of the power vested in it by s. 19, Act XVI of 1868, from the file of a Judge to that of a Subordinate Judge, the order of the latter is appealable to the Court of the Zillah Judge, and only specially appealable to the High Court. **Fuzl Hossein v Tussuduck Ali Khan 13 W. R. 395**

(6) ENQUIRY OR OMISSION TO MAKE ENQUIRY.

334—Enquiry or omission to make enquiry.

An appeal lies from the result of an enquiry or omission to make an enquiry under Act XXVII of 1860. **Tarinee Churn Brohmo v Roma Soonduree Dossee. 20 W. R 312**

Notes—See 1 Cal 128 N.

Appeal-*Contd.*

7 Certificate of administration Act-*Contd.*

(7) DEPOSIT OF SECURITY BY PERSON ENTITLED TO A CERTIFICATE.

335—Deposit of security by person entitled to a certificate.—No appeal lies under Act XXVII of 1860 on a question of the deposit of security by a person who has been declared entitled to a certificate under the Act. **Monmohinee Dassee v Khetter Gopal Dey** **1 Cal 127**
24 W R 362

Rukmin **1 All 287**

Notes—Fol: 1 All 287; 3 All 304 Ref. 20 Cal 245; 19 Mad 245; 5 M L J 36.

(8) Ss. 5-6 CERTIFICATE FOR COLLECTION OF DEBTS.

336—Ss. 5, 6-Certificate for collection of debts—No appeal impugning the order of a District Court requiring security from the person to whom it has granted a certificate under Act XXVII of 1860 lies under that Act to the High Court. I All 287 followed. **Paddo Sundari Dasi.** **3 All 304.**

Raj Mohinee Chowdhrani v Dino Bundhoo Chowdhry. **17 W R 566**

337—Act XXVII of 1860, Section 5—Appeal from order to find security—

Held that no appeal lies from an order to find security under Section 5 of Act XXVII of 1860—**Maya Das v Crown** **38 P R 1888**

(9) S. 6. ORDER FOR SECURITY.

338—S. 6—Order for security.—An appeal will lie under s. 6 of Act XXVII of 1860 merely for the purpose of varying the Judge's order by reducing the amount of security required by him from the party declared entitled to have the certificate. When an appeal has been properly instituted under s. 6, it has been ruled that the Court may alter or vary the Judge's order with respect to security. **Soonea v Ram Suha** **2 N W 146.**

Notes—Fol; I All 287; 3 All 304.

(10) FRESH CERTIFICATE.

339—The Fresh certificate referred to in s. 6 of Act XXVII of 1860 means a certificate granted to a person other than the person to whom the first certificate was granted. **Naurangi Kunwar v Raghubansi Kunwar** **9 All 231.**

See Gangia v Rangi Singh. **9 All 173.**

Appeal-*Contd.*

7 Certificate of administration Act-*Contd.*

(11) ORDER OF DISTRICT JUDGE AS TO SECURITY.

340—Security insufficient — order of the District Judge—Succession (Act X of 1865) S. 263 There is no appeal against an order made, either in pursuance of the directions of the High Court or otherwise by a District Judge as to security, while granting a certificate of administration on the ground of the insufficiency of such security. 1 Cal 127 referred to.

Lucas v. Lucas, **20 Cal 245.**

(12) ACT VII OF 1889.

341—Act VII of 1889—Portion of property held as security sold—Order to furnish fresh security.—

An order by which a certificate holder under Act XXVII of 1860 was directed to furnish security to the extent to which the security originally furnished had been diminished by the sale of a part of the property, is not an order from which an appeal would lie either under Act XXVII of 1860 or Act VII of 1889. **Alta Soondari Dasi v. Srinath Saha,** **20 Cal 641.**

(13) Ss. 6 AND 19-ORDER FOR SECURITY ON GRANT OF CERTIFICATE.

342—**Ss. 6 and 19**—Order for security on grant of certificate.—

Where a minor petitioner represented by the Court of Wards applied for a succession certificate under Act VII of 1889, and the District Court granted the certificate, but ordered security to be given by the Courts of Wards:—*Held*, that no appeal lay from the order requiring security. **Rama Reddi v. Papi Reddi,** **19 Mad 199.**

(13A) CERTIFICATE OF ADMINISTRATION.

342A—Succession Certificate Act VII of 1889 Ss. 7 and 19—Right of.

An appeal lies against an order under section 19 and not under section 7 of Act VII of 1889. 19 Mad 199 and 20 Mad 442 Ref:

Kunjunni Nair v. Elaya Nair, **7 M L T 246=6 Ind Cas 499.**

Appeal-*Contd.*

7 Certificate of administration Act-*Contd*,

(14) SS. 9 & 10—ORDER FOR ISSUE OF CERTIFICATE SUBJECT TO SECURITY BEING GIVEN.

343—Ss. 9 and 10—Order for issue of certificate subject to security being given.—

On a contested application for a succession certificate under Act VII of 1889, an order was made for the issue of the certificate on security being furnished by the applicant. The opposite party preferred an appeal against the order:—*Held*, that the appeal was maintainable.

Ariya Pillai v. Thangammal, 20 Mad 442.

Notes:—Not Fol: 26 All 173.

(15) SS. 9 & 19—ORDER GRANTING CERTIFICATE CONDITIONAL ON THE FILING OF SECURITY.

344—Succession Certificate Act, Ss. 9, 19—Conditional grant.—

An order on an application for a certificate of succession requiring security as a condition precedent to the granting of the certificate is not an order "granting, refusing or revoking a certificate" and, not being such, no appeal will lie against it. **Bhagwani v. Manni Lal, 13 All 214 =1891 W N 45=also 1890 W N 198.**

Notes:—Diss: 25 Cal 320; 20 Mad 442: 5 M L J 28. Fol: 2 A L J 606; 19 Bom 790; 26 All 173.

345.—Succession Certificate Act VII of 1889, Secs. 9 and 19—Order granting certificate by the applicant's furnishing security—No appeal from such order—Practice— Procedure — Discretion—Jurisdiction—Civil Procedure Code Act XIV of 1882, Sec. 622—Extraordinary jurisdiction.

The widow of a deceased person having applied for a certificate under the Succession Certificate Act VII of 1889, the Judge ordered the certificate to issue on the applicant's furnishing security under Sec. 9 of the Act.

Held, that such an order was not an order "granting, refusing or revoking a certificate" within the meaning of Sec. 19 of the Act, and was, therefore, not appealable. 18 All 214 followed, **Bai Devkore v. Lalchand Jivandas. P J 1894, p. 377=19 Bom 790.**

Notes:—Fol: 26 All 173.

345A.—S. 19—Appeal—Order granting certificate conditional on furnishing security not appealable.

Appeal-*Contd.*

7 Certificate of administration Act-*Contd.*

Where a certificate is granted conditional on the applicant's furnishing security, no appeal lies under s. 19 from such order. 13 All 214; 26 All 214; 173 Foll.—Per Richards J (dubitante) where the order of the District Court grants the applicant the right to obtain certificate on the furnishing of security but no time is fixed within which it should be furnished nor the consequence that should follow upon failure to do so set forth, the order falls within s. 19 of the Act. The order which the Legislature intended to be appealable was the decision of the court as to who was or was not the proper person to be granted a certificate and not the question whether or not that person should within definite or indefinite period furnish security. **Gauri Dutt v Masammat 2 A L J 606.**

345B.—S. 19—Appeal—Agent to the Governor of Vijagapatam-General clauses.

An appeal lies under s. 19 of the Succession Certificate Act from the order of the Agent to the Governor of Vijagapatam. (18 Mad 227 Diss.)

Babubalendrani Guruvaraju v Babubalendrani Chandrasakara Raju. 3 M L T 264= 18 M L J 252=31 Mad 362.

346—Conditional order granting certificate upon furnishing security—On an application for a Succession Certificate (Act VII of 1889) an order was made granting a conditional certificate upon the applicant's furnishing security—

Held, that this was an order "granting, refusing or revoking a certificate" within the meaning of s. 19 of the Act and, therefore, an appeal would lie therefrom. 13 All 214 dissented from **Radha Rani Dassi v Brindaban Chundra Basack 25 Calc 320= 2 C W N 59.**

Notes:—Ex 5 C W N 494. Ref. 26 All 173.

Appeal-*Contd.*

7 Certificate of administration Act-*Contd.*

347—S. 19—Conditional order for grant of succession certificate, whether appealable.—An order granting a succession certificate, though coupled with a condition that the applicant must give security, is an order granting a certificate and is appealable under S. 19 of the Act. 25 Cal 320 Fol; 5 M L J 28; 20 Mad 442; 2 A L J 606, Ref. 13 All 214; 26 All 173; 19 Bom 790 Dist. **Biri v Barkhurdar 139 P R 1908= 4 P L R 1909=156 P W R 1908= 10 P L R 22.**

Suit against Collector for damages on refusal to make award under Land Acquisition Act—Limitation—See Limitation Act—Arts 18, 120; 14 M L J 173; 27 Mad 535.

348—Ss. 9, 19—Order granting certificate conditionally on the giving of security by applicant—Appeal—

Where, on an application for the grant of a certificate under s. 7 of the Act, the Court passes an order conditioned on the previous filing of security, such an order is not an order "granting, refusing or revoking a certificate" within the meaning of s. 19 of the Act and no appeal lies therefrom 13 All 214 and 19 Bom 790 fol; 5 M L J 28; 26 Mad 42. **Nanhu Mal v Gulabo 1903 A W N 225=26 All 173.**

(16) Ss. 19 & 28—ORRDER REFUSING CERTIFICATE OF HEIRSHIP.

349—Appeal—Regulation VIII of 1827—Order refusing certificate of heirship appealable—Succession Certificate Act VII of 1889, Sec. 28—Practice,—An appeal lies from the order of a District Judge refusing to grant a certificate of heirship under Regulation VIII of 1827 by virtue of the provisions of Section 28 of the Succession Certificate Act VII of 1889. **Javermal v The Nazir of The District Court of Poona P J 1893 p. 517=18 Bom 748.**

Note—Fol. 19 Bom 399.

Appeal-*Contd.*

7 Certificate of administration Act-*Concld.*

350—Succession Certificate Act VII of 1889, Secs 19 and 28—Certificate of heirship—Order refusing certificate of heirship appealable—Appeal—Regulation VIII of 1827—An appeal lies from an order refusing to grant a certificate of heirship under regulation VIII of 1827, by virtue of Sec. 19 of the Succesion Certificate Act VII of 1889. **Rangubai v Abaji P J 1894 p 184; 19 Bom 399.**

351—s. 19—Appeal—Person entitled to—(Act XXVII of 1860)

Held that, a person who did not appear in the Court of the District Judge to oppose an application for the grant of a certificate under Act XXVII of 1860 was not in a position to contest the order of the District Court in the character of an appellant. **Tapeshra Kuari v Ajudhia Kuari 1 W N 162.**

(17) SUCCESSION CERTIFICATE ACT S 10

352—Act VII of 1889—Succession certificate; s. 10—Extension of certificate—No grant of certificate—No appeal under s. 19—

The extension of a certificate under s. 10 Act VII of 1889 to additional debts is not the grant of a certificate so as to give a right of appeal under s. 19 of the Act against the extension. **Venkateswaralu v Brahmaravutu Raja Kristnaji 25 Mad 634.**

(8) Costs.

(a) Discretion, Exercise of

353—Discretion. Exercise of—Act VIII of 1859, ss. 187, 189, 193, 196—

Held, (Macpherson, J doubting) an appeal will lie on a mere question of costs. **Gridhari Lal Roy v Sundar Bibi B L R Sup Vol 496 6 W R 187**

See Dowcett v Wise. **1 W R 522**

Note—See 6 W R 187.

354—Decree enforcing award—*Held* (by Loch J) with reference to the Full Bench ruling B L R Sup Vol 496; 6 W R 127 that an appeal lies, on the point of costs, from a decree enforcing an arbitration award. **Khoda Buksh v Mowla Buksh 14 W R 255**

Contra **Collector of Dacca v Kamala Kant Mookerjee 2 W R 33**

Appeal-*Contd.*

8 Costs—*Contd.*

Chooni Lal Misser v Patroo Deo 6 W R 19.

Keemee Baee v Luchmun Doss Narain Doss 5 W R P C 59. 1, Moore's I A 470

Achumbit Singh v Kunhya Lal Mohajun 7 W R 208.

355—Semble—A regular appeal in respect of costs will not lie where *bona fide* care and discretion have been exercised on the part of the Court below. **Desaji Lakhmaji v Bhavani Das Narotamdas** 8 B H C 100

Luchmun Ram Unooj v Watson W R 1864 146

356-C P C O 23 r 3 (1882 S. 375)-Appeal for costs—Final decree. Where a decree is final there can be no appeal against its direction as to costs. 8 Cal 91 Followed. **Sidha Gopal v Puran** 2 N L R 49

357—As a general rule an appeal in respect of costs will only be entertained in cases in which no discretion has been fairly exercised upon the question, and the decision of the Court below has proceeded upon mistake or misapprehension. Where *bona fide* care and discretion have been exercised, no appeal in respect of costs should be allowed, and the question whether such discretion has been well or ill exercised should not be entertained. **Keshavram Krishna Joshi v Bhavanji Bin Babaji** 8 B H C 142

Notes—Con. 2 Bom 1, Ref. 14 Cal 464; 2 Bom 252; 14 Bom 377; 20 Bom 408 F B Disc. L B R 1872—1892.

358—Where no appeal is made against the judgment passed on the subject-matter of the suit, the discretionary power of assessing costs given by s, 187 of Act VIII of 1859 should not, unless in a very exceptional case, be interfered with by the Appellate Court. **Kuppusvamiayyan v Nannuvayyan** 1 M H C 74.

(b) ORDER INVOLVING MATTER OF PRINCIPLE.

359—Order involving matter of principle—Though the distribution of costs is, under the Civil Procedure Code a matter within the discretion of the Court, yet there may be circumstances which will justify an appeal upon a mere question of costs. **Chithrayil *alias* Kunath Ahmed Koya v Irumanom Vittil Kanhamath Haji** 3 M H C 279

Dantuluri Naryana Gajapati Razu Garu v Saruppa Razu. 3 M H C 113.

360—Where some principle is involved, an appeal would lie on a question of costs only. **Secretary of State for India in Council v Marjum Hosein Khan.** 11 Cal 359.

360A.—Appeal—No principle involved—Quære.

It is very doubtful whether an appeal will lie from an order for cost when no principle is involved. **Amirul Hossain v Khairunnessa.** 28 Cal 567.

361—Discretionary orders—Special appeal.—

It is only when a matter of principle is involved that a second appeal would lie as to costs only but not where the question of costs is purely in the discretion of the lower Court. Where a suit was brought against A on the allegation that he had instigated his co-defendant B, not to deliver up a particular document and where no other relief was asked as against A, and the lower Courts awarded a decree in favour of the plaintiff and directed A to pay half the costs:—*Held*, that the question was one which involved a matter of principle and therefore a second appeal lay to the High Court against the decree as to such costs. **Bunwari Lall v. Chowdhry Drup Nath Singh,** 12 Cal 179.

Notes—Ref: 16 Bom 241; 34 Cal 878; 5 C L J 642.

362.—Second appeal—As to costs.

An appeal as to costs will lie from an appellate decree when the Court has exercised its discretion as to costs arbitrarily, and not according to general principles. (S D A., N W P 1861 p 235) and (N W P H C Rep 1867 F B. 90) followed. **Daulat Ram v Durga Parsad** 15 All 333=13 W N 110.

Notes:—Ref 4 C W N 90; 7 C W N 647 Fol: (1905) W N 75.

Appeal-*Contd.*

8 Costs—*Contd.*

(C) POWER OF APPELLATE COURT.

363.—Appellate Court, power of-Civil procedure code (Act XIV of 1882) s 220—The power given under s 220, Civil Procedure Code, to a Court to apportion costs in any way it thinks proper, is subject to the control of the Appellate Court. B L R Sup Vol 496 16 Bom 676 and 15 All 333. ref to. **Tara Prosunno Mukharjee v Satsih Chandra Singh 4 C W N 90.**

364—Appeal as to costs-Alteration of lower Court's costs in appeal-On defendant's appeal on costs among other matters, the appellate Court ordered the costs to be materially altered in favour of the defendant. **Suddasook Kootary v Ram Chunder 17 Cal 620.**

Notes:—Fol 14 Mad 61. Ref 10 C W N 566.

365.—Costs—Practice—Appeal.

The plaintiff sued for possession of certain land in the court of a Subordinate Judge of the Second Class. The Subordinate Judge returned the plaint for want of jurisdiction and ordered the plaintiff to pay a separate set of costs to each of the defendants. The plaintiff appealed to the District Judge on the grounds, first, that the Subordinate Judge had jurisdiction to entertain the plaint; and secondly, that the order as to costs was improper. At the hearing of the appeal the plaintiff's pleader abandoned the point of jurisdiction. Thereupon the District Judge held that the appeal would not lie simply on question of costs. He therefore, confirmed the Subordinate Judge's order.

Held, that the District Judge had jurisdiction to hear the appeal on the question of costs.

Vasudev Ramchandra v Bhavan Jivaraj P J 1891 p 100=16 Bom 241.

366—Partition suit, costs, appeal for-Appeal, if and where maintainable—Principle, matter of-Proprietors and lessees, interest as—Allotment of shares in proprietary and lease hold interests-Costs up to the preliminary decree, by whom payable—Rateable distribution—Costs, subsequent to preliminary decree, by whom to be borne—Lessor and lessee, liabilities of, to pay costs—Apportionment. An appeal will lie upon a question of costs when a matter of principle is involved. As the plaintiff in a partition suit commences it for his own advantage, convenience and security, and as the defendant as joint owner, holds his undivided share always subject to the right of the plaintiff to demand partition, the parties must each bear their own costs of the suit up to the stage of the preliminary decree, and the costs of the partition should be divided between the parties in proportion to their respective shares in the estate.

If however, there has been a frivolous contest, the party by reason of whose opposition unecessary costs are incurred, may be made liable.

A lessee who accepts a lease of a share in joint property, does so with full knowledge that the subject matter is liable to partition, and if he finds himself a defendant in a partition suit, it is by reason of his own voluntary act, and in such a suit each party must bear his own costs up to the first hearing or preliminary decree, and the costs of the partition should be borne by the parties in the proportion of their interests.

If the lessee took no part in the partition proceedings, and neither claimed not obtained the benefit of a separate allotment he could not be called upon to contribute to the costs of the partition. But if he did, the costs must be borne by him rateably with the other parties, according to his interest in the premises.

A permanent lessee may be regarded as a purchaser and will be entitled to similar privileges and subject to similar liabilities.

The costs of the partition should, as between the lessor and the lessee, be borne by them in proportion to their respective interest in the share covered by the mokurari (lease). **Nawab Dildar v Bhowani Sahai Singh 5 C L J 642 =34 Cal 878.**

367.—Appeal as to costs—Civil Procedure Code (XIV of 1882), ss 220, 540, and 568-Error of lower Court under misapprehension of fact and law.

Where the original Court has made an erroneous order for costs under a misapprehension of facts and law, an appeal lies from such order under the Civil Procedure Code, although the appellant complains of nothing else but the order for costs so erroneously made. **Ranchordas Vithaldas v. Bai Kasi. 16 Bom 676.**

Appeal-*Contd.*

8 Costs—*Contd.*

Khushal Sadashiv v Punam Chand Jusrupji 22 Bom 164.

Notes:—Ap, 22 Bom 164. Ref 4 C W N 50.

(D) PARTY IMPROPERLY BROUGHT ON THE RECORD AS REPRESENTATIVE OF DECEASED JUDGMENT—DEBTOR.

368.—Party improperly brought on the record as representative of deceased judgment—debtor-Civil Procedure Code, ss 2, 244 cl. (c), 540.

One B D was made a party to an application for execution of a decree as one of the representatives of a deceased judgment-debtor It had been decided in a previous suit that B D was not related to the judgment-debtor in such a manner that he could become his legal representative, and in this proceeding also he objected that he was not such representative and his objection was allowed and the order allowing it remained unappealed and became final. The Court however while allowing the objection, did not give the objector his costs:—*Held* that the objector did not by being improperly brought into the execution-proceedings, lose his right of appeal, and further that he could under the circumstances, appeal on the question of costs alone. **Bishen Dayal v Bank of Upper India 13 All 290.**

(E) C P C (1882) Ss 2, 588.

369.—Ss 2, 54, 373, 588—Suit, withdrawal of —Appeal from order allowing withdrawal of suit and costs.

The plaintiff in a suit applied to the Court for permission to withdraw it with liberty to bring a fresh suit in respect of the subject-matter and the Court allowed the withdrawal, passing an order directing the plaintiff's costs to be paid out of certain funds of which the defendant was trustee. The defendants appealed objecting to the award of costs.

Held: that the order of the Court as to costs was not a decree within the meaning of S 2 C P C and not being an order mentioned in s 588 C P C was not appealable. **Ramakisoor Doss v Sreerangacharlu 21 Mad 421= 8 M L J 74.**

(F) APPEALABLE ORDER.

370.—Order-Appeal—If an order is itself appealable as affecting either the jurisdiction of the Court or the merits of the case, an appeal will lie from that part of the order which relates to costs but as is the case with decrees, in those cases only where the order is appealable, will an appeal lie against the direction as to costs, which is ancilliary to the order. **Balkissen Dass v Luchmiput Singh 8 Cal 91.**

Notes—12 Cal 271. Ref: 16 Bom 241.

371.—As to costs.

In cases under the Succession Certificate Act where an appeal is prohibited by s 19 no appeal will lie as to costs alone. **Ram Ghulam v Shib Din 12 W N 35.**

See (1) Col 52 No 25
(2) Col 53 Nos 30 to 33.

(G) RETURN OF PLAINT,

372.—Returning of plaint——Jurisdiction—Code of Civil Procedure ss. 14 & 57.

The Court of first instance, dismissed the suit with costs as at its hearing it was found that the property in dispute placed the claim in the suit beyond the jurisdiction of the Court. This decision was reversed with costs in appeal, on the plea that the Court ought to have returned the plaint to the party for presentation to the proper Court. On the appeal of the defendant to the High Court.—*Held*, that he was entitled to an appeal on the ground that he ought have to been allowed his costs in both the Courts.

Moshingam v. Mozari Sajad 12 Cal 271.

Notes:—Ref: 16 Bom 241; 31 Cal 878; 6 C L J 642. Dist: 31 Cal 233.

(H) COSTS.

373-377.—Appeal withdrawn—Costs on the Memorandum of objection.

Whether allowable or not, Where an appeal is withdrawn, costs on the Memorandum of objections should be ordered in the absence of any agreement to the contrary between the parties.

Quere——Whether the objection cannot be heard when an appeal is withdrawn. (17 All 51[9] Ref:) **Ponnusawmy Nadar v Somdasundaram Chettiar 4 M L T 482,**

Appeal—Decrees. See C P C S 96 (1), (2) **88 P J 293.**

Appeal-*Contd.*

8 Decrees—*Contd.*

Appeal—Decrees. See Compromise, compromise of suits under C P C. **77. P R, 1908.**

Appeal—Decrees. See C P C S 96. **26 Mad 224.**

Appeal-Decrees. See C P C S 96 (1), (2). **4 A L J 683,**

Appeal—Decrees. See C P C O 41, r 3. **3 O C 234.**

Appeal—Decrees. See S 96 (*1*) (2). **29 Cal 252.**

Appeal— Decrees. See C P C S 96 (1) (2). **(1900) 28 Cal 82.**

Appeal—Decrees. See Compromise—Compromise of suits under C P C. **50 P R 1898.**

Appeal—Decrees. See C P C S 96 (1) (2) **89 P J 208.**

Appeal—Decrees. See Partition. **37 P.R 1896.**

9 Decrees.

(a) Order returning plaint.

378.—Order returning plaint—Civil Procedure Code, 1877, Section 540—Decree, form of.—

The plaintiffs, the widow, and son, repectively, of N, deceased, claimed immoveable property inherited from his father by N, and also immoveable property which had devolved upon N from his brother, who had predeceased him, and mesne profits of such properties The Court of first instance, finding that the claim to the former property was admitted and that to the latter was not denied, but resisted as barred by Sec. 13 of Act X ot 1877, and holding it not to be so barred, made a decree returning the plaint to the plaintiffs that they might, after correcting it, file it either in the Revenue Court in regard to the profits of the former property or in the Civil Court for possession of the latter property. *Held*, that, althogh the claim of the plaintiffs was not either decreed or dismissed, yet as the right and title asserted, by them to such properties was implicitly recognised by such decree, the defendants were entitled to appeal from it.

Behari Bhagat v Begam Bibi. 3 All 75

Appeal-*Contd.*

9 Decrees—*Contd.*

Notes—Ap: 14 All 348.

379.—Partition—Preliminary decree-Appeal against preliminary decree after final decree, not maintainable.

Where in a suit for partition a final decree has been made, and the preliminary decree only is appealed against: *Held*, that the correctness of that decree cannot be challenged without an appeal against the final decree also.

Kuriya Mal v Bishambhar Das. 5 Ind Cas 276 = 7 A L J 210 = 33 All 225.

380.—Partition — Appeal—Appeal against preliminary decree—Final decree passed since the appeal—No appeal against final decree.

In a suit for partition, an appeal which challenges the preliminary decree and not the final decree, will not lie, although the final decree may have been passed after the filing of the appeal. Reference:—32 All 225, App. and Ext.

Narain Das v Balgovind. 8 A L J 604.

380*A*—Ss. 2 (2), 115—Decree—Order holding portion of claim not sustainable and directing amendment—Appeal—Revision—Specific Relief Act (1 of 1877). Ss. 42, 54—Declaration—"Property" meaning of—Birt, right to—'Spes successionis'—Injunction when can be claimed—Birt, nature of.

Plaintiffs, as the heirs of a deceased *purohit*, sued for possession of his immoveable property and for a declaration that as such heirs they were entitled to realize *birt* offerings from the deceased's *jujmans*. On defendant's objection, the first Court held that plaintiffs could not ask for a declaration in regard to rights of *Birt* which might exist hereafter but did not exist at the moment. The Court further held that plaintiffs should ask for an injunction and it directed the plaintiffs to comply with this order within a certain period.

Held, that, as the order merely returned the plaint for amendment within a specific period it was not a decree, preliminary or otherwise, within the meaning of Section 2 (2) of the Civil Procedure Code, and was consequently not appealable, nor was it open to revision.

Gur Das v Bhag. 216 P L R 1911,

Appeal-*Contd.*

9 Decrees—*Contd*

(b) ORDER DISMISSING A SUIT.

381—Procedure—Civil Procedure Code (Act XIV of 1882), Sections 2 and 136—Order dismissing a suit—Decree—Appeal.

An order dismissing a suit under Section 136 of the Civil Procedure Code (Act XIV of 1862) is a decree under the definition contained in Sec 2 of the Code, and as such is appealable.

Mansingji v Metha Hariharram Narharram P J. 1894, P 139 = 19 Bom 307.

Notes;—Fol : 6 C L J 374.

382.—Decree—Dismissal on ground that no plaint could be found.

A plaint was filed and duly registered in the Court of a Munsif. Subsequently the Munsif found that the suit was undervalued, and that if properly valued it would be beyond his jurisdiction, and accordingly returned the plaint for presentation to the proper Court. The plaintiffs appealed to the Subordinate Judge against this order, attaching the plaint to their memorandum of appeal. The Subordinate Judge remanded the case under section 562 of the Code of Civil Procedure. Against this order of remand the defendants appealed to the High Court, but their appeal was dismissed. The case then went back to the Court of the Munsif, and it was brought to his notice that there was no plaint on the record before the Court. He accordingly, on the 9th of Agust, 1894, dismissed the suit. On appeal to the Subordinate Judge the order of the Munsif was reversed The defendants appealed to the High Court. *Held* that, the order of the Munsif of the 9th August, 1894 was appealable as a decree ; and that it was the duty of the Munsif or of the office of his Court to see that the plaint which had been all along on the record, was present in his Court. **Nasiban v Khurshed Banu 16 W N 54.**

(c) ORDER DISMISSING SUIT AS NOT PROPERLY BROUGHT.

383—Order dismissing suit as not properly brought—Right of appeal.

The plaintiffs in this suit claimed, as the heirs of G, possession from the defendants of certain lands which G had mortgaged to the defendants, alleging that the mortgage- debt had been satisfied from the usufruct. The defendants denied the title of the plaintiffs to redeem, asserting also that the mortgage-debt had not been satisfied. The Court of first instance held that the plaintiffs were entitled to redeem, but dismissed the suit on the ground that the mortgage-debt had not been satisfied. Held that the defendants were entitled to appeal, the case of 6 N W 19 not being applicable to this case.

Ram Gholam v Sheo Tahal 1 All 266

Notes:—Ap: 2 All 497 F B Ref: 17 All 174; 9 C W N 584.

384.—Appellate Court reversing judgment of first Court for want of jurisdiction—Order—Decree—Act X of 1877, SS. 2, 588 (6), 589.

Where the Appellate Court (the Judicial Assistant) reversed the order of the first Court on the ground that the value of the property in suit exceeded the value of suits which that Court was competent to try, and further returned the case to plaintiff in order that he might present it to the proper Court, *held*, that the appeal from the judgment of the Judicial Assistant lay to the Commissioner, and not to the Chief Court, such judgment not being merely an order as described in Clause 6, S. 588 of the Civil Procedure Code, and therefore appealable to the Chief Court under the last clause of S. 589, but a decree disposing of the appeal.

Guranditta v. Jaggu Shah. P R 185 of 1882.

385.—Right of appeal.

M sued *K* and *J* to enforce a right of pre-emption in respect of property which he alleged *K* had sold to *J*. *K* denied that she had sold such property to *J*. *J* set up as a defence that *M* had waived his right of pre-emption. The Court of first instance dismissed the suit on the ground that the alleged sale had not taken place. *J* then appealed to the High Court, making *K* the respondent. *Held* that neither the appeal from the original decree in the suit nor the appeal from the appellate decree therein was admissible.

Jumna Singh v. Kamarunnissa 3 All 152

Notes.—Ref: 9 C W N 584.

Appeal-*Contd.*

9 Decrees—*Contd.*

(d) ORDER ON DEATH OF PARTY.

386.—Civil Procedure Code Act X of 1877, ss 368 and 372—Abatement Death of sole defendant—Revivor—Limitation Act XV of 1877, Schd. II Art 178.

The sole defendant in a suit for land having died on the 5th September 1880, on the 8th November 1880, more than 60 days afterwards, an application to substitute the name of his heir on the record was made, and on the 22nd Nov.1880 rejection as out of time, an order was at the same time made that the suit should abate. On the latter date another application was made to set aside the order directing the suit to abate, and although it was found that the plaintiff had been prevented by sufficient cause from making the original application earlier, the Court dismissed the second application.

Held, that there was no appeal from the order dismissing the application.

Held, also, under section 622 of the Civil Procedure Code, that the case fell within section 178 of that Code and that the plaintiff therefore was entitled, under Art. 178 of Act XV of 1877, Schd. II, to three years from the death of the defendant within which to apply to substitute in place of the defendant the person upon whom his interest devolved upon his death.

Benode Mohini Chowdharani v. Sharat Chunder Dey Chowdhry. 8 Calc 837 = 10 C L R 449.

Notes :—Not fol: 16 Bom 27. Ref: 31 Cal 406.

(e) ORDER TREATING AS A NULLITY ORDER MADE WITHOUT JURISDICTION

387.—Order treating as a nullity order made without jurisdiction—Civil Procedure Code, 1859 ss. 102, 703.

There is no appeal from the order of a Principal Sadr Ameen setting aside as a nullity the order of a Judge who, acting for him in his absence, had admitted an appellant as legal representative of the original plaintiff, who had died *pendent lite*, the Judge having no jurisdiction to make such substitution. **Bipro Chunder Joobraj v. Ramlouchun Deb.** W R 1864, 121.

Appeal-*Contd.*

9 Decrees—*Contd.*

(f) ORDER REFUSING DECREE-HOLDER TO EXECUTE THE DECREE AGAINST LEGAL REPRESENTATIVES

388.—Order not to execute a decree against legal representatives—Ss. 210, 364. The Code of Civil Procedure (1859).

There is no appeal under s. 364 from an order made on proceedings taken under s.210 of Act VIII of 1859; the rule applicable in such cases being similar to that inunciated by the Privy Council in 2 Calc. 32. **Raygo v. Pogose.** 3 Cal 709, note

Pogose v. Catchick. 3 Cal 708 2 C L R 278.

389.—Order under s. 210 Civil Procedure Code, 1859.

No appeal lies from an order passed under s. 210, Act VIII of 1859, refusing application of decree-holder to execute decree against legal representatives of the person against whom the decree was passed. **Lootfur Ali Khan v. Sadda Brut Pershad.** W R 1864 Mis. 35.

(g) ORDER REFUSING TO ISSUE NOTICE TO REPRESENTATIVES.

390.—Order refusing to issue notice to representatives—Civil Procedure Code, 1859, s. 217.

No appeal lies from an order passed under s. 217, Act VIII of 1859, declining to issue notice as against certain alleged legal representatives of an original party. **Sohudra v. Roy Kaliha Sahoy.** W R 1864, Mis, 23.

(h) ORDER DIRECTING SUIT TO ABATE

391.—S. 588. (18)—Order rejecting application by Legal Representative of deceased sole Plaintiff and Appellant for substitution of names —Abatement of Suit—Civ. Pro. 1877, ss. 2.366.

An appellate Court rejected the application of the legal representative of a deceased sole plaintiff-appellant to enter his name in the place of such appellant on the record, on the ground that such application had not been made within the time limited by law, and passed an order that the suit should abate. *Held* that the order of the Appellate Court passed under the first paragraph of section 366 of Act X of 1877, not being appealable under cl. (18), section 588 of that Act,

Appeal-*Contd*

9 Decrees—*Contd.*

nor being a decree within the terms of section 2 from which a second appeal would lie, was not appealable. **Ahmad Ata v. Mata Badal Lal. 3 All 844, 1 W N 92.**

(i) ABATEMENT ORDER OF

392—An order under Sec. 366 of the Civ. Pro. Code is virtually a decree, and is therefore appealable. Sec. 366 Civ. Pro. Code, only requires application to be made by a person claiming to be representative, if other representatives are unwilling to join, they should be made defendants.

Bhikaji Ramchandra v. Purshotam Hari. P. J. (1885) 161=10 Bom 220.

Notes—Dist: 17 All. 172. Con: *23* Mad 125; 12 M L J *368*. Ref: 18 Mad *496*; 16 Bom 23; 27 Bom 162.

393—No appeal will lie from an order under the first paragraph of s. 366 of the Code of Civil Procedure, such order not amounting to a decree, and not being specifically appealable under s.588. (I L R 10 Bom 220) dissented from. **Hamida Bibi v Ali Husen Khan. 17 All 172, =15 W N 42.**

Hhwaja Ahmad v Matabadal. 1 W N 92.

(j) ORDER DISMISSING APPLICATION TO BE BROUGHT ON THE RECORD AS REPRESENTATIVE OF DECEASED PARTY.

394—S. 372 C P C S. 588 (21). An appeal will lie from an order dismissing an application under s. *372* of the Code of Civil Procedure to be brought upon the record as representative of a deceased party. such order being a decree within the meaning of s *2* of the Code. **Indo Mati v Gaya Prasad. 19 All 144=17 W N 7.**

(k) ORDER DISMISSING APPLICATION TO BE MADE PARTY AS REPRESENTATIVES.

395—Order refusing application to be made party as representative.—Ss. 2, 372, 588 (cl,) 21 Civ. Pr. Code (1882)—An order refusing a prayer in an application of a person under s. *372* of the Code, to be made a party as assignee of a defendant is not a decree within the meaning of s. 2 of the Civ. Pro. Code, and as such is not appealable. 19 All. 142 distinguished and explained.

Lalit Mohan Roy v. Shebock Chand Chowdhry. 4 C W N 403.

Notes—Fol *24* All 532 F B. Ref: *24* All *342*.

Appeal-*Contd.*

9 Decrees—*Contd.*

(l) ORDER REJECTING APPLICATION BY ASSIGNEES OF INTEREST IN SUIT TO BE ALLOWED TO APPEAL AGAINST THE DECREE.

396—The defendant, pending the suit, assigned his interest therein, but the assignee did not apply to be brought on the record and the suit was decreed *exparte* in plaintiff's favour. The assignee filed an appeal contending that they were entitled to appeal. The Court treating this as an application under s. 372 of the Code of Civil Procedure dismissed it. *Held* following (19 All. 142,) that an appeal lay from the order of dismissal. **Motiram v Kundan Lal. 20 W N 125, 22 All 380.**

Notes—Dist: 24 All 342. Over: 24 All 532 F B.

(m) ORDER REFUSING EXECUTION OF DECREE SIMULTANEOUSLY AGAINST PERSON AND PROPERTY.

397—Order refusing execution of decree simultaneously against person and property—Code of Civil Procedure (Act X of 1877), ss. 2 and 230.

An order under s. 230 of Act X of 1877 by a Court executing a decree refusing an application to execute it at the same time against the person and property of the judgment debtor being a "decree" under s. *2* of the Act, an appeal lies against such order, and the Appellate Court is bound to consider whether the lower Court has properly exercised the discretion vested in it by s. 230 of that Act. **Chena Pemaji v. Ghelabhai Narandas 7 Bom 301.**

(n) ORDER DIRECTING THE RELEASE OF JUDGMENT—DEBTOR.

398—Order directing the release of judgment debtor—Civ. Pro. Code (Act XIV of 1882), ss. 2, *244*, 337.

A judgment debtor, who had been arrested in execution of a decree of a District Munsif, made an application for his release under Civ: Pro. Code, s. 337, (a) and his application was granted—*Held*, that an appeal lay against the order granting the application. **Abdul Rahiman v. Mahomed Kassim. 21 Mad 29.**

Appeal-*Contd.*

9 Decrees—*Contd.*

(o) SECURITY FOR COSTS ORDER REJECTING APPEAL IN DEFAULT OF.

399—Security for costs.—s. 549 C P C.

An order under s. 549 Code of Civ. Pro. rejecting an appeal because security has not been furnished as directed under that section is a decree from which an appeal will lie.

Sirajul Huq v Khadim Husain 5 All 380=A W N (1883) 60.

Contra **Lekha v Bhauna 18 All 101 F B.**

400—Ss. 109, 110, O. 41 r. 10.

An order rejecting an appeal for failure to furnish security for costs under Order 41, r. 10, is not one affirming the decision of the Court within the meaning of s. 110.

Held, further, that the order was not "a final order passed on appeal" within the meaning of S. 109, (6 W R 102; 10 W R 1 (F B), 8 C W N 296; 30 Cal 679; 32 *Bom* 108 Ref:) **Radha Kishen v. Jamna Prasad 13 O C 59.**

(p) ORDER DISALLOWING OBJECTION TO EXECUTION.

401—Order in Execution—Assignment of Decree—Cross-decrees—Civ. Pro. 1877. s. 2

An order made in the execution of a decree disallowing the objections taken by the judgment-debtor to execution of the decree being taken out by a transferee by assignment of the decree, being the final order in a judicial proceeding, and therefore a "decree" within the meaning of this section, is appealable under that Act.

Murlidhar v. Parsotam Das. 2 All 91. =1 All 688 F B Foll.

(q) ORDER DISMISSING SUIT IN ITS PRESENT FORM.

402-Order dismissing suit in its present form—Civil Procedure Code, 1877, ss. 2, 13, 540—Judgment.

The plaintiff in this suit sued for the possession of certain land, on the ground that he was the owner thereof in virtue of a purchase from N. The defendants claimed such land as owners, on the ground that it was included in a certain garden which they had previously purchased at a sale in the execution of a decree against N, and they also claimed it on the ground that they were lessees there of under a lease from N, the term whereof had not expired. They also set up as a defence to the suit that it had been finally determined in a former suit between themselves and N, whom the plaintiff represented that such land was included in such garden, and that consequently their title to such land as owners could not be questioned in the present suit. The Court of first instance held that such land was not included in the defendants' garden, and they were not the owners of it, but that they could not be ejected from it, as they were in possession under the lease which had not expired, and that the question whether such land was included in the defendants' garden, and they were the owners of it, was not *res judicata*. It made a decree dismissing the suit in these terms: "Ordered that the plaintiff's claim as it stands at present be dismissed." *Held* (Straight J., dissenting) that the defendants were entitled under s. 540 of Act X of 1877 to appeal from such decree. **Lachman Singh v. Mohan 2 All 497**

Notes:—Diss 4 Mad 134 Ap. 7 All. 606 F B Dist. 3 All 152 F B Ref: 3 All 239; 17 All 174; 5 A W N 89; Ref: 9 C W N 584.

(r) ORDER IN EXECUTION OF DECREE

403—Repeal of Act—Pending Proceeding—Civ. Pro 1859—Act 1 of 1868, s. 6—Act X of 1877, ss2, 584.

The Court executing a decree for the removal of certain buildings made an order in the execution of such decree directing that a portion of a certain building should be removed as being included in the decree. On appeal by the judgment debtor the lower appellate Court, on the 22nd September, 1877, reversed such order. *Held*, Per Pearson, J, on appeal by the decree-holder from the order of the lower appellate Court, that the lower appellate Court's order, being within the scope of the definition of a "decree" in s. 2 of Act X of 1877 was appealable under section 584 of that Act as well as under Act VIII of 1859, notwithstanding its repeal, in reference to section 6 of Act I of 1868.

Held, *Per* Stuart, C J dissenting from the Full Bench ruling in (1 All 668), that a second appeal in the case would not lie. 1 All 668 F B Fol **Uda Begum v. Imam-ud-din. 2 All 74.**

(s-1) ORDER REFUSING TO FILE IN COURT AGREEMENT TO REFER TO ARBITRATION

404—Agreement to refer to arbitraion.

An order refusing to file in Court an agreement to refer to arbitration is not appealable.

Dayanand v. Bakhtawar Singh. 5 All 333= A W N (1883) 56,

Janki Tewari v. Gayan Tewari. 3 All 427.

Appeal-*Contd.*

9 Decrees—*Contd.*

Notes:—Dist: 22 Mad 299 Ap. 9 M L J 10 Con: 6 All 186 F B Appr: 33 Cal 11; 15 C W N 121; *A* W N (1907) 177; 11 O C 116 F B.

405.—Order of reference—Appeal.

No appeal will lie from an order of reference made by a Court upon an agreement to refer to arbitration filed in Court by one of the parties to a suit under the provisions of s. 523 of the Code of Civil Procedure. (1 L R 5 All 333); (5 N W P H C Rep 179) and (3 Mad H C Rep 183) referred to. **Kishori Mal v Behari Lal 15 W N 121.**

(s 2) AGREEMENT TO REFER

406—Agreement to refer—Civil Procedure Code 1882 ss. 523, 540—Decision thereon is a decree—Right of appeal-

In a suit to file an agreement to refer a matter to arbitration, a decision was passed refusing a reference on the ground that the agreement to refer was not proved. On the plaintiff appealing against such refusal—*Held* that a decision passed under s. 523 of the Code of Civil Procedure is a decree and an appeal lies therefrom under s. 540 of the Code. Decision of Oldfield J 5 All 333 approved. **Gowdu Magata v. Gowdu Bhagavan 22 Mad 299**

Notes:—Ref 27 Mad 255 F B: 2 C L J 80: 14 M L J 356; 84 P R 1901 Ref 112 P L R 1901

407—The second Schedule r. 20 (1882 S. 525.) Order refusing to file award—Decree—Appeal—An order rejecting an application under S. 525 to file an award is a decree within the meaning of S. 2. C. P. C. No appeal will lie from an order refusing to file an award between the parties without the intervention of a Court. 6 All. 186 followed. 29 Cal 167 distinguished. **Katiq Ram v Babu Lal 1903 A W N 234=26 All 205.**

(s 3) ORDER REJECTING MEMORANDUM OF APPEAL.

408—Order rejecting memorandum of appeal as barred by limitation.

An order rejecting a memorandum of appeal as barred by limitation is a "decree" within the meaning of s. 2, Code of Civil Procedure. It is therefore appealable and not open to revision by the High Court under s. 622, Code of Civil Procedure. (W N 1883 p 255); and (6 All 438) distinguished. **Gulab Rai v Mangli Lal 7 All 42=4 W N 223.**

Notes—Fol: 16 Mad 285; 9 *Bom* 452: 13 M L J 300. Ref: 22 Mad 155; 16 *Bom 23*; 27 Mad 21.

(s 4) ORDER DIRECTING ACCOUNTS TO BE TAKEN

409—Order directing accounts to be taken—Civil Procedure Code, 1882, s. 2—Interlocutory order

In a suit for a share of the cost of a party wall built by the plaintiffs, who, and also the defendant, were adjoining owners of plots of land under the Government for building, portion of the agreement being that all disputes as to the cost and maintenance of party walls were to be settled by the Government Surveyor, whose decision was to be final—the Judge Scott, J., on 11th December 1882 decreed that the defendant was liable to pay half whatever sum the Government Surveyor might certify to be due for the cost, and that the defendant was entitled to set off, in the calculation of what was due from him, the cost of any work or materials which the Government Surveyor might find had been contributed by him: and the case was thereupon adjourned for the certificate of the Government Surveyor. The Government Surveyor subsequently gave his certificate as to the cost of the unused portion of the said wall, but stated that on the evidence before him he was unable to decide as to the ownership of the foundations, etc., of the wall. The case came on again before Scott, J. who decided to take evidence on the points left undetermined by the Government Surveyor. Witnesses were accordingly examined, and on 11th December 1883 the Court disallowed the defendant's claim of set-off, and gave judgment for the plaintiff for half the sum certified by the Government Surveyor as the cost of the disputed part of the wall. The defendants appealed. *Held* that the decree of the 11th December 1882 was not a decree or an "order directing accounts to be taken" within the meaning of s. 2 of the Civil Procedure Code (XIV of 1882). and that the defendants, although they had not filed an appeal against it within the period allowed by the Limitation Act, were entitled to appeal ag-

Appeal-*Contd.*

9 Decrees—*Contd.*

ainst it when appealing against the decree of 11th December 1883. **Coverji Luddha v. Morarji Punja. 9 Bom 183.**

Notes:—Doub: 12 C W N 1102. Not Fol: 36 Cal 493.

(s-5) ORDER REJECTING APPEAL AS BARRED.

410.—Order rejecting appeal as barred—— Civil Procedure Code, ss. 2 and 540—Presentation of appeal beyond time.

The plaintiff's claim to redeem certain lands was rejected by a Subordinate Judge on 21st December 1882. On the 1st February 1883, the plaintiff, who was an agriculturist, presented an application for review to the Special Judge appointed under the Dekkhan Agriculturists' Relief Act. His application was rejected by that Judge, who was of opinion that the plaintiff's remedy lay in an appeal to the District Judge. The plaintiff was not informed of the result of his application to the Special Judge until the following May, at which time the Court of the District Judge was closed for vacation. On the 3rd June 1883 he presented an appeal on the opening of the District Court. The District Judge dismissed the appeal as barred by limitation. On appeal to the High Court, a preliminary objection being taken that a second appeal would not lie,—*Held* that the order of the District Judge, having the force of a decree within the meaning of s. 2 of the Civil Procedure Code, Act XIV of 1882, was appealable under s. 540 of the Code.

Raghunath Gopal v. Nilu Nathaji. 9 Bom 452.

Notes:—Foll: 19 Bom 323; 13 M L J 300. Ref: 16 Bom 23; 27 Mad 21.

411.—From preliminary decree apportioning shares—Final decree passed subsequently, no appeal from—Expiry of time for appeal from final decree.

Where after an appeal was preferred from a preliminary decree apportioning shares, a final decree was passed and objection was taken to the hearing of the appeal on the ground that no appeal had been preferred from the final decree though the time for filing it had expired, their lordships heard the appeal from the preliminary decree, having regard to S. 5A of the Limitation Act. **Bafatun v Bilaiti Khanum 30 Cal 683.**

412.—Time requisite for obtaining copy.

A decree for pre-emption dated the 28th September 1880, and drawn up in the terms of s. 214, of the Code of Civil Procedure, directed that the amount of the purchase-money should be paid into Court "within one month from the date the decree became final." It appeared that in consequence of delays in the preparation of copies of the decree and judgment which had been applied for by the defendants and the intervention of holidays, the period within which the defendants might have appealed expired on the 16th December, 1880. Neither of the parties to the suit appealed from the decree. On the 16th December, 1880, the defendants applied for execution of the decree for costs, on the ground that the plaintiff had failed to comply with the condition of the decree. On the same date the plaintiff appeared in Court and expressed himself ready to comply with the condition of the decree. *Held* that the decree in question not having been appealed against became final on the 29th October 1880, and the plaintiff's appeal was therefore beyond time. 1 All 293 followed.

Disa Singh v. Juala Singh 1 W N 165.

413.—Decision of a District Judge refusing to admit an appeal after after time reversed, the reason for delay being considered sufficient.

Hanmapa v. Basapa. P J (1889) 131= 13 Bom 281.

414.—Presented beyond time——Ground for admitting.

The lower Court rejected the appeal as barred by time. Appellant's excuse was that the file was before the Judicial Commissioner, in another case. *Held*, a good ground for admitting the appeal.

Das Mall v. Yar Mahomed Khan. P. R. 12 of 1866 Civil.

415.—Mistake of law, *bona fide* Indian Limitation Act, s.5—"Sufficient cause."

The plaintiff-appellant brought a suit for pre-emption on the allegation that the property had actually been sold for Rs. 4,634, and that the defendant had fraudulently entered Rs. 6.000 as the purchase money in the sale-deed. The defen-

Appeal-*Contd.*

9 Decrees—*Contd.*

dant pleaded that the sale was effected for Rs. 6,000. The Court of first instance dismissed the claim. The plaintiff, by his pleader, appealed to the Court of the Judicial Commissioner The memorandum of appeal was returned to the plaintiff-appellant to be presented to the proper Court. He filed the memorandum of appeal in the Court of the District Judge, and claimed the benefit of s. 5 of the Limitation Act. He explained that he had sufficient cause for not presenting the appeal within the prescribed period, inasmuch as his pleader, acting *bona fide* under a mistake of law had filed the appeal in the Judicial Commissioner's Court. The District Judge dismissed the appeal as barred by limitation. *Held*, that as the point of jurisdiction in the case was one of some difficulty, and there was some authority supporting the pleader's action, the plaintiff-appellant showed sufficient cause for not presenting the appeal within the prescribed period of limitation and that a *bona fide* mistake of law might amount to sufficient cause within the meaning of s. 5 of the Limitation Act. **Lal Bahadur v. Mir Bakar Husain. 2 0 C 133.**

New plea taken in. See Opium Act, 1878, s,9. **2 0 C 100.**

—No appeal lies to the Deputy Commissioner against the order of a Deputy Collector confirming the sale of an underproprietary tenure in execution of a decree for arrears of rent.

Babu Udres Singh v. Ram Bharos. R. A. R. No. 63

416.—S. 3—'Such debts and liabilities'—Appeal-Competency to contract-Perpetuities, law against.

The expression 'such debts and liabilities, in section 3 Act VI of 1876 means debts and liabilities other than those in favour of Government and includes every other debts or liabilities

An appeal in a suit to enforce an agreement outstanding when the estate is taken over by Government, is, therefore, barred.

When a suit is compromised by the proprietor of an estate taken charge of by the Government under Act VI of 1876, such proprietor is not *sui juris* and not competent to enter into an agreement to grant a lease of any portion of his estate at a time when the estate might be released by

Appeal-*Contd.*

9 Decrees—*Contd.*

Government, and such an agreement cannot therefore be enforced, even if it had been embodied in the decree drawn up by the Court in terms of the compromise. Such agreement, moreover, is bad as infringing the law against perpetuities, as the estate might not have been released within the period limited by that law. (2 Cal 445, 5 Cal 82 Fol:) **Jagadis Chandra Deo Dhabal v. Satrughan Deo Dhabal. 4 C L J 238=33 Cal 1063.**

(s 6) ORDER ALLOWING PURCHASER OF DECREE TO EXECUTE IT.

417.—Order to allow a purchaser of decree to execute a decree—Civil Procedure Code 1882 ss. 2, 232, 244.

A purchaser of a decree applied under s. 232 of the code to be allowed to execute it. Two of the judgment-debtors objected on the ground that the purchaser was benami for the other judgment-debtor,and that they had paid off the decree to the original decree-holder. The Munsif disallowing the objections of both, allowed the purchaser to execute the decree. *Held*, that the question was one between the parties to the suit or their representatives relating to "the execution, discharge or satisfaction of the decree" and that the decision of that question was a decree under ss. 2 and 244 of the Code and so a second appeal lay therefrom to the High Court.

Afzal v. Ram Kumar Bhudra. 12 Cal 610.

Notes:—Fol: 24 Bom 502.

418—Ss. 545 and 546,—Order under—— Appeal—"Decree"—Stay of execution.

Upon the application under s. 545, Civil Procedure Code, the District Judge allowed the decree-holder to go on with the execution, provided that security was given by him. *Held*, that the order of the District Judge, inasmuch as it determined a question referred to in s. 244, Civil Procedure Code, was a decree and was appealable as such. 12 Bom 279, referred to.

Ganga Din Singh v Lal Bahadur Singh. 1 0 C 102

(s 7) ORDER BY APPELLATE COURT DIRECTING THAT THE PLAINT BE RETURNED.

419—Order of the appellate Court to have the

Appeal *Contd.*

9 Decrees—*Contd.*

plaint returned—Decree—Civil Pro Code (1882) s. 2.

The plaintiff filed a suit in the District Munsif Court to recover his share in the family property. The amount of the family property exceeded the pecuniary limit of District Munsif Court though the amount of the share was within the jurisdiction of District Munsif who decreed for the plaintiff. On appeal it was held that the Munsif had no jurisdiction to hear the suit, and so decree was reversed and plaint was ordered to be returned for presentation to proper Court. The plaintiff preferred a second appeal to the High Court where it was held that the decision of the lower appellate Court was not a "decree" within s. 2 of the Civil Pro. Code and therefore the plaintiff cannot bring a second appeal but he must proceed under s. 588 of Civil Pro. Code.

Chinnasami Pillai v Kuruppa Udayan 21 Mad 234

Contra **Bindeshri Chaubey v Nadda. 3 All 456.**

Notes:—Fol: 25 All 174 F B Ref. 31 Cal 344 59 P R 1899=P L R (1900) 137=22 A W N 223 F B. Ref: 13 C P L R 9.

(s-8) ORDER UNDER S. 18 OF ACT XX OF 1863 GRANTING LEAVE TO INSTITUTE A SUIT.

420—Order under S. 18 of Act XX of 1863—Grant of leave to institute a suit—Bengal N. W. P. and Assam Civil Courts Act XII of 1887 S 20.

An order under S. 13 of Act XX of 1863 granting leave to institute a suit is not a "decree" under the Civil Procedure Code and is not an appealable order. A suit was brought to remove the defendants from their office as shebaits of an endowment. If leave had been obtained to institute it under s. 18 of the Act, it was contended that, having regard to the provisions of s. 20 of Act XII of 1887, an appeal from that order would lie to the High Court. It was held that S. 20 of Act XII of 1887 was intended only to define the Court to which an appeal lies from a decree or order of a District Judge, and was not intended to define the right of appeal of the class of decrees or orders from which appeals shall lie, and that no appeal lay from the order passed under s. 18 of Act XX of 1863 granting the plaintiffs leave to institute the suit.

Protap Chandra Misser v Brojonath Misser 19 Cal 275

Notes:—Ref: 18 All 227.

(s 9) ORDER REFUSING LEAVE TO SUE.

421—Order—Refusal of leave to sue Act XX of 1863 s. 18—Decree-Civil Procedure Code (1882) s. 2.

An order of refusal of leave to sue under s. 18 of Act XX of 1863 is not appealable, as it is not a "decree" within the meaning of s. 2 of the Civil Procedure Code. **Kazem Ali v Azem Ali Khan. 18 Cal 382.**

Venkateswara. 10 Mad 98

Anonymous Case. 10 Mad 98. note.

Delrus Banoo Begam v Abdoor Rahman. 21 W R 368

Notes:—Fol: 19 Cal 275 Ref: 5 C L J 641 : 34 Cal 584.

(s 10) ORDER REJECTING PLAINT.

422—Rejection of plaint—Civil Procedure Code Ss. 2, 53, 54, 442—What a decree includes.

Where a plaint on the face of it appears to have been filed by a minor, the case comes under s. 442 of the Civil Procedure Code But where the plaintiffs described themselves as adults and on the defendant's objection an issue was raised and an inquiry was made into the question of age:—Held that although the order professes to be one under s.442, yet under the circumstances it should be treated as one rejecting the plaint or dismissing the suit on the ground that the suit was instituted by persons who were found on evidence to be minors, and was appealable as a "decree" within the meaning of s. 2 of the Code. The words "rejecting the plaint" in s 2 are not limited to cases provided for in ss. 53, 54.

Beni Ram Bhutt v Ram Lal Dhukri. 13 Cal 189.

Notes—Ap: 20 All 162. Ref: 19 Mad 127; 13 Bom 7 Cited; 0 C 234 Ref.

423—Plaint, signing and verification of—Plaint signed and verified by some only of the plaintiffs-Objection to such plaint taken on appeal—Procedure—Civil Procedure Code, 1882, Sections 51, 578—"Co-plaintiffs".

Appeal-*Contd.*

9 Decrees—*Contd.*

Where, in a suit instituted by four plaintiffs the plaint was signed and verified by two only, but was further verified as being true to his client's knowledge by the pleader for the other two plaintiffs, whose names were added after the verification, it was objected on behalf of one S. S. (who had been impleaded as a co-defendant in accordance with the order of the Appellate Court remanding the case for that purpose) that the plaint had not been signed or verified by all of the plaintiffs and the suit could not be considered to have been instituted on behalf of them. The lower Court, thereupon, fixed an issue regarding the question and finally decided that the plaint had been duly signed and verified, and dismissed the suit as against S. S, but gave a decree against the other defendant, D. S, who appealed therefrom to the District Judge and urged, *inter alia*, that the plaint had not been duly signed or verified. The District judge held that the plaint had not been duly signed; that the verification by the pleader was probably sufficient; that the plaint could not be returned for amendment, and that the suit must be dismissed *in toto*, on the ground that as only two of the plaintiffs had signed the plaint, the suit must be considered as having been instituted on behalf of the four whose names appeared in the plaint, and that when a person sues on behalf of another and the objection has been taken in the Court of first instance, the suit must be dismissed altogether on appeal. Plaintiffs applied to the Chief Court on the revision side, and it was *held*, that there being no rule that a person named as a co-plaintiff is not to be treated as a plaintiff unless he signs and verifies the plaint, the two plaintiffs who did not sign the plaint were co-plaintiffs from the very first and that, therefore, the two other plaintiffs did not sue on their behalf.

Held, therefore, that the District Judge had erred in dismissing the suit on the ground stated.

Held, further, that although the plaint should have been signed by all the plaintiffs as required by Section 51, Civil Procedure Code, and the first Court should, of its own motion, have returned it for amendment, the verification which was made by two of the plaintiffs who were acquainted with the facts of the case, was probably sufficient for the purpose of the said section

Appeal-*Contd.*

9 Decrees—*Contd*

It is the duty of a Court on receiving a plaint to satisfy itself that it has been properly signed and verified, but when once a plaint has been admitted, issues drawn, and one or two judgments passed without any objection having been raised to the informal character of the signing and verification of the plaint, such objections when raised at the eleventh hour should not be attended to if they are of a purely formal character not going to the root of a suit I L R 17 Calc 580, and Weekly Notes (N W P) 1896, p 102 cited. **Chandi Mal v Dewa Singh 48 P R 1896.**

(s 11) ORDER ALLOWING WITHDRAWAL OF SUIT, WITH LEAVE TO BRING FRESH ONE.

424—An appeal Court may allow a suit to be withdrawn. **Ganga Ram v Data Ram, 8 All 82.**

Notes:—Diss 18 Cal *322*; 16 All 19. Not Fol: 17 All 97. Fol, 21 P R 1909=32 P L R 1909.

(s 12) ORDER PERMITTING WITHDRAWAL OF SUIT.

425—Order giving permission to withdraw a suit—Civil Procedure Code (1882) ss, 2, *373*, 588.

An order of an appellate Court giving permission to withdraw a suit, with liberty to bring a fresh one under s. 373 of the Code, is not appealable, as it is not a "decree" within the meaning of s.2, of the Code of Civil Procedure (1882). 8 All 82 Diss. from. & 6 All 211, approved of. **Jogodindro Nath v Sarut Sundari Debi. 18 Calc 322. Dick v Dick. 15 All 169. Rama Kissoor Dossaji v Sriranga Charlu. 21 Mad 421.**

Notes:—Fol. *27* Cal 362; 16 All 19; 17 All 97. Diss: 29 Cal *370*. Dist: *29* Bom 13. Ref: 21 Mad 421; 13 A W N 189.

426—Effect of withdrawal of one of two plaintiffs on appeal.

H S had two wives; by the first, he had two sons, A S and P S, and by the second also, two sons, J S and G S. In 1856 A S and P S separated from J S and G S. In 1858, P S died leaving a

Appeal-*Contd.*

9 Decrees—*Contd.*

widow, who took a life interest in her husband's property; A S also died leaving two sons, Achra Singh and Sampuran Singh. P. S.'s widow alienated a portion of the property of her deceased husband. J S. and Sampuran Singh sued for a declaratory decree protecting their rights as reversioners, and pronouncing the sale invalid as against them. The Lower Appellate Court decided in favour of the claim. On defendants' appeal to the Chief Court, Sampuran Singh withdrew from the suit.

Held, by Boulnois and Campbell, JJ., that as Sampuran Singh had joined in the suit, the sale must be declared void, whether or not J S had any *locus standi* as a reversioner and that Sampuran Singh's withdrawal from the case at the last stage could not affect the decree of the Lower Court.

Held, by Lindsay, J., that J S was not entitled to sue, inasmuch as a disassociated half-brother had no right during the life of the members of an associated family to question the alienation by the widow of a deceased member of that family, unless the living members sanctioned his action and relinquished their own right. **Dewan Kirpa Ram v Sirdar Jwahir Singh. P R 19 of 1874.**

427—Permission to withdraw—Appeal.

An order under s. 373 of the Code of Civil Procedure allowing a plaintiff to withdraw his suit with leave to bring another suit on the same cause of action is not appealable, being neither one of the orders specified in s. 588, nor a decree within the meaning of s. 2 of the said Code. 6 All 211; 18 Calc 322 followed. 8 All 82 dissented from **Jagdish Chaudhri v Tulshi Chaudhri. 16 All 19; 13 W N 189.**

Zahuri v Dina Nath. 13 W N 204.
Genda Mal v Pirbhu Lal. 17 All 97 15 W N 17.
Saya Mal v Laik Singh. 16 W N 21.

Notes:—Fol; 17 All 97. Dist: 29 Bom 13

428—Appeal—Order to set aside the order of withdrawal and dimissing the suit—Civil Procedure Code (1882), ss. 2, 373 and 588.

An order permitting a suit to be withdrawn with liberty to bring a fresh suit, under s 373 of the Code is not appealable as it is not a "decree" within the meaning of s. 2 of the Code. But, when, an appeal has been filed against such an order and the Lower Appellate Court dismisses the suit setting aside the order of withdrawal, then the order of the Lower Appellate Court is appealable as it is a "decree" within the meaning of s. 2 of the Code. 18 Calc 322, followed. **Abdul Hossein v Kashi Sahu. 27 Cal 362 =4 C W N 41.**

429—C. P. C. O. 23 r 3 (1882 S. 375)-Consent decree-Validity cannot be questioned on appeal.

When a decree is passed by consent of parties, the question as to whether or not the compromise decree is valid cannot be gone into on appeal against that decree. 10 Cal 612 ref to; 24 Cal 908 distinguished. **Biraj Mohini Dasi v Srimati Chintamoni Dasi. 5 C W N 877**

Notes.—Fol: 30 Cal 613. Ref: 10 C W N 1197.

(s 13) ORDER REJECTING APPLICATION UNDER C P C S. 44, R. (A), AND RETURNING PLAINT.

430—Order refusing leave—Appeal.

A instituted a suit in the Subordinate Judge's Court for the recovery of a house together with some grain stored in the house. The Subordinate Judge returned the plaint as the suit was not properly framed under s. 44 (a). An application to join the two causes of action had been previously rejected. From this latter order, A preferred an appeal. *Held* that no appeal would lie. The order returning the plaint was a decree and A could have preferred an appeal from that order. **Bandhan Singh v Solhu 8 All 191 =6 C W N 46.**

431—Failure to consider objections under s. 521.

Where certain objections to an award alleged misconduct and corruption on the part of the arbitrator, and others involved questions of fact and law, and the Judge overruled such objections without giving the objector any opportunity of substantiating them, and gave judgment affirming the award. *Held* that as there was no judicial disposal of the objections, the Judge was not competent to give judgment in the matter, and his decree was a bad one in law, and an appeal lay therefrom, notwithstanding the concluding portion of s. 522 of the Code of Civil Procedure. **Ram Manohar Misr v Lal Behari Misr. 9 W N 15.**

Appeal-*Contd.*

9 Decrees – *Contd.*

(s 14) ORDER DIRECTING COMMISSION OF PARTITION.

432—Partition Decree—Order for a commission—Civil Procedure Code (1882)—Appeal from the order.

Where an Appellate Court made a decree or order to issue a commission directing an Amin to effect a partition of certain property into a particular number of shares and to assign the share to the parties to the suit:—*Held*, that such order amounted to a decree within the meaning of s 2 of the Civil Procedure Code and that it was in fact an order in the terms of s. 396 of the Code and was proper, though it is called a decree **Bepin Behari Moduck v Lal Mohun Chattopadhaya 12 Calc 209.**

Notes.—Ref: 8 C W N 11, 31 Cal 214, 9 C L J 421; =13 C W N 611.

(s 15) ORDER IN PARTITION SUIT LEAVING PROCEEDINGS TO BE TAKEN IN EXECUTION OF DECREE.

433—Partition suit—Order to effect partition in the execution of the decree—Civil Procedure Code (1882) ss. 2 and 396—An appeal lies from an order under s. 396 of the Code declaring the rights of the parties in a suit for partition, but leaving their shares to be determined in execution of the decree, as it is a "decree" within the meaning of s. 2 of the Code. **Bhola Nath Dass v Sonamoni Dasi. 12 Calc 273**

Notes.—Dist: 12 Cal 275.

434—Code of Civil Procedure (1882) ss. 2, 396—

The Proceedings under s. 396 of the Civil Procedure Code (1882) are proceedings in a suit before decree as they enable the Court in that suit to determine exactly the terms of that decree. Where those proceedings however, were left to be taken in execution of the decree, the High Court treated it as an error in point of form. It did not decide whether, or not an objection, if it had been proved, would have proved fatal to the proceedings and dealt with the case in the same way as was done in 7 Cal, 318, as regards the further proceedings taken after decree declaring the rights of the several parties as proceedings to obtain a decree on further consideration. Where in a suit for partition an order was made in course of such proceedings by which the position of some of the parties to the suit was determined, but no declaration was made as to the exact rights of each of the parties—*Held* it was merely an interlocutory orders and as such unappealable. *Semble* Such an order is not a decree within the terms of s. 2 of Act XIV of 1882. 12 Cal 273 distinguished. **Bhoobun Moyi Dabea v Shurut Sundery Dabea. 12 Cal 275.**

(s 16) ORDER DECLARING THE RIGHTS OF PARTIES TO A PARTITION IN CERTAIN SPECIFIC SHARES

435—Right to partition—Suit—Order—Civil Procedure Code (Act XIV of 1882) ss. 2, 396—

Held, by the Full Bench (Prinsep J doubting) that, in a partition suit, an order which specifically declares the rights of parties and the property which is to be partitioned, decides that the suit must be decreed as the Court which made the order cannot dismiss the suit after such order and is therefore an order which adjudicates upon the rights claimed and the defence set up in the suit and which as far as the Court expressing it is concerned decides the suit and thus comes within the purview of the definition of a decree in s 2 of the Civil Procedure Code and is therefore appealable. **Dulhin Golab Koer v Radha Dulari Koer. 19 Cal 463.**

Notes—Fol 30 Cal 683, 25 Mad 244 F B; 23 Cal 279, 5 C W N 617 F B; Ref 24 Cal 725 F B, 29 Cal 758 F B 56 P L R 1902.

436—Order in a partition suit—Declaration of the rights of parties in certain specific shares Civil Procedure Code (1882 ss. 2 and 591)—

An order was passed by the Court of first instance (the Munsif) in a partition suit on the 28th February 1893, to the following effect—"Plaintiff is entitled to a moiety of the lands described in the plaint and to decree thereto. The lands set out in the plaint will therefore be divided into two equal shares by a Civil Court Amin and when that is done one of these shares will be decreed to the plaintiff with costs of the suit." The Munsif passed a decree in the suit on the 30th June 1893 in accordance with the report of the Amin On the 11th August 1893 the defendants filed an appeal from the final decree to the district Judge in which the legality of the order of the 28th February was questioned—Held that,

Appeal-*Contd.*

9 Decrees—*Contd.*

the order of the 28th February 1893, which declared the rights of parties to a partition in certain specific shares was a decree within the meaning of s. 2 of the Civil Procedure Code and was therefore appealable. 19 Cal 463 followed. The defendants not having filed an appeal from that order within thirty days from its date (see Art 152 of sch II of the Limitation Act) were not at liberty to question the correctness of the said order an appeal from it being then barred by limitation. **Boloram Dey v Ram Chundra Dey 23 Cal 279**

Notes—Over 5 C W N 617 F B: 29 Cal 758 F B; Ref 24 Cal 725 F B.

437—Dissolution of partnership—Jurisdiction of Court-Civil Procedure Code 1882, Section 17 (3) (ii)—Misjoinder of cause of action-No appeal from preliminary decree within fixed period, effect of as regards appeal from final decree —Representative of deceased partner, liability of —Presumption against wrong doer--Comparison of handwriting by experts—

Plaintiffs instituted a suit in the District Court of Ludhiana for dissolution of partnership, a settlement of accounts and a decree for whatever might be found due to them from defendants, which they stated to be in all probability a sum of Rs. 11, 500. They joined as defendents both the the remaining partners and also the representatives of a deceased partner. Defendants pleaded *inter alia* that as the parties were all residents of Jullundur District, the Court had no jurisdiction to entertain the suit, and that there was a misjoinder of causes of action. The suit having been decreed by the District Court, defendants appealed to the chief court.

A preliminary objection by plaintiffs to the effect that inasmuch as defendants had not appealed from the preliminary decree of the lower Court within the prescribed period, the appeal from the final decree was barred having been overruled.

Held—That as the contract of partnership was entered into by the parties at Ludhiana where balance sheets of accounts were prepared between the parties, and plaintiffs had a share in a shop there which carried on the same business as the firm of the parties. the District Court of Ludhiana had jurisdiction in the suit under Section 17 (3) (ii) of the Civil Procedure Code.

Appeal-*Contd.*

9 Decrees—*Contd.*

Held, further that the defendants, whether they were partners or representatives of partners, were necessary parties to the suit as framed, and that, therefore, there was no misjoinder of causes of action.

A representative of a deceased partner is liable to the extent of the deceased's assets in his hands, and this is ordinarily a matter for inquiry in execution of decree, but there is no absolute impropriety in its being decided prior to decree.

The Chief Court, finding that the deceased partner had previously to his death removed an unknown quantity of partnership property from the shop at Ludhiana, and that he had died a few days thereafter, concluded that his representatives had come into possession of the whole of the property so removed, and further finding that the shop books had come into the hands of the said representatives and were being willfully withheld by them, held that, in the absence of trustworthy evidence as to the amount of assets in their hands, the defendants, were liable to the full extent of the plaintiffs' claim.

A comparision of handwriting by experts is generally an unsafe test if it has to stand by itself. **Jagmal v. Gainda. 62 P R 1897.**

(s 17) PROVISIONAL DECREE.

438.—Provisional decree——Partition suit—Form of decree—Civil Pro. Code, (1882) ss. 2, 215 215A and 540.

A suit for partition of family property was brought in which a decree declaring the share of the plaintiff and some of the defendants in the family property was passed: but all other questions involved in the suit were reserved. *Held* such a decree is a provisional decree and an appeal can lie on it, yet this decree is irregular in form because it ought to have contained in it declarations as to all the rights and liabilities adjudicated on and directions as to accounts and inquiries which have not been taken and made.

Krishnasami Ayyangar v. Rajagopala Ayyangar. 18 Mad 73.

Notes:—Ref: 21 Bom 91. 3 C L J 521: 19 M L J 347.

Appeal-*Contd.*

9 Decrees—*Contd.*

439—Partition—Order declaring the right of parties and the property to be partitioned in a partition suit—Omission to appeal from such order—Effect of as regards appeal from final decree—Civil Procedure Code, *1882*, Section 396.

In a suit for partition of immoveable property a Munsif, on the 11th December 1899, passed an order declaring the specific shares of the parties and the property to be partitioned, and on the 10th January 1900, under Section 396, Civil Procedure Code, appointed a commission to make the partition in accordance with his order. The partition was effected through arbitrators, and a decree was drawn up on the 31st May 1900 in accordance with the award. On the 30th July 1900 the defendant appealed to the Divisional Judge, and amongst other objections, questioned the correctness of the preliminary order of the Munsif excluding a certain house from partition. The Divisional Judge rejected the appeal as time-barred on the grounds that the order of the 11th December 1899, declaring the rights of the parties and the property to be partitioned was a decree and that the defendant was not at liberty to question the correctness of the said order, not having appealed from that order within the prescribed period.

Held, that the order of the Divisional Judge was erroneous, inasmuch as the preliminary order of the 11th December 1899 could be questioned on appeal from the final decree even if it was itself appealable as a decree. 23 Calc 406 62 P R 1897 cited 22 Calc 279; 19 Calc 463 referred to. **Rustam Khan v Latif Khan. 49 P R 1902.**

(s-18) ORDER APPOINTING COMMISSION TO EFFECT PARTITION AFTER PRELIMINARY DECREE.

440—Interlocutory order appointing a commission to effect partition after preliminary decree—Effect of not appealing—Civil Procedure Code (1882) Ss. 2, 244 and 591.

Held by the majority of the Full Bench that an order appointing a commission to make the the partition, subsequently to the preliminary decree in a partition-suit, is not appealable under S. 244 of the Civil Procedure Code as it is not an order in execution. It is an interlocutory order in a suit which has not been finally decided; and the appellant may object to it in an appeal against the final decree. Maclean C J thought the point was not necessary to the decision under the circumstances of the case. **Jogodishury Debea v Kailash Chundra Lahiry 24 Calc 725=1 C W N 374.**

Notes—Ref. 25 Mad 244 F B; 8 C W N 257; 31 Cal 179; 2 C L J 351 Dist. I C L J 40.

441—Where an application to the Collector for partition was made on the basis of the Civil Court's decree, and the Collector did not adjudicate the question of title, an appeal would not lie to the Judge. **Bustee Ram v Mookh Ram 2 Agra Rep A C 251.**

(s-19) ORDER DIRECTING ACCOUNTS TO BE TAKEN.

442—Order to take accounts - Civil Procedure Code (1882) Ss. 2 and 591—Suit for an account and dissolution of partnership—Omission to appeal from preliminary order—Limitation—The right of appeal given by Act XII of 1879 in making an order directing accounts to be taken within the definition of a decree, and thus giving an appeal in a preliminary stage of a suit for dissolution of partnership, did not alter the existing law, by which an appeal was allowed against such an order on the termination of the trial, that is, in the final decree. In a suit for dissolution of partnership and an account, the Munsif, on the 25th April 1893, passed an order declaring the shares of the parties and ordering them to render accounts, with a statement that "this must be done within fifteen days from this date, after which the final order will be passed," and a commissioner was asked to take accounts and the case was referred to him for it. On the 31st May 1893 the Munsif passed a decree in the suit, and ordered defendants No. 1 and 2 to pay certain sums of money in accordance with the report of the Commissioner. On the 14th July 1893 an appeal was filed before the District Judge by defendant No. 1 in which the correctness of the preliminary order of the Munsif, which made him liable as a partner, was questioned. *Held*, that the order of the District Judge, which allowed the plea of defendant No. 1 and found that he was not a partner, was right, though no appeal against

Appeal-*Contd.*

9 Decrees—*Contd*

the preliminary order had been filed within the period of limitation. **Biswa Nath Chaki v Bani Kanta Dutta. 23 Calc 406.**

Notes.—Ap. 5 C W N 617 F B; 29 Cal 758 F B. Ref. 9 C L J 367=13 C W N 193 24 Cal 725 F B. Disap: 29 Cal 758 F B.

(s 20) ORDER BY APPELLATE COURT REMITTING CASE TO PASS DECREE UPON AWARD.

443 - Order to pass decree on award—Appellate Court remanding a case to Orignal Court—Civil Procedure Code (1882) S. 2—

In an appeal being preferred against a decree of an original Court dismising a suit the Appellate Court remanded the case for the purpose of certain evidence being taken, and certified to it. Pending that being done, the parties applied to the Appellate Court to refer the case to arbitration, and that Court referred that application to the Original Court for disposal, although the case was still pending on its own file for disposal. Subsequently another application was made to the original Court to refer the case to arbitration, and on the 10th May the record was sent to the arbitrator with directions to submit his award within seven days. On the 12th September, as the award had not been sent in, the original Court ordered to recall the record, and the award of the arbitrator dated the 12th September was subsequently filed. Thereupon the record was forwarded to the Appellate Court by the original Court for decision. The objections were overruled which were taken against the award and the Court of appeal ordered directing the case to be sent back to the Original court with orders to pass a formal decree in accordance with the award of the arbitrator. *Held*, that a second appeal would lie against the last mentioned order, in as much as it amounted to a decree under the provisions of s. 2 of the Civil Procedure Code.

Bhugwan Das Marwari v Nund Lall Sein. 12 Calc 173.

Notes—Fol. 18 Cal 507. Ref. 13 Bom 179.

(s-21) ORDER DISALLOWING OBJECTIONS BY DEFENDANT.

444—Order disallowing objections by defendant—Civil Procedure Code, 1882 ss. 584, 585.

Appeal-*Contd.*

9 Decrees—*Contd.*

Where a portion of the plaintiff's claim was disallowed by the first Court. and the plaintiff appealed to the Subordinate Judge from the portion of the decree which refused part of his claim, and the defendant filed a memorandum of objections under s. 561 of the Civil Procedure Code, the Judge decreed the plaintiff's appeal and disallowed the defendant's objections—

Held, in an appeal by the defendant on a preliminary objection taken by the respondent that a second appeal lay from so much of the decree of the Subordinate Judge as disallowed the objections filed by the appellant under S. 561 of the Code of Civil Procedure. **Ganapati v. Sitharama. 10 Mad 292.**

445.—Appeal filed against decree inadvertently passed against deceased defendant—Effect of decree passed against non-existing person Proper order to pass in appeal filed by person calling himself the legal representative of the deceased defendant.

Plaintiff having obtained a decree in the first Court, the defendant appealed to the Commissioner, who eventually accepted the appeal and dismissed the plaintiff's suit. From this decree one N, alleging himself to be the legal representative of the original plaintiff, whose death he set out in his petition of appeal as having occurred four days before the date of the Commissioner's decree, preferred an appeal in the Chief Court, and was met with the preliminary objection on behalf of the defendant-respondent that he had no *locus standi* with reference to his own allegations in the petition of appeal. It was admitted that no step was taken in the Commissioner's Court by either party to bring the name of any representative of the deceased plaintiff on the record, and further it appeared that the appeal filed from the Commissioner's decree was upon the merits, and not for the purpose of setting aside the decree as passed against a non-existing person.

Held, that no effect could be given to a decree passed by a Court against a non-existing person, such a decree being one passed in excess of the Court's jurisdiction, although passed inadvertently without notice of the death of the respondent; that the proper course for the person calling himself the legal representative of the

Appeal-*Contd.*

9 Decrees—*Contd.*

deceased was not to appeal on the merits to the superior Court, and that the objection taken must be allowed and the appeal rejected.

Bhai Nihal Singh v. Chait Singh. P R 31 of 1886, Civil.

(s-22) C. P. C. ss. 232-244 (1882)

446.—Civil Procedure Code 1882, ss 232,244-Assignment of decree—Validity of transfer—Registration of transfer.

The holders of a decree for the sale of mortgaged property transferred the same to M by instruments which were registered at a place where a small portion only of the property was situate. Subsequently M transferred the decree to other persons, and the co-transferees applied, under S. 232 of the Civil Procedure Code, to have their names substituted for those of the original decree-holders. The judgment-debtor opposed the application on the grounds that M's name had not been substituted for the names of the original decree-holders who had transferred to him, and that the transfers to M were inoperative, as the instruments of transfer had not been registered at the place where the substantial portion of the mortgaged property was situate in accordance with s 28 of the Registration Act (**III** of 1877). It appeared that no notice had been issued to M under s 232 of the Civil Procedure Code; that he was dead; and that his legal representatives had not been cited as required by law. The application was allowed by the Courts below——*Held*, that the matter involved questions arising between the parties to the decree or their representatives within the meaning of s 244 (c) of the Court and that the order allowing the application was, therefore, a decree within the definition of s 2 and was appealable as such. **Gulzari Lal v Daya Ram 9 All 46.**

Notes:—Fol 16 All 483.

447.- Collector applying under s 411 Civil Procedure Code.

Held that, a Collector applying on behalf of Government under s 411 of the Code of Civil Procedure for recovery of court-fees by attachment of a sum of money payable under a decree to a plaintiff suing in *forma pauperis* might be deemed to have been a party within the meaning of s 244 (c) of the Code of Civil Procedure and that an appeal would therefore lie from an order granting such application. **Janki v The Collector of Allahabad 9 All 64=6 W N 300.**

Notes:—Fol 13 All 326; Con 23 Mad 73; Ref: 18 Mad 439; 18 Bom 237.

(s-23) APPLICATION FOR PERMISSION TO SUE AS PAUPER.

448.—Application for permission to sue as pauper.

The rejection of an application for permission to sue as a pauper on the ground that the applicant has previously withdrawn the application and entered into a new contract with the defendants is a decree. **Baldeo Kuar v Gulab Kuar 9 All 129=A W N (1886) 321.**

Notes:— Dist: 21 All 133 F B; Ref; 20 Bom 86.

(s-24) ORDER REJECTING STAY OF EXECUTION.

449.—An order of a District Judge under s 545 Civil Procedure Code is a decree as defined in s 2 and therefore subject to appeal.

Musaji Abdulla v Damodar Das Manekla1 P J (1888) 23=12 Bom 279.

Notes:—Doub: 6 Bom L R 780; 29 Bom 71.

(s-25) C. P. C. ss. 2, 54.

450.—(S 25) C P C ss 2, 54 Civil Procedure Code, 1882 s 2—Rent Recovery Act (Madras Act VIII of 1865), 27, Order under—Decree-

An order made under the Madras Rent Recovery Act s 27 is not a decree within the meaning of the Civil Procedure Code s 2. **Perumal v Rajagopala 13 Mad 248.**

450A.—Order returning memorandum of appeal to be presented to proper Court.

An order of a District Judge returning a memorandum of appeal to be presented to the proper Court on the ground that the value of the suit is beyond the pecuniary limits of his jurisdiction is not a decree within the meaning of s 2, Code of Civil Procedure. **Mahabir Singh v Behari Lal 13 All 320= 11 W N 96 & 107.**

Notes:—W N (1891) 107. Ap: 23 Cal 536; 15 All 363. Con: 16 All 286. Ref: 22 Bom 963; 16 All 252; 17 All 69; 28 All 545 F B=3 A L J 266=(1906) W N 99.

Appeal-*Contd.*

9 Decrees—*Contd.*

451.—S 54 C P C—Insufficient stamp-Failure to make up deficiency—Dismissal—Appeal

The Court of first instance being of opinion that the plaint bore an insufficient court-fee, and the plaintiff not making good the deficiency, dismissed the suit after recording evidence but without entering into the merits. On appeal the lower appellate Court held that the court-fee was sufficient, and remanded the case for trial on the merits. Held that, s 158 of the Code of Civil Procedure was not applicable to the case, that the first Court, disposal of the suit must be treated as being under s 54 and was therefore a decree within the meaning of s 2 and appealable as such, and that such appeal was not prohibited by s 12 of the Court Fees Act. 6 Cal 249 and 4 Mad 204. referred to. **Muhammad Sadik v Muhammad Jan 8 W N 286=11 All 91,**

Hiralal v Wali Bhagat 9 W N 124.

Sheoraj v Daljit Singh 4 W N 151.

Notes:—Dist: 4 M L J 183 F. B. Ref: 12 All 129 F B.

(s 26) ORDER DECIDING POINT OF LAW ARISING INCIDENTALLY.

452.—Order—Decision an incidental point of law-Civil Procedure Code 1882 s 2-Decree—An order which merely decides a point of law arising incidentally or otherwise in the course of a proceeding for determining the rights of parties seeking relief is not appealable, not being a decree within the meaning of s 2 of the Code of Civil Procedure. Where, the judgment-creditor, after satisfaction entered upon a compromise, applied for execution on the ground of the compromise having been obtained from him by fraud, and the Lower Court, being of opinion that the remedy of the judgment-creditor was by execution proceedings and not by a regular suit, ordered the case to be tried on merits:—Held, that such order was not appealable. **Bahary Lal Pundit v Kedar Nath Mullick 18 Calc 469.**

(s 27) ORDER DISMISSING APPLICATION TO CERTIFY ADJUSTMENT OF DECREE.

453.—Civil Procedure Code s 258 s 2 Order under s 258.

An order under section 258 dismissing a petition praying that the munsiff should record the satisfaction of a decree by agreement between the parties, being a decree within the meaning of s. 2 of the Code of Civil Procedure is appealable. **Lingayya v Nerasimha 14 Mad 99.**

454.—Appeal.

An appeal will lie from an order under s. 258 of the Code of Civil Procedure refusing an application to record an adjustment of a decree made out of Court. 14 Mad 99 and 11 *Bom* 57 cited. **Jamna Prasad v Mathura Prasad 16 All 129=14 W N 6.**

Notes:—Ap 5 M L J 140. Ref 18 Mad 26.

455.—Order refusing to certify—Payment to decree-holder out of Court Civil Procedure 1882 S. 244 248. An appeal lies from an order passed as regards a payment of a decree under S 258 of Civil Procedure Code, as the order is a decree under s 244. Hence a separate suit cannot be brought because the question is res judicata between the parties.

Guruvayya v Vudayappa 18 Mad 26.

Notes:—20 Mad 369 to 21 Mad 409.

(s 28) ORDER ABSOLUTE FOR FORECLOSURE.

456.—S 244 C P C—s 87 T P A. An order under s 87 T P A., is an order in execution of a decree under S 244 of the Code of Civil Procedure and is appealable. **Kedar Nath v Lalji Sahai 12 All 61.**

Notes:—Diss: 10 C L J 91: 25 Cal 133. Ref: 25 Mad 244 F B, 24 All 542; 33 Cas;867=4 C L J 141, Ap 13 All 278 F B; 24 All 179, Dist: 14 All 221.

(s 29) ORDER DISSMISSING APPLICATION FOR PARTICIPATION IN ASSETS

457—458.—Participation in assets—Order rejecting application for Civil Procedure Code Ss. 2, 244, 295-Appeal.

No appeal will lie from an order under s 295 of the Code of Civil Procedure dismissing, on the ground that the decree was barred by limitation, a decree-holder's application to share in the assets realized under another decree against the same judgment-debtor. Such an order as above-mentioned cannot be regarded as a decree under sec. 244 read with section. 3 of the said Code.

Kashi Ram v Mani Ram. 14 All, 210=12 W N 56

Appeal-*Contd.*

9 Decrees—*Contd.*

Notes:— 27 Mad 504 ; 11 C W N 483 ; 6 C L J 437. 65 P R 1905=130 P L R 1905.

(s-30) TRANSFER PROPERTY ACT S 87 ORDER UNDER.

459.—An order under s. 87 of Act IV of 1882 extending the time for payment of the mortgage money by a mortgagor is a deree within the meaning of ss. 2 and 244 of the Code of Civil Procedure, 1882, and an appeal will lie from it. No application will therefore lie under section 622 of Code for revision of such order.

Rahima v Nepal Rai
14 All 520. 12 W N 99

Notes :—Fol ; 3 Bom L R 554 ; 26 Bom 121. Ref : 25 Mad 300 F B ; 244 P B.

(S(31) ORDER REJECTING AN APPEAL.

460.—Order rejecting an appeal—Civi Procedure Code, ss. 2, 252.

An intending appellant executed in favour of two vakils a vakalatnama; it was accepted only by one of the vakils, and he presented the appeal. The appeal was placed on the file by the District Judge, but on its coming on for disposal before the Subordinate Jugde, he held that it had not been duly presented, and made an order rejecting it. *Held*, that an appeal lay against the abovementioned order as being a decree within the meaning of section 2 of the Code of Civil Procedure. **Ayyanna v Nagabhooshanam.**
16 Mad 285.

Notes:—22 M 155, Foll 27 M 21. Ref: 13 M L J 300.

461.—No decree prepared—Practice.

In this case the Court of first instance (Assistant Collector) omitted to embody its decision in a decree. On appeal the District Judge holding that there being no decree the Court had no jurisdiction, dismissed the appeal. *Held*, that the lower appellate Court should have followed the rule laid down in 5 All, 520, and remanded the case for preparation of decree.

Kadir Baksh v Kifaitullah.
4 W N 224.

462.—Disposal of one—Effect on the other.

Where the plaintiff and the defendant prefer separate appeals from the same decree, and on the appeal first heard the decree is reversed and the cause remanded under sec 562 of the Code of Civil Procedure, the other appeal cannot be heard, the decree having disappeared. **Jawahar Lal v Mohan Lal, 10 W N 68.**

(s-32) ORDER UNDER CIVIL PRO. CODE (1882), S 543, REJECTING MEMORANDUM OF APPEAL ON ACCOUNT OF SCANDALOUS MATTER THEREIN.

463. Order under Civil Procedure Code (*1882*) Section *543*, rejection of memorandum of appeal on ground of scandalous matter therein.

The grounds of appeal preferred to the District Court, alleged among others that thing's actual partiality against the Judge whose decree was appealed against-The appeal-Memo was returned for being amended as it contained expression disrespectful to the Court of first instance. The pleader for the appellant returned the appeal amended saying that he wanted to rely on the objectionable passages and adding that the Court may, if it likes strike out those passages. The District Judge rejected the appeal, under section 543 Civil Procednre Code. The objectionable portions were, it was shown, separate from the rest. *Held*, that an appeal lay to the High Court against the order rejecting the appeal to the District Court. **Zamindar of Juni v Bennayya. 22 Mad 155.**

(s-33) ORDER DISMISSING AN APPEAL FOR DEFAULT.

464.—Order dismissing an appeal for default —Difinition of " decree "—Civil Procedure Code (1882) ss. 2 and 556.

An order dismissing an appeal for default under section 556 does not fall within the definition of " decree", in section 2 of the Civil Procedure Code (1882) and as such is not appealable. 16 Bom 23 dissented from.

Jagarnath Singh v Budhan.
23 Cal 115.

465.—Definition of decree—Civil Procedure Code (1882) ss 2, and 556.

An order dismissing an appeal for default is not appealable as it does fall within the scope of

Appeal-*Contd.*

9 Decrees—*Contd.*

the definition of "decree" in section 2 of the Civil Procedure Code (1882). 23 Calc, 715 followed. 15 All, 359, referred to.

Anwar Ali v Jafer Ali. 23 Cal, 827.

(s-34) ORDER REJECTING APPEAL ON DEFAULT IN FURNISHING SECURITY.

466.—Order rejecting appeal on default in furnishing security for costs—Civil Procedure Code (1882), ss 2 and 549.

An order rejecting an appeal under s. 549 of the Code of Civil Procedure is not appealable either as an order or as a decree. 5 All 380 overruled. **Lekha v Bhauna. 18 All 101.**

Notes:—Ref : 21 All 133 F B, Fol · 30 All 143=(1908) W N 53=5 A L J 109. 3 M L T 221=4 L B R 17.

(s-35) APPEAL AGAINST ORDER REJECTING AN INSUFFICIENTLY STAMPED APPEAL.

467.—Appeal against order rejecting an insufficiently stamped appeal—Civil Procedure Code (Act XIV of 1882), s 2.

An appeal petition, having been presented bearing an insufficient Court-fees stamp, was returned to the appellant. After the period of limitation had expired, it was presented again bearing a sufficient stamp, together with a petition that it be received. The Appellate Court made an order refusing to admit the appeal:—*Held*, that the order was not a decree, and therefore that no appeal lay to the High Court

Venkatarayadu v Rangayya Appa Rau. 21 Mad, 152.

Notes:—Dist : 8 A W N 64.

468.—Order dismissing appeal for deficient Court fee.

The memorandum of appeal in this case being insufficiently stamped and the appellant having failed to supply such deficiency within the time allowed, the following order was made by the Court below on the memorandum of appeal :—" Appeal dismissed ; full fees being unpaid ". *Held*, that as no decree was made in the lower

Appeal-*Contd.*

9 Decrees—*Contd.*

appellate Court no appeal lies to the High Court. **Gajraj Singh v Bhagwant Singh. 3 W N 255.**

(s 36) APPLICATION FOR LEAVE TO SUE IN FORMA PAUPERIS

469—S 409—No appeal will lie from an order rejecting an application for leave to appeal in *forma pauperis*. (9 All 129), and (18 All 101), referred to. **The Secretary of State for India v Jillo. 28 W N 204, 21 All 133**

Notes:-Ref: 28 All 72=2 A L J 749=(1905) W N 191.

470—Decision in pauper suit-Separate Application for Enquiry into pauperism—Civil Procedure 1859, s 367.

An appeal lies from a decision in a suit heard in *forma pauperis*. A separate formal application for enquiry into the pauperism of applicant need not precede an application for leave to appeal in *forma pauperis*. **Kamod Poory v Sheo Poory. I N W P 246.**

(s-37) DECREE ON COMPROMISE EXTENDING BEYOND SCOPE OF SUIT.

471—Compromise including reliefs beyond the scope of suit—Decree embodying compromise—Civil Pro Code (1882) s. 375—A suit for the partition of zamindari was instituted in which a compromise was effected in writing which included certain other reliefs which could have been given by a suit on a different cause of action. The compromise was filed in Court and decree was passed embodying the whole of it.—

Held—That the decree is appealable. Under s. 375 of Civil Pro. Code, a decree is only final so far as it relates to subject matter of the suit dealt with in the compromise **Venkatappa Nayanim v Thimma Nayanim 18 Mad 410.**

472—C.P.C O.23,r.3(1882 S.375)-Compromise, finality of—Appeal from decree passed on compromise—Interpretation of compromise,difference between parties in.

If there is difference between parties in interpretation of compromise, and an amended compromise is not again put in, an appeal can lie from decree passed on compromise. 29 Mad 104, 9 Mad 103, 16 Bom 202, 1 C W N 597, 5 C W N

Appeal-*Contd.*

9 Decrees—*Contd.*

877 & 7 C W N 419, Ref:

Ram Lal v Balak Ram, 9 O C 365.

(s-37 a) DECREE NOT INCORPORATING THE COMPROMISE.

472 *A*—Decree—Interlocutory order—Compromise before it is incorporated in decree.—

No appeal lies against a compromise arrived at between the parties to a suit until it is incorporated in a decree. A Compromise was put forward before the Court which ordered that if the defendants accepting the Court's opinion, got a deed of sale of certain properties, after obtaining the District Judge's sanction in respect to the share of one of the defendants, who was a minor, it would pass a decree in accordance with the compromise, but if they did not act in this way, it would proceed to hear the suit on the merits. *Held*, that the order of the Court was not a decree and no appeal lay against it. **Manohar Lal v. Narain Das, 109 P L R 1903.**

(s-38) ORDER DISMISSING APPLICATION FOR REMOVAL OF TRUSTEE.

473—Order dismissing application for removal of trustee.

No appeal will lie from an order dismissing an application for the removal of a trustee, such order not being a "decree" within the meaning of S. 2 of the Code of Civil Procedure and not being otherwise appealable. **Nathu Wilson v. C. H. Mc. Afee, 19 All 131=16 W N 200.**

474—From amended decree:—

An amended decree is a decree and an appeal lies therefrom. **Menal Ali v. Amdar Ali, 9 C W N 605.**

475—S. 2, O, 35 r. 5, S. 104, O. 42 r. 1—(1882), Ss. 2, 473 (c) 588 (23)—Decree—Order—Appeal—Interpleader suit.—

Held, that an adjudication upon the claims of defendants in an interpleader suit is a decree and appealable as such under S. 540 of the Code of Civil Procedure and not under S. 588 of the Code. **Maharaj Singh v. Chittar Mal, 1907 A W N 270=4 A L J 683=30 All 22.**

476—Pro. Small Cause Courts Act, S. 32 (2)—Jurisdiction—Pecuniary limit—Appeal.

A suit in the nature of Small Causes Court suit was instituted in the Court of the Subordinate Judge who was invested with the jurisdiction of a Court of Small Causes to the extent of Rs. 50. The amount in dispute was Rs. 81-4-0, and therefore the suit was tried as a regular suit. Later, the jurisdiction of the Judge as a Court of Small Causes was raised to Rs. 100, and subsequently to this the suit was decided by him as a regular suit. The defendant appealed to the District Court but it held that no appeal lay on the ground that the suit was triable and must be taken to have been tried in the extended jurisdiction vested in the Subordinate Judge:—*Held*, that the appeal lay to the District Court, since under S. 32 (2) of the Provincial Small Causes Courts Act, it was necessary that the Judge should before the institution of the suit be vested with a Small Causes Court jurisdiction entitling him to hear the particular suit. **Sambhu v. Ram Vithu, 5 Bom L R 1008=28 Bom 244.**

(s-39) FINAL ORDER IN THE EXECUTION DEPARTMENT.

477—The lower Court in the course of execution proceedings passed an order that future mesne profits awarded by the decree were to be recovered for a stated period, and tried the question separately and embodied its finding in a formal order:—

Held, that the order was appealable. The decision was a final one in its essence and would be so equally whether it stood alone or was combined with decisions on other points.

Held, further, that the order was a decree within the meaning of S. 2 and was open to appeal under S. 540 of the Code. **Bhup Indar Bahadur v. Bijai Bahadur, 2 Bom L R 978.**

(s-40) APPEAL AGAINST DECREE PASSED ON REVIEW.

478—Appeal against decree passed on review—Jurisdiction of Court, admitting review—Review, application for—C. P. C., O. 47, Rr. 1 (2) and 7.

Held, that a decree passed on an application for review of judgment is appealable on the ground that the Court which admitted the application for review had no jurisdiction to do so.

Ujagar v. Ram Sahai, 14 O C 108.

Appeal-*Contd.*

9 Decrees—*Contd.*

(s-41) RIGHT TO PROSECUTE APPEAL AS REGARDS PART OF CLAIM DISMISSED.

479—Plaintiff obtaining decree for part of his claim—Appeal as regards part dismissed—Execution of decree—Right to prosecute appeal.

A plaintiff, who has obtained a decree for part of his claim and has appealed as regards the part dismissed, is not debarred from prosecuting the appeal because he has begun to execute the said decree. (82 P R 1868, overruled).

Raghu Mal v. Bandu. 31 P R 1907 (F B)= 64 P W R 1907=1 P L R 1908.

480—Tenancy Act (II of 1901) Sections 177, 193—Schedule IV-Decree of Assistant Collector class I, order in execution—Appeal to District Judge—Civil Procedure Code, Sections 2, 244—Decree:—

An order made by an Assistant Collector of the First Class in execution of a decree for over Rs. 100 in a suit falling under groups A and B of Schedule IV N.W.P.Tenancy Act is a "decree" within the meaning of Section 177 of that Act and an appeal will lie therefrom to the District Judge. (unreported) (1) (approved).

Kharag Singh v. Pala Ram, 1 A L J 305=1904 A W N 156.

(s 42) ORDER RETURNING PLAINT FOR PRESENTATION TO THE PROPER COURT.

481—Ss. 180, Cl. 2, 193—Collector's appellate order returning plaint—Appeal to District Judge—C. P. C., Ss. 2, 588:—

Under S. 180, cl. 2, U. P. Tenancy Act, no appeal lies to the District Judge from an appellate order of the Collector as distinguished from a decree. An order returning a plaint for presentation to the proper Court is not a "decree" within the meaning of the Sections providing for appeals in the U. P. Tenancy Act. In order to dicide what are 'orders' and what are 'decrees' under the U. P. Tenancy Act, 1901, the definitions contained in C. P. C. S. 2 must be applied. **Dhani Ram v. Bhola Singh, 1904 A W N 152 =1 A L J 308=27 All 21.**

(s 43) APPEAL AGAINST DECREE WHICH WAS A NULLITY APPEAL.

482—483—In an application under the section in which a decree was granted which was a nullity. *Held* that there was no appeal. **Purus Ram v Musst Deo Korer. 4 N W P 29.**

Appeal-*Contd.*

9 Decrees—*Contd.*

(s 44) APPEAL AGAINST FINDING.

484—Appeal-Res-judicata-Incidental finding -Grant of a life estate-A Mahomedan Law-Invalidity. As a General rule an appeal against a finding does or does not lie according as such finding will operate as *res judicata* or is merely an incidental finding which does not prejudice the rights of the party against which it is given. The grant of life estate is not invalid under the Mahomedan law. 11 Cal, 301; 7 Bom. 464; 13 Bom. 264; 17 Bom. 1, 15 I A 186: 3 I A. 291; 12 I. A. 91 referred to

Gajraj Singh v Murtaza Khan 11 C P L R 150.

(s-45) APPEAL AGAINST DECREE OF ONE OF TWO JUDGES OF A DIVISION BENCH.

485—s. 98 (1882 S 575)—Judgment of the affirming judge—Decree—Charter Act. Arts. 15 and 36—Appeal—Points on which the appeal should be heard.

The decree of one of two judges of a Division Bench, whose judgment has prevailed under the provisions of S. 575 of the Code of Civil Procedure is appealable under S, 15 of the Letters Patent. On appeal under the Letters Patent, the appellate court has jurisdiction to hear the appeal not merely on the points on which the judges of the Division Bench differed, but also on other points raised in the appeal. (I All 181 fol) 20 All 258; 4 B L R A C 86 Dist. **Kunhunni v Srivullabhan II M L J 10 F B.**

Notes—Fol: 18 M L J 497=4 M L T 110 =32 Mad 95.

(s 46) ORDER DETERMINING THE QUESTION WHETHER DECREE HOLDER HAD USED DUE DILIGENCE IN THE EXECUTION OF HIS DECREE.

486—Civil Procedure Code (Act X of 1877), Setions 230, 540—Act XII of 1879, Section 2—"Decree."

Held, that an order in execution of decree determining the question whether the decree holder had used due diligence in the execution of

Appeal-*Contd.*

9 Decrees—*Contd.*

his decree within the meaning of Section 230 Act X of 1877, appealable under Section 540 of the Code, such order being a "decree" within the definition given in Section 2 of the Code, as amended by Act XII of 1879. **Balmokand v Muerjoo P R 45 of 1880.**

(S 47) ORDER AS TO WHETHER THE DECREE WAS EXECUTABLE OR NOT.

487—488—Execution—Declaratory decree. Decision as to executability of—Whether decree-Appealability—First order deciding executability Appeal against, in time—Subsequent order appointing Commissioner to carry out former order—No appeal—Effect.

A decree provided that the 'first defendant shall enjoy land yielding 126 muras of rice'. The District Judge held, on an execution application, that the decree could be executed by setting aside lands that yield 126 muras of rice and directed that this should be done and ordered the appointment of a Commissioner to prepare lists of the lands. An appeal was made in time against the District Judge's order on the ground that the District Judge was wrong in construing the decree as one that was not purely declaratory. Before the presentation of the appeal, the District Judge passed another order directing delivery of possession of the lands in accordance with the Commissioner's report, and no appeal was preferred against the second order.

Held, that the first order as to whether the decree was executable or not was a decree under S. 47, C. P. C. read with S. 2, C P. C. and as such appealable.

The determination of a mere issue by the execution Court prior to the passing of the final order would not be regarded as an adjudication between the parties against which an appeal would lie;

that the second order which merely carried out the first order could not affect the right of appeal against the first order.

When the law gives a person two remedies, he is entitled to avail himself of either of them. unless they are inconsistent.

Where a right and jurisdiction are conferred

Appeal-*Contd.*

9 Decrees *Contd.*

expressly by statute, they cannot be taken away or cut down, except by express words or necessary implication. References:—28 Mad 355. Fol: 14 M L J 359 Dist; 6 All 269; 23 All 152; 14 C L J 35, Ref: 18 Mad 421 & 19 Mad 479, Fol; 32 Cal 1023; 36 Cal 762; 2 All 225 & 8 A L J 604, Diss; 30 All 479 & 12 C W N 590, Ref. (c) 13 C W N 1197 & 12 Cal 45 Ref.

Lakshmi v Marudevi 10 M L T 437.

(T) DECREE IN SUIT WITHDRAWN FROM SMALL CAUSE COURT.

489—Decree in suit withdrawn from Small Cause Court.

No appeal lies from a decree passed in a suit withdrawn from a Court of Small Causes.

Balkrishna Gangadhar v Ram Narain Rathi 10 C P L R 94.

(U) ORDER DISMISSING THE CASE.

490—S. 2-Order striking off certain defendants to be treated as order dismissing the case—Order dismissing the case to be treated as a decree. An appeal therefore, lies against such an order.

Idan Khan v Mendi Lal 8 Ind Cas 409.

(V) NO FORMAL DECREE DRAWN UP.

491——s. 2 (2); (1882 s. 2)—Decree—Decision of an issue in a case—No decree drawn up embodying the decision-Appeal.

In an administration suit, the Court of first instance decided on one of the issues a substantial question of right between the parties; and having so decided it appointed receivers of all the property in dispute

Held, that no appeal lay to the High Court, for there was in fact no formal decree upon the question raised in the issue. **Bai Divali v Vishnay Manordas. 11 Bom L R 1326—24 Bom 182=4 Ind Cas 829.**

(W) ORDER GRANTING LEAVE TO BRING A SUIT UNDER RELIGIOUS ENDOWMENTS ACT

492—S. 18-Leave to bring suit for accounts-Grant of leave-Order, a decree-Civil Procedure Code (Act. XIV of 1882), section 2—Appeal, Act XX of 1863 (Religious Endowments Act) makes no provision for appeal and an order granting

Appeal-*Contd.*

9 Decrees—*Contd.*

leave to bring a suit for the purpose of having the accounts of a certain religious endowment not being a "decree" within the meaning of section 2 of the Code of Civil Procedure, no appeal lies against such an order. **Mojaffer Ali v Mirza Hedayet Hossain 5 C L J 641=34 Cal 58 t.**

Notes—Ref 10 C L J 503.

(X) APPEAL FROM DECREE ORDERED TO BE REVIEWED

493—Review, granting of—Appeal—Delay.

Where a decree passed on the 31st January was ordered to be reviewed on the 9th April,

Held, that there was no decree form which an appeal could be preferred till the order granting review was set aside. **Ramaswami Iyengar v Janaki Ammal 7 M L T 387=6 Ind Cas 793.**

494—495—Conditional decree for foreclosure-Mortgage-money made payable by instalment-Order of Court refusing to make decree absolute-Appeal—Civ. Pro. Code. S 540.

An order of an additional District Judge, refusing to make absolute a conditional decree for foreclosure, by which the mortgage money was made payable by instalments, on the ground that all instalments due up to date have been deposited in Court, is a "decree" within the meaning of S 2 C P C and an appeal lies against such order under S 540 Civ Pro Code. 3 N L R 55.3 N L R 146; 2 N L R 178, 16 C P L R III Ref.

Pandurung v Ram Chandra Venkatesh 4 N L R 54.

Appeal—Decrees. See C P C s. 47
8 O C 370

Appeal—Decrees. See C P C s. 47
1 Ind Cas 284

Appeal—Decrees. See C P C s 47
11 Bom L R 1113

Appeal—Decrees. See C P C s. 47
6 C W N 190

Appeal—Decrees. See C P C s. 47
6 Ind Cas 180

Appeal—Decrees. See C P C s. 47
2 M L T 307

Appeal—Decrees. See C P C s. 47
8 O C 405

Appeal-*Contd.*

9 Decrees—*Contd.*

Appeal—Decrees See C P C s. 47
24 All 108

Appeal—Decrees. See C P C s. 47
29 Cal 622

Appeal—Decrees. See C P C s. 47
13 M L J 212

Appeal—Decrees. See C P C s 47
25 All 443.

Appeal—Decrees. See C P C s. 47
11 C L J 202.

Appeal—Decrees. See C P C s 47
3 Bom L R 554.

Appeal—Decrees. See C P C s 47
5 Ind Cas 483.

Appeal—Decrees. See C P C s 47
6 C W N 63.

Appeal—Decrees. See C P C s 47
26 All 136.

Appeal—Decrees. See C P C s 47
15 M L J 247.

Appeal—Decrees. C P C s 47
3 M L T 307.

Appeal—Decrees See C P C s 47
31 Mad 406.

Appeal—Decrees **See** C P C S. 47.
28 All 72.

Appeal—Decrees **See** C P C S. 47.
11 C W N 239.

Appeal—Decrees **See** C P C S 47.
4 A L J 492.

Appeal—Decrees **See** s. 47.
38 P R 1898

Appeal—Decrees **See** C P C S. 47.
29 Mad 318.

Appeal—Decrees **See** C P C S. 47
87 P R 1887.

Appeal—Decrees **See** C P C S. 47.
30 All 486.

Appeal—Decrees **See** C P C S. 47.
2 Bom L R 887.

Appeal—Decrees **See** C P C S. 47.
3 A L J 370

Appeal-*Contd.*

9 Decrees—*Contd.*

Appeal—Decrees See C P C S 47.
32 Bom 572

Appeal—Decrees See C P C S. 47.
28 P R 1898.

Appeal—Decrees See C P C S. 47.
26 Bom 121.

Appeal—Decrees See C P C S. 47.
94 P J 48.

Appeal—Decrees See C P C S 47.
90 P J 263

Appeal—Decrees See C P C S, 47
30 Cal 134.

Appeal-Default in appearance See C P C O, 41 r 17. 5 P R 1900.

Appeal-Default in apperance See C P C O. 41 r. 17. 34 P L R 1910.

Appeal-Default in appearance See C P C O, 41 rr. 17 & 19 8 O C 261.

Appeal-Default in appearance See C P C O, 41 r. 17 42 P R 1894

(10) Default in Appearance.

(a) ORDER REFUSING TO ISSUE FRESH SUMMONS AFTER DISMISSAL

496—Order refusing to issue fresh summons after dismissal—Civil Procedure Code, 1859, s. 110—Order refusing to issue fresh summons on plaint.

Where a suit is dismissed under s. 110 Act, VIII of 1859, upon default in appearing made by both parties, no appeal lies from a refusal by the Court to issue a fresh summons upon the plaint already filed. **Loke Nath Sahoo v. Tukeer Singh** Marsh 630

(b) ORDER REJECTING APPLICATION TO SUE AS A PAUPER

497—Order rejecting application to sue as a pauper—Civil Procedure Code, 1859, s. 310.

There is no appeal open to a pauper when his application to sue as pauper is rejected for default. Where there has been no refusal under s. 310, Act VIII of 1859, the applicant may revive his application for leave to sue as a pauper. **Bhoj Singh v. Maha Koonwer** 3 Agra Mis 1.

Appeal-*Contd.*

10 Default in Appearance—*Contd.*

Notes.—Ref: 2 Bom 19.

(c) ORDER DISMISSING SUIT FOR NON APPEARANCE AFTER ADJOURNMENT.

498—Order dismissing suit for default—Adjournment—Non-appearance of plaintiff—Civ. Pro. 1877 ss 102, 103, 540

Nothing remained to be done in a suit except to hear arguments, for which a time had been appointed. Neither the plaintiff nor his pleader appeared at the appointed time. The Court consequently dimissed the suit. *Held* that, its decree was appealable under section 540 of Act X of 1877 and the lower appellate Court should have entertained the appeal, and disposed of it with reference to the provisions of section 565, and sections 102 and 103 were not applicable to the circumstances. **Rai Chand v Mathura Prasad,** 3 All 292.

499—Suit dismissed for default—Appeal from order of dismissal— C P C 1882, ss. 102, 103, 588 (8)— Sufficient cause for admitting appeals after time—Limitation Act 1877, s. 5.—An application under s. 103 of the Civ. Pro. Code must be made within 30 days of the date of the order dismissing the suit; if not presented within that period, it must be dismissed; but an appeal from the original order dismissing the suit, which has the force of a decree is not thereby affected. Under s. 5, Limitaion Act, delay in filing such an appeal can be excused and the period extended, if the appellate Court thinks that the appellant had no notice of the date fixed for the hearing of the original case. 60 P R 1897 Ref. **Sahib Ditta v Roda** 83 P R 1902.

500—Civ. Pro. Code Ss. 98, 99, 157, 158.

A case was struck off the file by a District Munsif for default in appearing of both the parties. Afterwards the plaintiffs having applied the case was taken back on file. The order of restoring to file was reversed by the District Judge. Held—(1) the order to struck off the case was illeagal (2) that assuming that the case was dismissed the District Judge had no Jurisdiction to pass any order on appeal. **Alwar v Seshammal** 10 Mad 270

Notes—Ref: 5 C L J 260 ; 34 Cal 235 ; 18 M L J 51

Appeal-*Contd.*

10 Default in Appearance—*Contd.*

501—Dismissal for default—Appeal.

Held that, an appeal lay from an order of dismissal for default under s. 102 of the Code of Civil Procedure. Plaintiff's remedy was not limited to that provided in s. 103 of the Code of Civil Procedure. **Ablakh v Bhagirathi 9 All 427=7 W N 66**

Notes:—Ap: 16 Bom 23, Dist 19 Bom 749; Ref: 8 C W N 313; 1 M L J 385 Diss 31; Mad 157.

502—O 9 rr. 8,9: s. 104 O 43 r. 1 (1882 ss. 102, 103, 588)—Order under s. 102 whether a decree and appealable as such.

An order under s. 102 C P C dismissing a suit is as much a decree as an order under any other section deciding a suit. The order comes within the definition of a decree and is appealable as such. 9 All 427 ; 1883 A W N 171 Fol. 30 Cal 660 referred to. **Gosto Behary Sardar v. Hari Mohan Adak. 8 C W N 313.**

[d] ORDER DISMISSING SUIT IN ADJOURNED HEARING FOR NON-APPEARANCE OF PLAINTIFF.

503—Civil Procedure Code Ss 102, 157 & 158-Dismissal of suit for non-appearance of plaintiff or his pleader—Appeal An order dismissing a suit at an adjourned hearing for non-appearance of the plaintiff and his pleader is an order under Sec. 157 and its consequential Sec. 102, and not under Sec 158 of the Civil Procedure Code and is appealable.

Shrimant Sagajirao v S Smith. P J 1895 p 267=20 Bom 736.

Notes:—Dist: 6C L J 427. Ref.30 Cal 788. Ref: 34 Cal 235; 11 C W N 705; 5 C L J 260, Fol 19 M L J 760.

(e) ORDER DISMISSING APPEAL FOR DEFAULT.

504—Order dismissing appeal for default—

An appeal does not lie from the order of a Judge dismissing an appeal before him for default of prosecution.— **Mahomed Jan v Ameerun 17 W R 180**

505—Remand-Dismissal for default without notice to appellant—Jurisdiction.—

Plaintiff appealed to Additional Commissioner, Amritsar, against the order of the first Court dismissing his suit.The Additional Commissioner remanded the case, and on receipt of return to the order of remand, the appeal came on for hearing on 15th February 1878, but no notice of such date was given to plaintiff, appellant. The Additional Commissioner waited three days for appellant, and on 18th February 1878, appellant being still absent, the appeal was dismissed for default. Plaintiff applied for re-admission of his appeal, but the application was rejected. Thereupon, plaintiff appealed to the Chief Court.

Held, that the appellant having had no notice of the date fixed for the hearing of his appeal, the Additional Commissioner acted without jurisdiction in dismissing the appeal for default - P R 48 of 1875, cited and approved. **Bala v Hakim P R 90 of 1879**

506—Appellant unable to support appeal—

Where upon the day fixed for the hearing of an appeal the appellant's pleaders were not present in Court and, the appellant who was present declined to support the appeal, it was *held* that the appeal was properly dismissed for default of prosecution. **Gopal Bakhsh v Daulat Rai 16 W N 92.**

507—Order dismissing an appeal for default Pleader unprepared to go on with the case, though present-Civil Procedure Code (1882)ss 556,558.

Where, when an appeal is called on, the pleader is unprepared to go on with the case though present the dismissal is a dismissal for default within s 556 of Act XIV of 1882 and the appeal can therefore be re-admitted under s, 558 15 W, R 143 followed. **Shibendara Narain Chowdhuri v Kinoo Ram Dass 12 Cal 605**

Notes—Diss 16 Bom 23; Dist 27 Cal 529. con 23 Cal 991. Ref 34 Cal 403 F B; 11 C W N 329 F B; 5 C L J 247 F B.

508—Dismissal for default—Application for re-admission—Art. 168, Limitation Act 1877.—

A second appeal set down for hearing under ss. 551, 587, Civ. Pro. Code, 1877, cannot be dismissed for default on the day fixed for hearing, as ss. 556, 558, Civ. Pro. Code apply to appeals in which a date is fixed under s. 552 and notice issued to the respondent. The limitation of 30 days will not apply to a petition dismissed

Appeal-*Contd.*

10 Default in Appearance—*Contd.*

for absence on the date fixed for hearing under s. 551. (48 P R 1878 Cited) **Buta v Rattan Singh** **76 P R 1882.**

509—C.P.C O.41 r. 19 (1882—S.558)—Appeal dismissed for default--Death of one defendant-Appellant pending appeal—

Application by surviving appellants for restoration. A suit was decreed against several defendants on grounds common to all. The defendants appealed and after the filing of the appeal one of them died. Ultimately the appeal was dismissed for default of appearance, no steps having meanwhile been taken to bring on to the record the representatives of the deceased appellant. *Held*, that inasmuch as it would have been competent to one only of the defendants, having regard to S. 244 of the Code C. P., to appeal against the whole decree. There could be no objection of the surviving defendants applying for restoration of the appeal. **Muhammad Jan v Ismdor Khan** **1901 A W N 192**

510—Application for adjournment by appellant's pleader on ground of absence of leader—Dismissal for default—Judgment not written—Validity of order—

When an appeal came on for hearing, the pleader for the appellants applied for an adjournment on the ground that the counsel engaged by him to argue the appeal was absent with important papers in his possession and consequently he was not prepared to argue the case. The District Judge refused to grant the adjournment and rejected the appeal. *Held* that there was no default on the part of the appellants. Their pleader did not withdraw from the case, but merely urged that, as the records were in the possession of his leader, who was absent, he could not argue the appeal. It was open to the Judge to refuse the adjournment, but when he did so, he was bound to write a judgment and dispose of the appeal he could not dismiss it for default.(16 Bom 27 Foll) **Patinhare Tarakatt Rama Mannadi v Vellur Krishnan Menon** **26 Mad 267.**

Notes:—Ref. 17 C P L R 1; 8 C W N 621; 34 Cal 403=11 C W N 329=5 C L J 247 =2 M L T 123; 1 S L R 115.

511—Sufficient cause—Proper adjudication—

The appellant's appeal to the lower appellate Court was dismissed on the 29th March, 1880,

Appeal-*Contd.*

10 Default in Appearance—*Contd.*

for the appellant's default, under s. 556 of Act X of 1877. The appellant applied, under s. 558 for the re-admission of the appeal on the ground that of his pleaders, one was present, another was absent "on sick leave" and a third and a fourth had, owing to holidays, gone home after obtaining permission". The lower appellate Court made the following order on this application—"It was brought forward to-day in the presence of the pleaders for both parties; after perusing the English judgment there appears no sufficient reason for allowing this application, ordered that the petition be disallowed". The Court *held*, that the lower appellate Court had dismissed the appellant's application, with reference to its former order of the 29th March, without due consideration and inquiry into the circumstances alleged. The appellant's allegation should have been inquired into, and a proper order passed after inquiry (the lower appellate Court was accordingly directed to dispose of the application afresh). **Shimbhu Narain v Mobarak Ali** **1 W N 22.**

512—*Held*, that rule 43 A of the Rules of Court of the 18th of January 1898 is not ultravires of the High Court, and that, when an appellant after repeated warnings from his advocate, neglects to pay the fees agreed to be paid to such advocate, and his appeal is dismissed for default, the High Court will not entertain an application under s. 558 of the Code of Civil Procedure for restoration of the appeal. Per Banerji J, *held* by Aikman J, that there is a discretion in applying the strict terms of rule 43 A. **Bisharat Husain** **18 W N 155**

513.—Dismissal of an appeal for default—Pleader unprepared to proceed with a case—Civil Procedure Code (Act XIV of 1882) Sections 2 and 556—"Decree".

On the day fixed for the hearing of an appeal in the lower Appellate Court the appellant appeared by a duly appointed pleader. The pleader applied to the Court for an adjournment on the ground that he had not time to fully prepare himself in the case. The Court refused to grant any adjournment, and dismissed the appeal for default.—*Held*, that the order of dismissal was bad. The mere fact that the appellant's pleader was not prepared to proceed with the case would not enable the Court to deal with the case as if

Appeal-*Contd.*

10 Default in Appearance—*Contd.*

there was no appearance at all for the appellant, and to dismiss the appeal for default. Per Birdwood J.—An order dismissing an appeal for default is one falling within the definition of a "decree" contained in section 2 of the Code of Civil Procedure (Act XIV of 1882) and is, therefore, appealable. **Ramchandra Pandurang Naik v Madhav Purshottam Naik.**

16 Bom 23.

Jagarnath Singh v Budhan.

23 Calc. 115

Anwar Ali v Jaffer Ali.

23 Calc, 827,

Lekha v Bhauna. **18 All, 101,**

Watson & Co v Ambica Dasi.

27 Calc 529,

4 C W N 237.

Notes—23 Cal 115. Not Fol: 15 All 359. Fol: 19 Bom 307; 20 All 294. Dist: 23 Cal 115; 827; 27 Cal 529. Ref: 18 All 241; 30 Cal 660 F B; 8 C W N 621; 5 C L J 247 F B; 34 Cal 403 F B; 11 C W N 329 F B; 31 Mad 157.

513*A*. Order dissmissing appeal for default—Suit struck off for default—Civil Procedure Code, 1859, Sections 119, 347—Order striking off.—

In regular suits, where a Court of first instance refuses to re-admit a suit. there is an appeal under section 119, Act VIII of 1859; but there is no provision under section 347 for an appeal where an Appellate Court has refused to re-admit an appeal struck off for default.

Anonymus. **1 Ind Jur O S 49.**

Fuzzoo Khan v Issur Chunder Sircar.

Marsh 30,

513*B*.—Civil Procedure Code (Act X of 1877) Secsion 551——Dismissal of appeal in default of appellant's appearance at preliminary hearing.

Held, that an Appellate Court has no power to dismiss an appeal by reason of appellant's default at a preliminary hearing under Section 551, Act X of 1877. **Akbar v Hira.**

P R 139 of 1879,

513*C*.—Appeal heard on its merits in absence

Appeal-*Contd.*

10 Default in Appearance—*Contd.*

of appellant—Act VIII of 1859, Section 346—Act XXIII of 1861, Section 35—Act IV of 1866, Section 44—Jurisdiction—Review.

Where a Court was bound, under Section *346*, Act VIII of 1859, to dismiss an appeal for default of appellant's appearance and instead of so doing, went into the merits and dismissed the appeal *Held* that in hearing the appeal, the Court had exercised a jurisdiction not vested in it by law, and that either under Section 35 of Act XXIII of 1861, or Section 44 of Act IV of 1866, the Chief Court could set aside the order dismissing the appeal on the merits.

Dharm Singh v Nizam Din.

P R 62 of 1877.

513*D*.—Civil Procedure Code (Act X of 1877) Sections 556, 558, 584 and 588—Order dismissing appeal for default—Decree——Appealable order.

The order of a Court dismissing an appeal under Section 556, Act X of 1877, for appellant's default, is not a decree within the meaning of Section 584, and therefore no appeal lies from such an order, it not being included in the list of appealable orders contained in Section 588.

Muhammad Ali v Hyat.

P R 113 of 1879.

513*E*.—Dismissal for default of preliminary hearing—Act VIII of 1859. Section 346—Act IX of 1873, Section 7.

On 23rd May 1877, appellant filed an appeal in the Judicial Assistant's Court at Umballa, which was ordered to be registered and brought up with the file of the case on 13th June. On that date, appellant being absent, the appeal was dismissed for default under Section 346, Act VIII of 1859, though no notice had been issued to respondents, and the date was only fixed under Section 7, Act IX of 1873, for hearing appellant or his pleader in support of his petition of appeal. *Held*, that the order of dismissal was illegal.

An Appellate Court is only competent to dismiss an appeal for default under Section *346*, Act VIII of 1859, when a date has been fixed under Sections 344 and 345 for hearing the appeal.

Appeal-*Contd.*

10 Default in Appearance—*Contd.*

There is nothing in Section 7, Act IX of 1873, which renders it obligatory upon an appellant whose appeal has been registered to appear in support of his petition, or which authorizes the appellate Court to dismiss the appeal for default. **Kirpa Ram v Jamna Das. P R 48 of 1878.**

Notes—Cited : 76 P R 1882.

513*F*—A Court should deal with an application to re-admit an appeal dismissed for want of appearance on the part of the applicant on the merits and consider whether the grounds for re-admission set forth in it are reasonable or not. In any case where there is a *bona fide* mistake on the part of the pleader for the applicant the appeal should be readmitted.

Balaji Raghunath KulKarni v Narayan Appaji Kulkarni P J (1898) 219.

513*G*—Dismissal for default on date of which appellant had no notice—Civil Procedure Code (Act VIII of 1859), Section 346.—

The Judicial Assistant, Umballa, fixed the 7th June 1877 for hearing an appeal filed in his Court. On 10th May 1877 the date was altered to 22nd May 1877, and the parties ordered to be informed. On 22nd May 1877, neither party being present, the appeal was dismissed for default, though notice of the change of date had not been served upon them *Held*, that in hearing the appeal on 22nd May 1877, the Judicial Assistant exercised a jurisdiction not vested in him by law.—

Kanhya v. Bahadur Ali. P R 61 of 1878.

513*H*.—No appeal lies against an order rejecting an application for the re-admission of an appeal dismissed for default (P R 87 of of 1876. P R 23 of 1871. P R 32 of 1869)

But an appeal will lie if the appellant did not receive notice or sufficient notice of the place of hearing. P R 48 of 1875. And an appellant is entitled to have a day fixed for hearing the appeal P R 60 of 1869. In the absence of any such day having been fixed, his non-appearance is not a "default." An appeal will therefore lie from an order dismissing an appeal for alleged default when no such day has been fixed.

Kaim v Kasim. P R 79 of 1869.

514—Where on an appeal being called on for hearing the vakil who held the brief for the appellant stated that he was unable to argue the case, the fact being that the brief had come into his hand too late for him to prepare himself in the case and the appeal was in consequence dismissed, it was *held* that this was not a dismissal for default of appearance (W N 1898, p 17) distinguished. (16 Bom 23) referred to. (12 Calc., 605) dissented from. **Chiran Lal v Kundan Lal. 18 W N 35.**

(f) ORDER REJECTING APPLICATION FOR READMISSION OF APPEAL.

515.—Order rejecting application for re-admission of appeal—Civil Procedure Code (Act VIII of 1859), s 347.

No appeal lies against an order rejecting an application for the re-admission of an appeal under s 347, Act VIII of 1859. **Amiruddin v Jiban Bibee I B L R F B 101= 10 W R F B 39.**

Note:—See 10 W R F B 39.

516.—Refusal to re-admit appeal dismissed in default—" Sufficient cause. "—

Notice of the date fixed for the adjourned hearing of an appeal, under Section 551 of the Code, had in this case been duly given to an appellant. He left the station and his pleader having cases elsewhere left the Court on the day fixed, though he was told the case would be heard. It was called on within business hours and dismissed in default. An application for re-admission was rejected on the ground that sufficient cause had not been shown. On appeal to the Chief Court, stress was laid on the Court's Circular IV of 1887.

Held, that although under Section 551 of the Code, a day and not a particular hour is to be fixed for the hearing yet when the appeal is dismissed for default, the appellant is required by Section 558 to show cause for non-attendance at the time when the appeal was called on for hearing.

Book Circular IV of 1887 explained. Para. 3 is restricted to parties and does not refer to pleaders.

Held, further, that the non-attendance of both

Appeal-*Contd.*

10 Default in Appearance—*Contd.*

pleaders and client in this case was wilful.

Miran Bakhsh v Rattan Chand. 71 P R 1890.

517—Act X of 1877, Sections 558 and 588 (v)-Appeal—Order refusing to re-admit appeal dismissed for default—Act XV of 1877, Schedule II Art.163, extension by Court of time prescribed by.

Under S .588 (v) of Act X of 1877, an appeal lies from an order under Section 558, refusing re-admission an appeal dismissed for default, even though the application for such re-admission was not presented within the thirty days prescribed by Act XV of 1877, Schedule II, Art 163.

The Courts have no power to extend the time prescribed by the last mentioned Article.

Mahi v Jiwan P R 141 of 1879.

518.—Order refusing re-admission of appeal dismissed for default—Civ Pro 1859 s 347.

A special appeal will lie from an order rejecting an application, under the provisions of s. 347 Act VIII of 1859, for the re-admission of an appeal dismissed for default of prosecution, if it appears that the Court below has not exercised the discretion which it possessed under the section.

The lower appellate Court, without enquiry, and without recording any reasons summarily refused an application under section 347. The order of refusal was set aside in special appeal, and the application remanded for proper consideration and disposal. **Lall Singh v Zahuri 6 N W P 222.**

519.—Appeal dismissed for default—Application for re-admission—Absence of party, not of pleader, to be explained—Special appeal.

In the lower Appellate Court, the appellant and his pleader were both absent on the day fixed for hearing; the appeal was dismissed for default; appellant applied for re admission, explaining that on the day fixed his son was dangerously ill; the Court rejected the application, recording that, "the fact that the appellant's son was ill did not excuse the pleader for not attending. If appellant has suffered by the dismissal owing to the default of his counsel he must settle that with him". On special appeal the Chief Court *held*, that it was sufficient for the appellant to explain his own default; he was not bound to account for the non-attendance of his pleader. Case remanded for

Appeal-*Contd.*

10 Default in Appearance—*Contd.*

the Lower Court to decide whether plaintiff's own default was explained and to proceed accordingly. **Subhan Shah v Karm Khan P R 113 of 1876.**

(g) ORDER REJECTING APPLICATION FOR RE-HEARING OF APPEAL

520.—Order rejecting application for re-hearing of appeal—Civil Procedure Code 1859 s 347 —

A special appeal lies from an order passed under s 347 of Act VIII of 1859 rejecting an application for the re-hearing of an appeal dismissed for default of prosecution. The reasons for rejecting such an application should be stated.

Huro Chunder Doss Chowdhry v Ram Coomar Chowdhry. 2 W R 254

Ram Yad v Bissessur Bhuttacharjee 2 W R Mis 23.

Gholam Mahomed Akbur v Koonj Beharee Lall 5 W R Mis 27.

Kisher Chunder Putronovis v Tara Monee Chowdhrain 3 W R 4.

Dinobundhoo Chutteraj v Beharee Lall Mookerjee 3 W R Mis 23,

Mittoo Khan v Rahman Khan 8 W R 36.

Notes:- Fol 8 W R 361; Dist: 6 W R Mis 130 Ref: 3 W R 4; 10 W R 160.

521,—Civil Procedure Code (Act XIV of 1882 SS 586, 588 (27)—Appeal from order refusing to re-admit appeal dismissed for default in suit cognizable by Small Cause Court.—

An appeal lies to the Chief Court under Clause (27) of S 588 of the Civil Procedure Code from an order of an Appellate Court refusing to re-admit an appeal dismissed for default and is not affected by the provisions of S 586 of the Code, which exclude a second appeal in suits of the nature cognizable by a Small Cause Court.

Mussammat Kahno v Sohel Singh P R 100 Of 1883.

522.— Civil Procedure Code 1859 s 347.—

When a lower Appellate Court after eleven months' delay, and without fixing any time for disposing of the appeal, made an order dismissing the case for default, the High Court set aside the order as erroneous, holding that it was the subject of an appeal notwithstanding s. 347, Act VIII of 1859, which only applies to cases of involuntary failure to comply with a Court's order.

Soodhamonee Dossee v Gooroopersaud Dutt W R 1864, 176.

Appeal-*Contd.*

10 Default in Appearance—*Contd.*

522A—Dismissal of appeal for default.

An order dismissing an appeal for default under s. 556 of the Code of Civil Procedure is not appealable. **Nand Ram v Muhammad Baksh 2 All 616.**

Mukhi v Fakir. 3 All 382

Kanahi Lal v Naubat Rai 3 All 519.

Notes:—Fol: 3 All 519; 15 All 359. Ref: 16 Bom 23.

523—C. P. C. O 9 r. 9; O. 21 r. 88; S. 104, O. 43 r. 1 (1882 Ss 103, 310 and 588)

Appeal-Order refusing to restore application under s 310 dismissed for default. *Held* that no appeal lies from an order refusing to restore to the file of pending applications an application under s 310 of the Code of Civil Procedure, which had been dismissed for default of appearance. (31 Cal 207, 10 Bom 433, 11 Mad 319, Fol).

Ghasiti Bibi v. Abdul Samad. A W N (1907) 186=29 All 596.

524—Civil Procedure Code (Act X of 1877) S. 556—Order dismissing appeal for default.

Held, that no appeal lies from an order dismissing an appeal for default under Section 556 of the Civil Procedure Code. (P R 113 of 1879), cited. **Mussammat Amna v Mussammat Askari Begam. P R 9 of 1883**

525—Civil Procedure Code 1877, ss 556, 558.

An appellate Court, the appellant not attending in person or by his pleader, instead of dismissing the appeal for default, as provided by s. 556 of Act X of 1877, proceeded, in contravention of the provisions of that law, to dispose of the appeal on the merits, and dismissed it. The appellant preferred a second appeal to the High Court, contending that the Appellate Court had acted contrary to law. *Held* that the appellate Court had so acted and its decision could only be treated as a dismissal for default, and that, so treating it, the proper and only course open to the appellant was to have applied under s. 558 for the re-admission of his appeal, and under these circumstances the second appeal would not lie. 2 All 616 followed.

Kanahi Lal v. Naubat Rai. 3 All 519.

Notes:—Over: 22 All 66 F B. Ref: 16 Bom 88.

Appeal-*Contd.*

10 Default in Appearance—*Contd.*

526—Where the Lower Appellate Court dismissed the appeal on the merits in the absence of the appellant, who had failed to appear, and a special appeal was preferred to the Chief Court, *held*, that the lower Court was bound to dismiss the appeal for default, and the special appeal would not lie **Mullik Said v Abbas. P R 36 of 1871.**

527.—S 558 C. P. C.—Dismissal for default Disposal on merits in absence of appellant—Appeal.

When an appellate Court in a case in which the appellant made no appearance whatever, instead of dismissing the appeal for default, proceeded to hear it upon the merits and delivered judgment thereon. *Held* that the decision of the Court must nevertheless be regarded as a dismissal under s. 556 of the Code of Civil Procedure and no appeal would lie therefrom. 14 All 361; 15 All 359; 3 All 519; 8 All 277; 20 W R 425.

Murdari v Mariam Bibi. 15 W N 140.

528.—Civil Procedure Code, 1877, ss. 2, 540, 556.

An order under s. 556 of Act X of 1877, dismissing an appeal for the appellant's default, is not a "decree" within the meaning of s. 2, and is not appealable. **Mukhi v. Fakir. 3 All 382.**

Notes:—Fol: 15 All 359.

(h) DISMISSAL OF APPEAL FOR DEFAULT.

529—Dismissal of appeal for default-"Order"—"Decree"—Civil Procedure Code, s. 2, and ss. 556, 558.

No appeal will lie under s. 10 of the Letters Patent from the order of a single Judge of the High Court dismissing an appeal for default. The decision of a Court dismissing a suit or appeal for default is an "order" and not a "decree". 2 All 616, 3 All 382, 8 All 519, 16 Cal 98. 14 All 226, cited. In *Bom* 23, not followed.

Mansab Ali v. Nihal Chand. 15 All 359.

Notes:—Dist: 28 Cal 81, Ref: 23 Cal 827; 32 Mad 321.

530.—Appeal—Dismissal of appeal for de-

Appeal-*Contd.*

10 Default in Appearance—*Contd.*

fault, order of—Civ. Pro Code (Act V of 1908), S. 2, O. 41, r. 17.

No appeal lies from an order of dismissal for default of an appeal under O.41, r. 17 of the Code, as it is not a decree under S. 2, nor is it specified in the Code as an appealable order.

Rukminimoyi v. Poran. 15 C L J 334.

(i) ORDER DISMISSING SUIT FOR DEFAULT OF APPEARANCE.

531.—Order dismissing suit for default of appearance—Civil Procedure Code (1882), s. 102.

The decision of a Court passed under s 102 of the Civil Procedure Code, dismissing a suit in default of appearance by a plaintiff, is an order and not a decree, and there is no first or second appeal therefrom **Gilkinson v. Subramania Ayyar. 22 Mad 221.**

Notes —Fol. 29 Cal 61: 12 M L J 473. Ref: 26 Bom 599; 601, 31 Mad 157, 26 Mad 599. Appr: 16 M L J 30.

532 —S 14—"Defect of jurisdiction," meaning of—Appeal — Pre-emption— Valuation of suit

Held, that the words "defect of jurisdiction" in S 14 of the Limitation Act mean a defect of jurisdiction peculiar to the Court in which the proceedings were taken and do not cover such mistakes as the presentation and prosecution of an appeal which did not lie in any Court.

Held, also that no appeal lies from an order dismissing a case on plaintiff's default.

In a pre-emption suit, the plaintiff was directed to deposit a certain sum in advance, and on his failing to appear and to do so by the date fixed, his suit was dismissed. He appealed against this dismissal, but his appeal was rejected as incompetent. He then applied for the restoration of his case, and his application was dismissed as time barred. He preferred an appeal against this dismissal, which proved successful on the ground that he was entitled to a deduction of the time he had spent in the prosecution of his appeal against the dismissal of his suit. On further appeal to the Chief Court, it was urged, *inter alia*, that the plaintiff could not have the benefit of S.14, Limitation Act.

Held that, inasmuch as the first appeal by the plaintiff to the lower appellate Court was not competent, he was not entitled to any deduction on account of that appeal.

Appeal-*Contd.*

10 Default in Appearance—*Contd.*

A Divisional Judge has no jurisdiction to hear an appeal in a suit for pre-emption of land, when the value of the land, according to the thirty times *jama* rule, exceeds Rs. 5,000. 63 P R 1886; 45 P R 1893; 34 P R 1898, Ref; P R 121=51 P W R 1907, Fol.; 46 P R 1908=94 P W R 1908, Fol:

Moti Singh v Maghar. 163 P W R 1911.

(j) ORDER DISMISSING SUIT FOR NON-APPEARANCE OF PLAINTIFF SPECIALLY ORDERED TO APPEAR.

533.—S. 107—s 103 C. P. C.

Where a suit has been dismissed under s. 107 read with s. 103 of the Code, the remedy of the plaintiff is not by way of appeal, but by an application under s. 103 and appeal under s. 588 (8).

Krishna Ram v. Gobind Ram. 8 All 20=5 W N 321.

534—Application for restoration of suit—Appeal—Appeal cannot be application for revision—

A suit was dismissed for plaintiff's default under s. 102 Civil Procedure Code. An application was presented for the restoration of the suit to the file but it was refused. An appeal was preferred against the order of the First Court which was dismissed On second appeal from the order of the Lower Appellate Court it was *held* that no appeal lies against such an order. The appeal cannot also be treated as an application for revision under s. 622 of Civil Procedure Code as the Courts below have not been shown to have acted with material irregularity in the exercise of their jurisdiction. A Court is not bound to do anything more than have cause called and it is the duty of the parties and their legal representatives to be in attendance. **Balaram v Mulla and Mt Gopi 5 C P L R 81**

(k) ORDER REJECTING APPLICATION FOR RETRIAL.

535—Order rejecting application for re-trial-Civil Procedure Code, 1859, ss. 119, 347—Appeal heard ex-parte.

A special and not a regular appeal will lie from an order rejecting a respondent's application for the retrial of an appeal heard in his absence.

Sreedhurchurn Nundee v Juggobundoo Paul. W R 1864, Mis,, 37.

Appeal-*Contd.*

10 Default in Appearance—*Contd.*

(L) ORDER TO ATTEND AS WITNESS.

536-544.—Order to attend as witness—Decree against defendant—Civil Procedure Code, 1859, 170.

A defendant who has been ordered to attend and give evidence under Act VIII of 1859. s 170 and has failed to do so, is not precluded from appealing against a decree in favour of the plaintiff. **Khomkar Abdool Guffoor v. Khoda Newaz. Marsh., 568.**

Kedarnath Bhuttacharjee v. Kripa Ram Bhuttacharjee. 5 W R 270.

Notes:—Ap: 5 W R 270.

545.—Decree on default of party summoned as witness—Civil Procedure Code, 1859 s. 170.

A regular appeal lies from the judgment of a first Court passed on the default of a party summoned to attend as witness under s.170, Act VIII of 1859. **Chunder Mohun Mojoomdar v. Teetooram Bose. 4 W R Act X, 18.**

546.—Decree on default of plaintiff summoned as witness.

The right of appeal is not lost to a plaintiff whose suit is dismissed for default by reason of non-appearance as a witness. or when the appellant wants to prove that he should not have been summoned at all. **Lekhraj Roy v. Buckland. 5 W R Act X, 65.**

(M) DECREE AGAINST MINOR-RESPONDENT NOT REPRESENTED BY GUARDIAN.

547.—Decree against minor Respondent not represented by guardian.

Held, that a minor respondent. not duly represented by a guardian, cannot be treated as having appeared, though actually present in the Appellate Court, and that any decree passed by it against the unrepresented minor is not merely to be considered as an *ex parte* one, but is illegal and liable to be set aside by the High Court. (24 Cal 25, 24 All 383, 28 All 137, Fol, 22 Mad 187, Ref) **Mussammat Ido v. Rulia. 55 P W R 1910=35 P R 1910=43 P L R 1910=6 Ind Cas 663.**

(N) ORDER REFUSING TO RESTORE SUIT DISMISSED.

548.—C.P C.S.104,O IX rr.3,4 and O XLIII—

Appeal-*Contd.*

10 Default in Appearance—*Concld.*

Suit dismissed for non-appearance of both parties—Application for restoration of suit dismissed—Appeal.

An order passed under O. IX, r. 4, refusing to restore a suit dismissed for default of appearance of *both* parties under O. IX, R. *3*, is not appealable. **Shaddi Lal v. Karm Din. 9 Ind Cas 238.**

549-550.—The Second Schedule r.21 (1882 S. 526)-Appeal dismissed for default Memorandum of objection—Costs.

Affidavit of objections, filed under the old Civ. Pro. Code, cannot be argued, if the appeal is dismissed for default.

Courts are not bound to allow costs when the memorandum of objections is dismissed owing to the appeal having been withdrawn or dismissed for default. **Muthu Payal v. Nagalingam. 6 Ind Cas 309=8 M L T 53.**

11. Exparte Cases.

(A) ORDER ADMITTING APPLICATION TO SET ASIDE EXPARTE DECREE.

551-552.—Order admitting application to set aside ex-parte decree.

Where a Court of first instance had admitted an application, made after the time allowed by law, to set aside an *ex-parte* decree,—*Held* that the Appellate Court was authorized to try in appeal whether under the law the Court of first instance had power to receive the application, and if its order was made without jurisdiction to set it aside. **Radha Benode Chowdhry v. Juggut Surnokar. 6 W R 300.**

Notes:—Ex: 23 W R 147. Ref: 8 B H C R 44; 2 Cal 114; 15 W R 175.

(B) ORDER ON APPLICATION TO SET ASIDE EXPARTE-DECREE.

553.—Order on application to set aside ex-parte decree—Civil Procedure Code. 1859, s. 119.

Though an order passed for setting aside a judgment is, on the merits of the application, final, yet where a Civil Court makes an order setting aside an *ex-parte* judgment on an application presented after the period allowed by law has elapsed, an appeal against that order

Appeal-*Contd.*

11 Exparte Cases—*Contd.*

will lie on the ground that it has been made without jurisdiction. **Keshavram Valad Hirachand v. Ramchandra Trimbak. 8 B H C 44.**

Toolsee Dossee v. Doorga Churn Paul 15 W R 175.

(C) APPEAL FROM EXPARTE DECREE WRONGLY ADMITTED.

554.—Appeal from ex-parte decree wrongly admitted.

Where a decree is passed *ex parte* in an original suit, the defendant has no right to a special appeal, even though his appeal has been entertained by the Civil Court. **Chidambara Pillai v. Kaman. 1 M H C 189.**

555.—Order setting aside ex-parte decree—Civil Procedure Code, 1859. s. 119.

An *ex-parte* decree of June 1865, kept alive by successive applications for execution, was subsequently set aside on an application of 14th August 1871 (within 30 days after attachment in execution) made under Act VIII of 1859. s. 119, and a judgment was passed on the merits. The lower Appellate Court reversed the order setting aside the *exparte* decree. *Held* that, in so far as the Munsif had decided that the application was in time, he did not come under s 119, and therefore his order was not final, and the lower Appellate Court had jurisdiction to enquire into his proceedings. **Bimola Soonduree Dassee v. Kalee Kishen Mojoomdar. 22 W R 5.**

(d) Order refusing to set aside exparte decree.

556.—Order refusing to set aside ex-parte decree—Act VIII of 1859, s. 119—Delay in appealing until Act X of 1877, which gave no appeal.

An application under s. 119, Act VIII of 1859, for the re-hearing of a case decreed *ex-parte*, was rejected. Under that law, this order was appealable. No appeal was however, filed until October 1st, 1877, on which date Act X of 1877 came in force. *Held* that the appeal was inadmissible, there being no provision in Act X of 1877 for such an appea **Jan Koer. 1 C L R 402.**

Appeal-*Contd.*

11 Exparte Cases—*Contd.*

557.—S. 588 (9)—

No appeal lay under Act X of 1877 from an order made under that Act rejecting an application for an order to set aside an ex-parte decree. **Gulab Singh v. Lachsmandas. 1 All 748.**

Notes:—Dist 4 All 387 F B.

(e) Order setting aside ex-parte decree.

558—Order setting aside ex-parte decree—Civil Procedure Code. 1859, s. 119.

A District Judge is not competent to entertain a summary or miscellaneous appeal from an order setting aside an *ex-parte* judgment. But where an *ex-parte* judgment has not been set aside and a judgment afterwards come to on trial, and where a regular appeal is preferred, the Appellate Court may, amongst the matters urged in appeal, take into consideration the regularity of the proceedings of the Court below in making an order under Act VIII of 1859, s.119. **Luckhee Monee Dossee v Bhoobun Mohun Bose. 23 W R 147.**

559.—Civil Procedure Code, s 534, of 1877.

An appeal lies from an order made under s 534 of the Civil Procedure Code of 1877, refusing to set aside an *ex parte* decree. **Luckmidas Vithaldas v Ebrahim Oosman. 2 Bom 644.**

Notes:—Dist: 4 All 387 F B. Ap· 9 Mad 445. Ref: 8 All 354 F B

560.—Order setting aside ex-parte decree—Appeal.

No appeal will lie from an order made under s, 157 read with s. 108 of the Code of Civil Procedure setting aside a decree passed *exparte* in default of appearance of the defendant on a day to which the hearing of the suit had been adjourned. (23 Cal 738) referred to. **Bhagwan v Hira. 19 All 355=17 W N 89.**

Notes:—Ref: 20 All 195.

561—Ex-parte decree— Appeal from—Grounds.

An appeal lies from an *ex-parte* decree both on the merits and on the ground that the defen-

Appeal-*Contd.*

11 Exparte Cases - *Contd.*

dant was not in default in failing to appeal.

Sadhu Krishna Aiyar v. Kuppan Iyengar. 16 M L J 479=30 Mad 54; F B.

562—Civil Pro, Code ss. 100, 101, 108 540—Appeal from a decree passed ex parte.

A decree was passed ex-parte against a defendant who did not adopt the procedure provided by s 108 of Civil Pro. Code. He has a right to appeal from such a decree under the general provisions of s 540. 4 All 387 dissented from.

Karuppan v. Ayyathorai. 9 Mad 445.

563—O. 9 r. 13, s. 96 - (1882 ss. 108, 540)—Preliminary decree, appeal against

Exparte decree, setting aside of—Final decree, appeal against, if can attack preliminary decree-Civil Procedure Code (Act XIV of 1882) secs, 108. 540.

The provisions of section 540 of the Civil procedure Code make it clear that an *ex-parte* decree is appealable.

In an appeal against the final decree in a suit for account, propriety of the preliminary decree may also be questioned. (21 Cal 550; 55 Mad 543 Ref.)

Inspite of the fact that an application under s. 108 of the Civil Procedure Code has been unsuccessful, an *exparte* decree may be challenged, if there are good grounds, in a proper proceeding for instance. in a regular suit on the ground of fraud. the test being whether the refusal of the application under s. 108 has already determined the question raised in the subsequent proceeding, (28 Cal 475; 29 Cal 395 Rel.)

The dismissal of an application under section 108. or ommission to prefer an appeal against such order of dismissal, does not bar another remedy on suitable grounds. and when the law provides an appeal against a decision, the effect of the omission to appeal is that the decision holds good for what it is worth. So far, therefore as concerns any other mode of relief available, the person who does not appeal, is in no worse position than if he had appealed and failed. **Golap Singh v Indra Kumar 9 C L J 367=13 C W N 493=5 M L T 360=1 Ind Cas 86.**

564—appeal.

Held that though no appeal lies from an *ex-parte* decree an appeal may be entertained in order to see whether the decree appealed against was in fact and law an *ex-parte* decree. **O And R Railway Company v Shib Charan 6 W N 172.**

565—Exparte decree–Appeal against ex-parte decree. arguments. permissible in support of-Civil Procedure Code Act XIV of (1882), Ss 108 and 540.

Although a person, against whom an *ex-parte* decree has been made, is entitled to appeal against it, instead of resorting to the procedure prescribed by S. 108 of the Code, yet. his contentions on appeal must be limited either to questions of law or to such arguments as arise upon the record as it stood when the *ex-parte* decree passed. He is not entitled to ask the appellate Court to accept the appeal on grounds which could be urged in an application under S. 108 and to remand the suit for rehearing it. 4 All 387. 17 Bom. 733; 23 All 167. Ref. 8 Cal 272. 23 Cal. 738. Appr. 30 Mad 54 dissented from. **Jadu Nath Basak v Ram Narayan 12 O C 25 =1 Ind Cas 329.**

566—Civil Procedure Code (1882). ss 108, 540 Decree passed exparte through non-attendance of defendants—Order on appeal for re-trial *de novo* on ground that defendants had insufficient opportunity for being heard—Jurisdiction of Subordinate Judge.

The defendants in a suit for possession of property and an injunction filed written statements. but failed to appear, either in person or by pleader, when the suit came on for hearing in the District Munsif's Court. Evidence adduced by the plaintiff was taken and a decree passed in plaintiff's favour as prayed. Some of the defendants applied to the District Munsif for an order to set aside the exparte decree, which application was refused; and the defendants then appealed against the original exparte decree, when the Subordinate Judge reversed the said decree and remanded the suit for retrial *de novo* on the ground that the defendants had not had a proper opportunity for being heard. *Held* that it was not competent for the Subordinate Judge to pass such an order ; that he could only deal with the case on the materials on the record ; and that the decree of the District Munsif must be restored. **Caussanel v Soures 23 Mad 260.**

Notes—Dist: 23 Mad 494 Diss: 16 M L J 479 F B=I M L T 268; 30 Mad 55 F B; 9 C L J 367=13 C W N 493.

Appeal-*Contd.*

11 Exparte Cases -*Contd.*

567.- Order setting aside ex-parte decree—The Code of Civil Procedure (1882) ss. 108, 588.

An order setting aside an ex-parte decree is not liable to appeal. **Shama Dass v. Hurbuns Narain Singh.** **16 Cal 427.**

568—C P C O. 5 **r. 25** (1882 s. 89) Service of summons on defendant residing out of British India. Where a summons is sent by post to a defendant residing out of British India, it is not, in the absence of evidence that the person to be served was at the time residing at the place to which the summons was sent, sufficient proof of service to show that the summons was posted, but there must be some evidence of its having been received by the defendant. **Fakir-uddin v Ghapur ud-din 1901 A W N 1=23 All 99.**

569—Contempt of Court. Notice of motion for committal—Service of notice—personal service necessary—Service upon attorneys not sufficient.

Where an application is made for committal of a person to jail for disobedience of the Court's order, it is necessary not only that the order should be served upon the defaulting party personally, but the notice to commit should also be similarly served upon him. Service upon the party's attorneys is not sufficient. **Bai Moolibai v Chunilal Pitamber 11 Bom L R 360=2 Ind Cas 485=33 Bom 630.**

570-C.P.C -O 41 r 21: S. 104; O 43 r. 1 (1882 Ss. 560, 588)—Applicability of Civil Procedure Code —Act X of 1859, Sec. 161—Complete Code-Transfer of brief—Pleader not named in vakalatnama—Adjournment-Hearing exparte Proper discretion. Section 560 of the Code of Civil Procedure, and by necessary implication, section 588 also, are applicable to appeals under Act X of 1859 by the operation of sec. 161 of the Act.

Quære—Whether the proposition that Act X of 1859 is a complete Code in itself requires modification in view of the decision in *Nilmani Singh v. Tara Nath Mukerjee.*

In an appeal before a District Judge, a respondent engaged two pleaders. On the day of hearing, the pleader being ill had transferred his brief to another pleader whom the Judge declined to hear as his name did not appear in the vakalatnama. The junior not being instructed to argue, applied for a day's adjournment to get himself ready. This was refused and appeal was decreed *exparte.*

Held, the Judge had erroneously exercised his discretion. He ought either to have allowed the pleader, who appeared to argue the case or allowed an adjournment, making, if necessary, an order for costs in favour of the appellant. **Hare Krishna v. Bishun Chandra 7 C L J 426=12 C W N 888.**

571-C.P.C.O 5 r. 17, O 9 r.13 (1882 Ss. 80, 108)-Application to set aside a decree passed exparte—Irregular service of summons.

Where a serving officer finds a defendant to be away temporarily from home and knows where he is, it is not a good service if he thereupon does no more than fix the summons to the outer door of the house; but he must make further efforts to effect personal service. **Sakina v Gawri Sahai 1902 A W N 68=24 All 302.**

(F) Refusal to re-hear appeal

572—Order refusing to rehear—Appeal decided ex-parte—Second Appeal—Civ. Pro. 1877, ss. 560, 584, 588.

An Appeal was heard ex-parte in the absence of the respondent (defendant), and Judgment was given against him. He applied to the Appellate Court to re-hear the appeal, and the Appellate Court refused to re-hear. He then appealed, not from the order refusing to re-hear the appeal, but from the decree of the appellate Court. *Held* that he was not debarred, by reason that he had not appealed from the order refusing to re-hear the appeal, from appealing from the decree of the Appellate Court. **Ramjan v Baij Nath. 2 All 567.**

Notes:—8 All 354 F B; Dist: 4 All 387 F B.

(G) Order exparte directing attachment in execution of decree

573-Exparte order for attachment in execution of a decree—An exparte order for attachment in execution of a decree is appeallable. **Zamindar of Sivagiri v Alwar Ayyangar Sangli Virapandia Chinnathambiar v Alwar Ayyangar 3 Mad 42.**

Notes:—Fol: 5 Mad 232 F B; 13 Mad 265. Ref

Appeal-*Contd.*

11 Exparte Cases—*Contd.*

9 Bom 198 F B; 16 All 449; 32 Mad 429; 19 M L J 401.

(H) Order against defendant not appearing

574—Order against defendant failing to appear-Civil Pro. Code 1877 s 540 Exparte decrees are appealable under s 540 of the Civil Pro. Code if a dependant after appearing at the first hearing files a written statement he should not be considered Exparte. **Anantharama Patter v Madhava Paniker 3 Mad 264**

See Luckmidas Vithaldas v Ebrahim Oosman 2 Bom 644

and Modalatha 2 Mad 75

Notes:—Ref: 10 Cal 410; 19 Mad 230; 21 Mad 356: 7 Bom 341. F. B. 7 All 345.

575—Ex-parte decree—Application to set aside—Appeal.

Held that a defendant against whom a decree has been passed ex- parte and who has not adopted the remedy provided by s. 108 of the Code of Civil Procedure is not competent to prefer an appeal from such ex-parte decree. **Lal Singh v Kunjan 4 All 387=2 W N 85**

Notes:—Dist 8 All 354 F B; Not Fol 9 Mad 445, 9 All 427; 8 All 20 Dist. 7 All 159; 9 All 427.

576—Ex-parte decree.

An appeal from an ex parte decree lies under the general provision of Section 540 Act X of 1877 as no express provision is to be found in the said Act precluding such appeal **Mussammat Sahib Dai v Jaga Singh P R 105 of 1880**

577—Civil Procedure Code Act X of 1877, sections 101 and 108 appeal.

A defendant against whom a decree has been passed ex-parte is entitled to appeal without having first resorted to the procedure laid down in section 108 of the Civil Procedure Code.

Ashruffunissa v Lehareaux 8 Cal. 272= 10 C L R 502

Notes:—Ref 8 All 354 F B,

578—Ex-parte decree-Act X of 1877 Section 108 *Held*, following (P R 105 of 1880) and other rulings that an appeal will lie by the defendant from an ex-parte decree against him notwith-standing that he has not applied under Section 108 of the Civil Procedure Code to set it aside.

The ruling of the maiority of the Full Bench in 4 All 387 dissented from **Radha Prashad v Hirde P R 60 of 1883.**

Followed in Prem Singh v Kharak Singh. P R 60 of 1883

And Chuni Lal v Bodar Mal P R 2 of 1886.

Appeal-*Contd.*

11 Exparte Cases—*Contd.*

579—Decree against defendant under s. 136 Exparte Decree—Appeal.

A defendant failing to comply with an order to answer interrogatories, the Court under s. 136 of the Code of Civil Procedure struck out his defence and, proceeding ex-parte passed a decree against him. *Held* that the decree could not be treated, in respect of the remedy by appeal, as an ex-parte decree, and therefore under the ruling in (4 All 387) not appealable, but that an appeal would lie from the decree **Chunni Lal v Chhamman Lal. 7 All 159 =4 W N 313.**

Notes:—2 C W N 676.

580—Order refusing application—Appeal

Held that an order rejecting an application to set aside an ex-parte decree is appealable under s. 588 (9) of the Code of Civil Procedure.

Hira Dai v Hira Lal. 7 All 538=5 W N 144.

Ramtahal Ram v Rameshar Ram. 8 All 140=6 W N 42.

Notes:—Ap: 20 Bom 380; 23 Bom 414. Fol. 8 All 140. Con. 23 Cal 991. Ref. 18 All 241; 34 Cal 403 F B: 5 A L J 247 F B; 11 C W N 329 F B.

(I) ORDER AGAINST RESPONDENT NOT APPEARING.

581,—Second appeal from ex-parte decree.

Held, by the Full Bench (Straight Officiating C J., and Tyrrell J., expressing no opinion) that a respondent in whose absence the appeal has been heard ex-parte and against whom judgment has been given, may prefer a second appeal from the decree, under the provisions of s 584 of the Code of Civil Procedure, and his remedy is not limited to an application under s 590 to the Court which passed the decree to re-hear the appeal. 2 All 567 approved.

Per Oldfield, J.—There is a distinction between the case of defendant in a Court of first instance and that of a respondent in an appellate Court not appearing, with reference to ss 108 and 560 of the Code. 4 All 387; 6 Bom H C Rep 161 referred to.

Per Mahmood, J.—The distinction is one of detail merely and not of principle. 4 All 387 dissented from. 2 All 67: 7 All 606; 8 Cal 272; 2 Bom 644; 3 Mad 204 and 2 Mad 75 referred to.

Also *per* Mahmood, J.—Where two procedures or two remedies are provided by statute, one of them must not be taken as operating in derogation of the other. **Fateh Lal v Baimakund 8 All 354=6 W N 110.**

Notes—Fol 9 All 427: Ref 11 Bom 6 F B; 21 Mad 157.

Appeal-*Contd.*

11 Exparte Cases—*Contd.*

582.—Ex-parte order against respondent.

Where on appeal to the Commissioner's Court the decision was passed in favour of the appellant in the absence of the respondent. *held*, that the respondent could either have applied for a rehearing of the appeal under Section 37 of Act XXIII of 1861, or at once preferred an appeal to the Chief Court without getting rid of the ex-parte judgment. **Sodha Singh v Kesur P R 8 of 1871**

583.—(10) service of. to respondent—Practice —Appeal—Notice to respondent.

The notice to the respondent was served by being affixed on the door of a house at Satara at a time when he was living at Gwalior,and the District Judge made no enquiry, and no declaration was made that the notice was duly served:

Held, that the respondent was entitled to have the appeal reheard *ab initio* as it was improperly heard *ex-parte*, no notice having been served on the respondent in the manner required by law. **Narayan v Raghavendracharya 2 Bom L R 281.**

(J) Order Admitting appeal.

584.-Exparte-Order-Appeal admitted.-An ex-parte order admitting an appeal can be reconsidered when the appeal is heard **Moshaullah v Ahmedullah 13 Calc 78.**

Notes.—Fol 9 All 11, 655. Ref 19 M L J 209.

(K) Application to set aside exparte decree dismissed

585.—S 104 cl 2—Order passed in appeal—Appeal against such order—Bar—Application to set aside ex-parte decree dismissed—Appeal.

Where an appeal was preferred against an appellate order passed by a District Judge, who set aside the order of the District Munsif, on the ground that an amendment in the Limitation Act cannot take away the right to obtain reliefs which had become already vested prior to the amendment. *Held*. that the appeal was barred under S 104 (2). C P C., 1908. **Venkatachellaya v Subramania Aiyar 21 M L J 442= 9 Ind Cas 55.**

(k-1) Questioning propriety of prelininary decree in an appeal against the final decree.

585 A—O. 9 r. 13; s. 96—(1882 ss. 108, 540 - Preliminary decree, appeal against.

Expart decree, setting aside of- Final decree, appeal against, if can attack preliminary decree-Civ. Pro Code (Act XIV of 1882) secs, 108, 540.

Appeal-*Contd.*

11 Exparte Cases—*Contd.*

The provisions of section 540 of the Civil Procedure Code make it clear that an *ex-parte* decree is appelable.

In an appeal against the final decree in a suit for account, property of the preliminary decree may also be questioned. (21 Cal 550, 25 Mad 543 Ref.)

Inspite of the fact that an application under s. 108 of the Civil Procedure Code has been unsuccessful. an *exparte* decree may be challenged, if there are good grounds, in a proper proceeding for instance. in a regular suit on the ground of fraud, the test being whether the refusal of the application under s. 108 has alredy determined the question raised in the subsequent proceeding, (28 Cal 475; 29 Cal 395 Ref.)

The dismisal of an application under section 108, or ommission to prefer an appeal against such order of dismissal,does not bar another remedy on suitable grounds, and when the law provides an appeal against a decision,the effect of the omission to appeal is that the decision holds good for what it is worth. So far, therefore as concerns any other mode of relief available, the person who does not appeal, is in no worse position than if he had appealed and failed.

Golap Singh v. Indra Kumar. 9 C L J 367=13 C W N 493=5 M L T 360 =1 Ind Cas 86

(L) Jurisdiction of first Court to entertain application for setting aside exparte decree after decree of appellate Court.

586.—Ex parte decree—Applications to set aside by some defendants-Contested decree against other defendants—Plaintiff's appeal against contesting defendants—Self-contained appellate decree—Jurisdiction of first Court to entertain application for setting aside ex-parte decree after decree of Appellate Court.

It cannot be laid down broadly that, as soon as an appeal has been preferred against a decree, the authority of the original Court to deal with that decree is completly taken away.

After the decree of an original Court has merged in the decree of an Appellate Court, the only Court which is competent to entertian an application for amendment of the decree is the Court of Appeal.

A mortgage-suit was resisted by the sixth and seventh defendants alone and the suit proceeded

Appeal-*Contd.*

11 Exparte Cases—*Concld*

exparte against the other five defendants. The decree directed the sale of two thirds of the mortgaged property and declared that, it the mortgage debt was not satisfied thereby, all the seven defendants would be personally liable.The plaintiff appealed against tl at portion of decree which declared that a one-third share of the mortgaged property was not liable—that is, the appeal was directed against the sixth and seventh defendants alone, who filed a memorandum of cross objections to the effect that they should not have been made personally liable. The appeal and the cross-objection both succeeded, as the Appellate Court held that the whole property was liable but that the sixth and seventh defendants were not personally liable. The decree of the Appellate Court was made self-contained and the provisions of the decree of the original Court, so far as they related to the first five defendants, were re-produced and incorporated in the decree.

The first five defendants then applied to the first Court to have the *ex-parte* decree set aside.

Held that the Court had jurisdiction to entertain the application: that the questions in controversy between the plaintiff and the first five defendants were not raised in the appeal; that the decree of the first Court was not affirmed, modified or reversed in so far as the first five defendants were concerned, and that the effect of the appellate decree was not to merge the ex-parte decree therein. 30 Mad 535; 17 M L J 436, Not Fol 9 Ind Cas 189; 13 C L J 221; 15 C W N 399; 38 Cal 394 Ref 11 All 267; 6 C L J 542 Ref. 4 C W N 456; 5 Ind Cas 525; 12 C L J 53; 22 W R 537, Dist. **Brija Lal Singh v Mahadeo Prasad 12 Ind Cas 669.**

12, Execution of decree.

Appeal-execution of decree See also cases under—sale in execution of decree.

Appeal-execution of decree—See C P C S 68,70,71. **5 N L R 121.**

Appeal-execution of decree—See C P C S. 68,70,71 **7 Bom L R 682**

(A) Order refusing application to execute joint decree.

587.—Order refusing application to execute joint decree—Civil Procedure Code, 1859 s 207.

No appeal lay from an order of a lower Court refusing an application by one decree-holder under s 207 Art VIII of 1859, to execute the whole of a joint decree to the execution of his co-decree-holder. **Gooroo Dass Roy v Ram Runginee Dossia 17 W R 136. Odhoya Pershad v Mohadeo Dutt Bhandaree 17 W R 415.**

Appeal-*Contd.*

12 Execution of decree—*Contd.*

Notes:—Fol: 17 Mad 394 Dist:

588—C P C O.21 rr.66,70 (1882 s. 287)—Sale Proclamation, statement in, of value Appeal Application for execution of decree of appellate court, whether an application in continuance of application to execute the decree of lower court.—

Time to take objections. A judgement-debtor has the right to have as nearly as may reasonably be, a just and true valuation placed upon his property before it is sold: he has also the right to have the property to be sold described in the sale proclamation with reasonable accuracy, 25 I. A 146, 15 I A. 171 relied upon. An appeal lies against an order refusing an application made by a judgmant-debtor objecting that the valuation of the properties contained in the sale proclamation was incorrect and in many instances grossly inadequate and that the properties were misdescribed in such a manner as to render their identification by intending purchasers extremely difficult ; 9 Cal 214 declared absolute. 9 All 500 distinguished. 18 Cal 469 dist. 23 Mad 568 approved ; 4 Cal 739 ref to. Where the sale proclamation was published on 11th November and the judgment-debtors made an application on the following day for transfer of the execution proceedings to another district. Pending the hearing of an appeal the decree holder took out execution of a mortgage decree. The judgment debtor made an objection to the validity of the sale proclamation on the ground that the statement therein as to the value of the property was incorrect ; and the Court overruled the objection. The appellate Court altered the decree and extended the period of redemption ; the decree-holder then made an application to execute the decree of the appellate Court. *Held*, that the application to execute the decree of the appellate Court was not a continuation of the former application and the lower Court was in error in declining to enter into the question as to the value of the property as stated in the sale proclamation. **Rajah Rameshur Prashad Narain Singh v Rai Sham Krissen. 8 C W N 257**

(b) Order on application for execution by one or more joint decree-holders.

589—Order on application by one or more joint Decree-holders for execution Civil Pro Code (1882) ss. 231-234.

Appeal-*Contd.*

12 Execution of decree—*Contd.*

An order under s. 231 of Civil Pro Code is appealable as it relates to the execution of a decree within s 244, **17 W R 136** & **17 W R 415** distinguished. **Lakshmi Ammah v Ponnassa Menon. 17 Mad 394**

Notes:—Dist: 23 Bom 623. Foll 28 P R 1898

(c) Order refusing to allow execution by one of several joint decree-holders.

590 Civil Procedure Code S. 231-Order under s. 231—Appeal does not lie against such order.

No appeal lies against an order passed under Section 231 of the Code of Civil Procedure refusing to allow one of several joint decree holders to execute joint decree. **Ratanlal v Bai Gulab 1 Bom L R 87=23 Bom 623**

(d) Adjustment of decrees more than three years old.

591-Adjustment of decrees more than three years old Civil Procedure Code. 1882, ss. 257, 258—Reference to High Court under s. 617 of a question arising under these sections.

On the 22nd March 1886 the applicant presented an application to a Subordinate Judge, praying that the adjustment of certain decrees, dated the 20th March 1867 and 11th July 1871, might be certified, and a sanction granted to a sankhat, dated 18th March 1880, passed to him by the defendant in satisfaction of the said decrees and in substitution of two bonds dated February 1879. The Subordinate Judge, being of opinion that the application could not be granted inasmuch as the execution of the decrees was then barred by limitation, referred the case to the High Court under s. 617 of the Civil Procedure Code (Act XIV of 1882), *Held*, that the question not be could referred under s. 617 of the Civil Procedure Code (Act XIV of 1882), as the order applied for to the Subordinate Judge was appealable under s. 2 of the Code. The question raised by the application related to the satisfaction of the decree within the meaning of s. 244 of the Code. **Rangji v Bhaiji Harjivan. 11 Bom 57.**

Notes:—Ap: 16 All 129; 5 M L J 140; 18 Mad 26 Fol: 7 C W N 172.

592—Appeal.

No appeal lies from an order of the Court executing a decree granting or refusing an application for extension of time for payment by the judgment-debtor of the amount due under the decree. **Sheonarain v Hait Ram. 10 W N 183**

Appeal-*Contd.*

12 Execution of decree—*Contd.*

(e) Order in matter specially provided for.

593—Order in matter specially provided for —Act XXIII of 1861, s. 11—Civil Procedure Code 1859, ss. 243. 364.

S. 11 of Act XXIII of 1861 did not allow an appeal in matters already specially provided for in the different sections of the Procedure Code (e. g., ss. 243 and 364). **Greejanund Oopadhya v Ruttee Raman Oopadhya. 8 W R 136.**

Notes:—Diss: 10 W R F B 5.

(f) Order confirming report of Commissioner of Accounts.

594—Order confirming report of Commissioner of Accounts—Act XXIII of 1861, s. 11.

S. 11 of Act XXIII of 1861, must be read as an amendment to the Civil Procedure Code (Act VIII of 1859). That section in terms confined to questions arising in the execution of decrees, which expression, as used in the said Code means the enforcement of the decree on the application of one or other of the parties to it. *Held*, that an order of a Judge confirming the report of the Commissioner for taking accounts, by which he refused to require the defendants to give inspection of certain books, was not an order within the contemplation of that section, and was, therefore, not appealable **Rustomji Burjorji v Kessowji Naik. 8 Bom 287.**

Notes:—Ref: 13 Cal 267 F B.

(g) Dispute among heirs of deceased decree-holder.

595—Dispute among heirs of deceased decree -holder—Act XXIII of 1861, s. 11

According to s. 11, Act XXIII of 1861, no appeal lay in a case of private dispute among the heirs of a deceased decree-holder as to their respective rights. **Rajchunder Roy Chowdhry v Grishchunder Roy. 5 W R Mis 45**

(h) Order under S. 246 C P C (1859)

596—Order under s. 246, Civil Procedure Code, 1859.

S. 11, Act XXIII of 1861, did not alter or modify the effect of s. 246, Act VIII of 1859, so as to give an appeal from orders passed under the latter section. **Dheeraj Mahatab Chand v Pearee Dossee. 6 W R Mis 61**

Notes:—Ap 15 W R 163; 12 W R 333. Ref: 20 W R 280.

Appeal-*Contd.*

12 Execution of decree—*Contd.*

(i) Order rejecting appeal in execution case.

597—Order rejecting appeal in execution case-Act XXIII of 1861, s. 11

Under s. 11 of Act XXIII of 1861, an appeal lay from the order of a lower Appellate Court rejecting an appeal in an execution case as presented out of time **Gopeenath Roy** v **Gopeenath Chatterji.** **6 W R Mis, 106**

598.—*Act* XXIII of 1861, s. 11.—

The Munsif, on the application of a judgment debtor, set aside a sale held in execution of a decree passed against him on the ground that the decree was barred by lapse of time. The judgment creditor appealed to the Judge, who rejected the appeal on the ground that no appeal was allowed from such an order. *Held*, in special appeal, that, under s 11 of Act XXIII of 1861, an appeal lay from the order of the Munsif.
Dhan Bibee v Haradhan Ram
2 B L R Ap 11=11 W R 4.

(j) Order passed on application for discharge from arrest in execution of decree

599—Order passed on application for discharge from arrest in execution of decree—Act XXIII of 1861, s. 11—Civil Procedure Code, 1859, ss. 273, 283, 365.

Held that the procedure, on an application for his discharge under s. 273 of Act VIII of 1859, by a person arrested in execution of a decree for money was such a question as came within the words introduced by s. 2 of Act XXIII of 1861, in addition to the original provision in Act VIII of 1859, s. 283; and the order passed thereon by the Court executing the decree was subject to appeal, notwithstanding that orders as to imprisonment in execution of a decree were excepted from the operation of s. 365 of Act VIII of 1859, as this exception, there being no affirmative prohibition, was removed by the provision of ss 8 and 11 of Act XXIII of 1861, which Act, as directed by s 44 thereof, was to be read as part of Act VIII of 1859. **Yesvantrav Amritrao Jamin v Ismail Ali Khan.**
2 Bom 99, 2nd. Ed., 94.

600.—Civil Procedure Code (Act XIV of 1882), Sections 244, 588—Order refusing to release judgment-debtor arrested in execution of decree—Appealable order.

Held, that an order refusing to release a judgment-debtor arrested in execution of a decree is not appealable, as it is not among those orders enumerated as appealable in Section 588 of the Civil Procedure Code, nor is it an order falling under Section 244 of the same Code; and if it be regarded as an order for imprisonment, it is expressly excepted from the orders appealable under Clause 29 of Section 588. **Hissam-ud din v Muhammad Umr.** **P R 55 of 1886.**

601.—Civil Procedure Code, 1882, Chapter XIX (i) and Sections 2, 244 (c) and 588 (29)—Order by execution Court for imprisonment of judgment-debtor—Appeal—Revision.

Held, that an order passed by the Court executing a decree under Chapter XIX (i) of the Civil Procedure Code for the imprisonment of the judgment-debtor, though not appealable *as an order* under Section 588 (29), is appealable as a *decree* inasmuch as the question decided by such order is one relating to the execution of the decree within the meaning of Section 244 (c) of the Code. **Seva Singh v Dhaunkal-**
69 P R of 1895.

(k) Order refusing refund of Purchase-money

602.—Order refusing refund of purchase-money—Act XXIII of 1861, s. 11.

A sale in the execution of a decree having been cancelled, the auction-purchaser applied for the refund of the purchase-money, which the Court executing the decree ordered, subject to the deduction of the sale fees. The auction-purchaser then applied for the return of the sum deducted. The Court passed an order refusing the application, which order the auction-purchaser questioned in appeal. *Held* that an appeal did not lie.
Hurdei Beebee v Surjoo Pershad.
6 N W 309.

603.—Appeal.

A sale in execution of a decree having been set aside on the ground that the judgment-debtor had no interest in the property sold, the purchaser applied for a refund of the purchase money under s 315 of Act X of 1877. This application

Appeal-*Contd.*

12 Execution of decree—*Contd.*

was refused by the Court executing the decree (Munsif.) The purchaser appealed to the District Judge with the same effect. In appeal to the High Court, *held* that the order of the Munsif, not falling under s. 244 of the Code of Civil Procedure, was not appealable as a decree, nor was it appealable under s. 588 of the Code of Civil Procedure. **Debi Das v Sujan Singh. 4 W N 178.**

(L) Order on application to correct error in proceeding

604.—Order on application to correct error in proceeding—Act XXIII of 1861, s. 11.

Where an application was made to correct an error in a proceeding in which interest was calculated, the order passed on the application was open to appeal under s. 11, Act XXIII of 1861. **Amanut Ali v Bindhoo. 13 W R 138.**

(m) Order as to sum due on mortgage account

605.—Order as to sum due on mortgage accounts—Usufructuary mortgage—Suit by mortgagor for possession.

In a suit by a mortgagor against a mortgagee to recover lands in the possession of the latter under a usufructuary mortgage, the only question in issue is whether the plaintiff is entitled to enter; and no appeal lies from the finding of the Judge that a specific sum is still due, it being open to the parties to dispute that decision by a separate suit. **Motee Soonderee v Indrajit Kowaree. Marsh 112. S. C. Brijolall Upadhya v Motee Soonderee. W R F B 33.**

606.—O. 34, R. 4 (T P A S. 88)—Civil Procedure Code, Ss. 230 and 244. Cl. (c)—Decree for sale—Direction by Appellate Court to take accounts—Application by decree-holder to Original Court—Order declaring amount due—Appeal.

A decree for sale passed under S 88 of the Transfer of Property Act is the final decree in the suit; and all proceedings subsequent to that decree for the purpose of enforcing and working out such decree are proceedings in execution of that decree. A decree for sale under S. 88 may either declare the amount due on the mortgage at the date of such decree or direct that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage on

Appeal-*Contd.*

12 Execution of decree—*Contd.*

a future day which is to be fixed by the decree itself. Where a decree for sale under S. 88 directs accounts to be taken, an application which the decree-holder may make for taking the account and declaring the amount which may be found due on the taking of such account is an application to enforce the decree within the meaning of S. 233, C. P. C. Such an application may be made to the Court which passed the original decree, and an order passed thereon is applicable, being one falling under S. 244, Cl. (c) of the Civil Procedure Code. **Aryan Bank of Vizagapatam v Venkata Narayamma (1902) 13 M L J 212=26 Mad 237.**

(n) Order allowing mortgagor to deposit in Court amount due after date fixed.

607.—The appellant obtained a foreclosure decree which was prepared in accordance with s. 86 of the Transfer of Property Act. The date on which the money was to be deposited by the mortgagor (judgment-debtor) was a close holiday. He therefore applied to be allowed to deposit the money on the next day. That application was granted and this is an appeal from that order. *Held*, that it was purely a ministerial order not falling within the purview of S 244 or s.588 and as such cannot be made the subject-matter of appeal. **Hulas Rai v Pirthi Singh. 9 All 500 =7 W N 109.**

Notes.—Ref: 14 All 350; 520; 25 Mad 244 F B; 300 F B. Ex: 8 C W N 257.

(o) Order rejecting appeal in execution case

608.—Order rejecting appeal in execution case—Act XXIII of 1861, s. 11—Question whether decree is barred by limitation.

The question whether the execution of a decree is barred by limitation is a question arising between the parties to the suit; and an appeal lay under s. 11 of Act XXIII of 1861 from a decision on such question, whether it be raised by the Court *proprio motu* or by the parties. **Hari Vishnu v Gopal Bin Ragji. 6 B H C 181.**

(P) Order in Case transferred for execution.

609—Order in case transferred for execution—Act XXIII of 1861, S. 11—Beng. Act III of 1870.—Where a decree by a Deputy Collector had been transferred to the Civil Court, and ap-

Appeal-*Contd.*

12 Execution of decree—*Contd.*

plication for execution was made while Bengal Act III of 1870 was in force. — *Held*, that the execution proceedings were subject to the provisions of the Civil Procedure Code, and an order passed therein was appealable under Act XXIII of 1861, s. 11. **Chedee Singh v. Peareeoonnissa, 20 W R 19.**

610—An order passed by a Court to which a decree has been transferred for execution is not open to appeal, unless the order has been made in the course of the actual execution of the transferred decree. *Quære*—Whether, where a decree has been transferred to the Munsif's Court for execution, an appeal will lie to the Judge from the Munsif's order in the matter of the execution? **Sumat Das, 13 B L R Ap 27.**

Soomut Dass v. Bhoobun Lall, 21 W R 292.

See this case at a former stage in which the question was raised. **Soomut Dass v. Bhoobun Lall, 20 W R 478.**

611—A decree transmitted to a Court for execution is to be regarded as a decree of that Court for the purpose of execution, and an appeal therefore lies against the order of a District Judge passed in execution of a decree transmitted to his Court from a Small Cause Court. **Mobaruck Ali v. Soomee Runga Charee, 3 N W 168.**

612 C P C, O. 21 r. 7 (1882—S. 225)—Decree Execution—Court to which a decree is sent for execution—Court executing a decree—Jurisdiction of the first Court—Appeal.

When a decree is sent to a Court for execution that Court can, under S. 225 of the Civil Procedure Code, go into the question of the jurisdiction of the Court passing the decree, if it sees reason to do so. If that Court comes to the conclusion that the first Court had no jurisdiction to pass a decree and declines to become the executing Court, the order so passed does not fall within the purview either of S 244 or S. 588 of the Civil Procedure Code, and cannot be appealed against. **Bhagvantappa v. Vishwantath, 6 Bom L R 342=28 Bom 378.**

Notes:—Dist: 30 Bom 101=7 Bom L R 659.

(P [1]) Order rejecting application for transfer of a decree for execution.

613—S. 47, Ss. 38, 39, 41, O. 21 rr. 4, 5 (1882

Appeal-*Contd.*

12 Execution of decree—*Contd.*

—Ss. 244, 223)—Appeal Rent decree Application, for transfer of decree rejecting application:—

An application for the transfer of a decree for execution under S. 223 of the Code of Civil Procedure is an application which involves a question relating to the execution of decree: and as such comes within S. 244 of the Code. An appeal therefore lies against an order rejecting such an application. 16 Cal 744 Dist; 24 Cal 244 Fol.

Bhabani Charan Dutt v. Pratap Chandra Ghosh, 8 C W N 575.

(Q) Order as to issue of certificate.

614—Order as to issue of certificate — Act XXIII of 1861, S. 11 — Civil Procedure Code, 1859, S. 285.—

All orders passed by a Court between parties to the decree and relating to the execution of decree are, unless they are specially barred, appealable. There is no special prohibition against an appeal from an order directing or refusing the issue of a certificate under S. 285, Act VIII of 1859. **Gopal Lall v. Mahomed Hadee. 6 N W 73.**

(R) Order rejecting application as to mode of sale of property.

615—Order rejecting application as to mode of sale of property—Civil Procedure Code, 1877, Ss. 244, 588—Question relative to the execution of a decree.—A judgment debtor having applied, under S. 284 of Act X of 1877, that certain property attached in execution of a decree against him should be sold in successive 8-pie shares, on the ground that the amount due under the decree was only Rs. 9,000, and that on a former occasion a similar share of the same property had been sold for Rs. 5,000, the Judge refused the application. *Held*, that the question between the parties was one relating to the execution of a decree; and accordingly that, although no appeal was given by the Act against an order under S. 284, there was an appeal under S. 588. **Chandhari Sital Pershad Singh v. Jhumah Singh, 4 C L R 27.**

(S) Order as to mesne profits subsequent to decree, and as to costs of execution.

616—Order as to mesne profits subsequent to decree, and as to costs of execution—Civil Procedure Code, 1877, S. 244.—

Appeal-*Contd.*

12 Execution of decree—*Contd.*

There is no appeal against an order made under S. 244 of the Code of Civil Procedure (X of 1877), determining the questions between the parties to a suit as to the amount of mesne profits recovered by the plaintiff subsequently to the decree and as to the amount payable on account of the costs of the execution of that decree.

Dalpathbhai Bhagubhai v. Amarsang Khemabhai, 2 Bom 553=P J (1878) 48.

Notes:—Ap: 5 Cal 50.

(T) Order disallowing objection to attachment.

617—Different characters.

Held, that where a decree is passed against a person in one capacity (partner in a firm) and he objects to an attachment under the decree in another (the house attached is his personal property) which is disallowed, no appeal lies from such order, as the order would fall under S. 281 and not under S. 244 of the Code of Civil Procedure. **Abdul Rahman v. Muhamadyar, 4 All 190=2 W N 1.**

Nath Mal Das v. Tajmmul Husain. 7 All 36=4 W N 218.

Notes:—Over: 12 All 313 F B. Not Fol: 16 Cal 1. Dist: 9 All 605. Con: 15 Cal 437; 9 Bom 458. Ref: 8 All 626.

618—S. 588, (16)—Order disallowing objection to confirmation of sale—(Act X of 1877).

Held, that an appeal lies from an order disallowing the judgment-debtor's objection to the confirmation of the auction sale. **Hira Singh v. Umrao Singh, 2 W N 45.**

619—C P C, S. 47—(1882 S. O 244)—No appeal Execution of decree — Objection by judgment-debtor that more had been delivered to the auction-purchaser than was included in his sale certificate—Objection disallowed—Appeal.—

Certain landed property was put up for sale in execution of a decree. On the property stood a house. After the sale the auction-purchaser obtained possession of the house The judgment-debtor objected that the house should not have been delivered, inasmuch as no mention was made of it in the sale certificate. This objection was disallowed.—*Held*, that the order disallowing the judgment-debtor's objection did not fall within

Appeal-*Contd.*

12 Execution of decree—*Contd.*

S. 244 of the Code of Civil Procedure and was not otherwise appealable. 20 Mad 487; 13 Cal 326 ref. to. **Ram Adhar v. Narain Das, 1902 A W N 157=24 All 519.**

620—Applicability of section to appeal under s. 244, Civil Procedure Code—Substantial loss.]

This was an application for staying an order for execution of a decree. It appeared that a dispute between H S and K S was referred to arbitration. The arbitrator by an award dated the 27th August, 1887, assigned certain villages to K S. This award was subsequently filed in Court under the provisions of s. 525, Code of Civil Procedure, on the application of K S, and a decree made in accordance with this award. No appeal was preferred from this decree. K S applied from possession of the villages in execution of this decree, and H S took objections relating to the validity of the decree. The Court executing the decree disallowed the objections and made an order for delivery of possession. H S thereupon appealed from the order disallowing the objections and then applied for stay of the order for execution. *Held* that the order disallowing the objections taken by H S was appealable as a decree, as it fell within the purview of s. 244, Code of Civil Procedure, and in an appeal from such order the provisions of s. 545, Code of Civil Procedure, would be applicable. The application for stay was therefore entertainable by this Court. But as no danger of injury such as is contemplated by s. 545, has been shown the application must be rejected. **Hariraj Singh v Kirat Singh. 8 W N 245.**

(u) Order of Security in Execution.

621—Civil Procedure Code Act, X of 1877. Section 244 (c); 546, 588—Appeal—Execution security for restitution of property.

A decree-holder having tendered certain security for the restitution of property about to be taken in execution of a decree, the Court made an order refusing to accept it and staying execution.

Held, that the question decided by the order was a question arising between the parties relating to execution of a decree within the meaning of section 244 (c) of the Civil Procedure Code and that an appeal therefore lay **Luchamiput Singh v Sita Nath Doss. 8 Cal 477=10 C L R 517.**

Appeal-*Contd.*

12 Execution of decree – *Contd.*

Notes:—Fol: 10 Cal 470; 12 Cal 624; 13 Cal 111; 7 All 73.

(v) Order for Attachment & Sale of Property.

622—Order to attach and sell the property—Civil Procedure Code (Act X of 1877) ss. 244 and 588, cls. (J) and (r).

An order to attach and sell the property in execution of a decree is an order "of the same nature with" an order made in the course of a suit for attachment of the debtor's property. The latter order can be appealed against under s. 588, cl (r), of the Code of Civil Procedure. It follows that an order for attachment and sale in execution of a decree is [according to the requirement of s. 588 cl. (j)] "of the same nature with appealable orders made in the course of a suit" and so under that section it is appealable. **Polokdhari Rai v Radha Persad Singh. 8 Cal 28=8 I A 165. Reversing the decision of the High Court in Polokdhari Roy v Radha Persad Singh 5 Cal 59=4 C L R 342**

(v 2) Claim by Legal Representative to Property as his own independently of deceased Judgment-debtor.

623—Where a judgment-debtor dies after the passing of the decree, and his legal representatives are brought on the record in execution proceedings to represent him in respect of the decree, questions which they raise as to property which they say does not belong to his assets in their hands, and as such capable of being taken in execution, are questions which under s.244 (c) of the Code of Civil Procedure, must be determined in the execution department, and not by separate suit. There is no distinction in this respect between the positions of legal representatives added to the suit before, and those added after, the decree. Under the last paragraph of s. 234 the Court executing the decree may try and determine the question whether property in the legal represent atives' hands formed part of the deceased judgment-debtor's estate, and find this fact for the purpose of bringing the property to sale in execution, and giving the auction purchaser a good title under the sale; and the Court's order is subject to appeal under s. 244, but not to a separate suit under s. 283. Where the legal representative asserts that the property is his own, and has not come to him from the deceased judgment debtor, he cannot set up a *jus tertii*, so as to come in under s. 278 and the following sections of Code. He can only do so where he opposes execution against any particular property on the ground that, although it is vested in him, it is vested in him not beneficially by reason of his being the representative of the judgment-debtor, but as a trustee or executor of some one else. In that case either party may have the question of *jus tertii* determined in a separate suit. So *held* by the Full Bench Tyrrell *J.*, dissenting. *Held* by Tyrrell J., *contra* that where the legal representative of a deceased party to the decree appears, not in his capacity of legal representative contesting a question arising between the parties and relating to the execution, discharge or satisfaction of the decree, but in his personal character independent of the suit and decree, and prefers a claim under s.278 on the ground that the decree has no operation against certain property attached, for reasons personal to the objector and antagonistic to all the parties and their representatives as such, the objector is not debarred from bringing a separate suit by the mere accident that he is a legal representative in the execution proceedings. Observations by Straight J., as to the necessity of conducting the proceedings in execution of decrees with the same care, and as far as practicable, in accordance with the same procedure as that adopted in regular suits. 16 Cal p 1 approved. 4 All 190 and 6 All 109. overruled. 8 All 626 distinguished.

Seth Chand Mal v Durga Dei 12 All 313 10 W N 137.
Ishri Dut v Mahabir Prasad. 10 W N 183.

Notes:—Diss. 23 Bom 237. Fol: 23 Mad 195 F B; 13 All 290; 23 All 195 F B; 28 All 51=(1905)W N 180; 3 A L J 370=(1906) W N 157; 19 All 543; 21 All 323. Ref: 17 Mad 399; 20 Bom 385: 16 All 449; 19 All 480; 21 All 277; 23 All 263; 28 Bom 125; 28 All 644=3 A L J 565=(1906) W N 158; 11 C W N 593 F B; 34 Cal 642 F B; 5 C L J 491 F B.

(v-3) Questions between execution creditor and persons placed on the record as representative or deceased Judgment debtor.

624—Question as to who is representative. Certain decree-holders obtained during the life

Appeal-*Contd.*

12 Execution oj decree—*Contd.*

time of their judgment-debtor attachment of certain immoveable property as belonging to the said judgment-debtor; but on the decree-holder's seeking to bring the property to sale one S D came forward with an objection that the property was his and was not liable to sale in execution of the decree in question. Pending the decision of the Court on this objection the decree-holders applied to the Court to have the names of S D and the widow of the judgment-debtor (who died about the time the previous objectiou was filed) placed on the record as reprcsentatives of the judgment-debtor. S D filed a similar objection to this application also; but both objections being heard together on the 6th September, 1892, were dismissed and he was placed on the record as representative oi the deceased judgment-debtor. On appeal by S D against " the order of the District Judge of Jaunpur of the 6th September, 1892" it was *held* that the order making S D a party to the execution proceedings as representative of the judgment-debtor rendered any order as to his former objectiou superfluous and that order was appealable under s. 244 of the Code of Civil Procedure, **Shanker Dat Dube v J. G, Harman and Co. 17 All 244=15 W N 66**

Notes—Ref 19 All 332.

(V (4)) Assignment of Decree.

625—Transferee of decree holder.

A person who within the meaning of s. 232 of the Code of Civil Procedure is a transferee of a decree, is a representative within the meaning of S. 244, qua the decree, of the party to the suit under whom he immediately, or by, mere assignment in writing, or by operation of law, has derived title to the decree in the suit. It is the assignment in writing from the decree-holder, and not the recognition by a Court of him as a representative, which makes such transferee a representative of a party to the suit. A Court upon the application of such a transferee for execution of a decree may wrongly decide that he is not a transferee within the meaning of s. 232 or that, although he is a transferee within the meaning of that section, he is not representative of a party to the suit, or that by reason of limitation he is not entitled to obtain execution of the decree, and if the Court has so decided, it has determined a question or questions mentioned or referred to in s. 244 of Act No XIV of 1882, but not specified in s.588 and an appeal lies under s.540 of that

Appeal-*Contd.*

12 Execution of decree—*Contd.*

Act. **Badri Narain v Jai Kishen Das 16 All 483=14 W N 184,**

See also **Gulzari Lal v Daya Ram. 9 All 46=6 W N 287**

Notes—Fol 27 Cal 670; 25 Mad 545. Ref 26 Cal 250; 20 Mad 378; 21 Mad 388; 7 M L J 89=25 All 443=26 All 447: 11 C W N 433=1 A L J 61=6 C L J 437.

(V (5)) Question whether transferee of decree is the representative of decree holder.

526—Whether a transferee of a decree is the respresentative of the decree-holder—the Code of Civil procedure (1882) ss. 232, 244—

An order of a court, which executes a decree, determining whether an alleged transfree from a decree-holder or from his legal representative is or is not the respresentative of the decree-holder within the meaning of s. 244, cl (c) of the Code of Civil Procedure is an order from which an appeal lies as it is an order under that section and therfore a decree. 26 Cal 250 and 16 All 483 followed. **Ganga Das Seal v Yakub ali Bobashi 27 Calc 670**

(V(6)) Order refusing to allow representative to take out execution until granted certificate.

627—S. 2 C. P. C.—Stay of execution.

On appeal from an order allowing an application by the legal representative of a deceased decree holder for execution, the appellate Court holding that the applicant must obtain a certificate under Act XXVII of 1860 before he could take out execution of the decree, made an order staying execution until the certificate was obtained. The order is under s. 244 of the Code of Civil Procedure and appealable. **Hoti Lal v Hardeo. 5 All 212=A W N (1882) 191**

Noes—Ref 13 Cal 47; 23 Cal 87 F B.

(V) (7) Order staying execution of decree

628—All orders for stay of execution whether passed by the Court which passed the decree or by the Court to which it is transmitted for execution are appealable. **Ghazidin v Fakir Begam 7 All 73.**

Kassa Mal v Gopal 10 All 339.

Notes—Appr: 11 Bom 57; Fol 12 Cal 624; 13

Appeal-*Contd.*

12 Execution of decree—*Contd.*

Cal 1 II; 18 Mad 26; 20 Mad 366; 12 Bom 30; 10 All 389.

629—Order Absolute-T. P. Act s. 89—Application by Judgment-debtor to raise decretal amount by sale or mortgage-Civil Procedure Code s 305—Sufficient cause—Appeal—Civil Procedure Code s. 244. cl (c)—Transfer of Property Act, sale of mortgaged property when decree passed under Civil Procedure Code, chapter XIX parts A B and C.

Held, that an order under s. 305, Civil Procedure Code, postponing or refusing to postpone the sale is one determining a question relating to the execution, discharge, or satisfaction, or to the stay of the execution of the decree, and is therefore appealable under cl. (c) s. 244. *Held*, that the provisions of s. 305, Civil Procedure Code, are not inconsistent with those of s. 89, Transfer of Property Act and are applicable where the decree is one for the sale of mortgaged property passed under the Transfer of Property Act. Before the Court can grant a certificate under s. 305 Civil Procedure Code, the judgment debtor must satisfy the court that there is sufficient cause for believing that the amount of the decree can be raised by mortgage or lease, or by private sale of the property. *Held*, further, that the rules contained in parts (A), (B) and (C), chapter XIX of the Code of Civil Procedure, 1882, in force at the time the Transfer of Property Act came into force, are generally applicable to sales of mortgaged property where the decrees are passed under the Transfer of Property Act.

Chandika Bakhsh v. Birjbihari Lal. 3 O C 42.

630.—Order—Stay of execution of a decree Civil Procedure Code Sections 2, 243, 244—Decree.—

An order under Section 243 of the Code of Civil Procedure (1882), which stays the execution of a decree, determines a question relating to the execution of a decree within the meaning of Section 244, and therefore comes wihin the meaning of the word "decree" in Section 2 of the Code and as such it is an appealable order.

Steel v Ichcha Moyi Chowdhrain, 13 Cal, 111.

Notes:—Ref: 8 C W N 257, Fol: 20 Mad 366; 10 All 389.

Appeal-*Contd.*

12 Execution of decree—*Contd.*

631.—A question as to the amount of security to be given by the defendant as the condition of the stay of execution against him, being a question relating to execution within the contemplation of Section 244, cannot be referred under section 617 of the Civil Procedure Code, the decision being appealable.

Ishwargar v Chudasama Manabhai Madarsang. P J (1887) 212= 12 Bom 30.

632.—Civil Procedure Code. 1882 Section 244. Question as to what had been actually sold.—Question between Auction purchaser and Judgment—debtor.

In accordance with a decree of a Subordinate Court land was sold in execution and a sale-certificate was granted. A question for determining the real subject of sale having arisen the auction purchaser applied to the Court with the result that the sale certificate was amended. An appeal was filed by the Judgment-debtor bringing decree-holder and auction purchaser as respondants in the District Court. It was dismissed on the ground that no appeal could lie. *Held*, that the question does not come under Section 244 of Civil Procedure Code and so the decision of the lower Court was upheld. **Mammod v Locke. 20 Mad 487.**

(V(8)) Order Staying Sale in execution of decree

633.—Civil Procedure Code, Act X of 1877, Sections 243 and 244 (C)—Appeal—Decree, Question relating to execution of.

An order under section 243 of the Civil Procedure Code staying execution of a mortgage decree obtained against the representatives in title of the mortgagor, on the ground that, owing to disputes among such representatives as to their respective shares in the property left by the mortgagors, an administration suit had been instituted and was pending. comes within clause (c) of Section 244, inasmuch as the question raised thereby is a question arising between the parties to the suit in which the decree was passed and relating to the execution of the decree, and is therefore appealable. **Kristo Mohiney Dossee Bama Churn Nag Chowdhry. 7 Calc 733=9 C L R 344.**

Appeal-*Contd.*

12 Execution of decree—*Contd.*

Notes:— Fol 12 Cal 624 ; 13 Cal 111 ; 7 All 73.

634.—Ss 2; S. 47; O. R. 69 (1882 Ss 2. 244, 291)–Order for stay of sale of property in execution of mortgage—Decree—Appeal.

An order for stay of sale of mortgaged properties in execution of a mortgage decree is an order under Cl c of S 244 C P C though the order is in terms one under S 291. **Shyam Kishen v Sunder Koer. 31 Cal 373.**

635—Ss. 2 and 244—Under valuation-Application for stay of sale—Rejection of application—Appeal—Order relating to execution—Formal adjudication—Immaterial error.

An order relating to execution of a decree is appealable though it may not be a formal adjudication of a right claimed or defence set up 9 Cal, 214 dissented from

Gross under-valuation of properties in a proclamation of sale is a material irregularity , if objection is taken to it, the proclamation should be amended before the properties can be brought to sale. 20 All, 412, P C followed.

Sivasami Naicker v Ramaswami Naicker. 23 Mad 568=10 M L J 314.

Notes —Ref : 27 Mad 259 F B; 14 M L J 57, 8 C W N 257 ; 264. Dist: 31 Cal 922.

636.—Civil Procedure Code (1882), Ss 244, 318, 588– Order refusing possession to purchaser at sale in execution of a decree.

An order passed under Section 318 of the Civil Procedure Code (1882) rejecting an application by the purchaser at a sale in execution for possession is not appealable ; because no appeal is allowed by Sec. 588 and the order not being one relating to the execution discharge or satisfaction of the decree it cannot be said to be one under section 244 of the Civil Procedure Code (1882). 18 Alla , 36 approved of. 13 Mad 540, dissented from. **Bhimal Das v Ganesha Koer. I C W N 658**

637.—Sections 2, (12) , O 20 r. 12 ; O 21, r. 26 (3) O, 41. r 3—(1882 Ss 2 211, 240, 543)—Mesne profits, period during which recoverable—Order determining mesne profits, interlocutory or final, if appealable—Decree.

Appeal-*Contd.*

12 Execution of decree—*Contd.*

A decision in execution proceedings determining the period for which mesne profits are recoverable is appealable both under general principles and under sections 2 and 540 of the Civil Procedure Code.

Where a decree for possession with mesne profits was taken to the Privy Council in appeal and was affirmed by Her Majesty in Council.

Held,—That, three years upto which mesne profits may be given under section 211, Civil P C must be counted from the date of the Queen's order and not from that of the original decree.

Where the original Court granted a decree for possession with " future mesne profits " and on appeal, Her Majesty in Council affirmed that decree without expressly mentioning the mesne profits.

Held,—That the Queen's order granted mesne profits by reference to the original decree.

Raja Bhup Indar Bahadur Singh v Bijoy Bahadur Singh, 5 C W N 52=10 M L J 290 =23 All 152 P C.

(V 9) Order directing accounts in administration suit

638—Order directing account—Administration– Suit—Civil Procedure Code 1877 S. 244.

An order which directs account to be taken is not in the nature of a final decree, nor one in execution of decree and so not liable to be appealed against. The order is mere directory of certain proceedings, with a view of drawing up a final decree.

Shreenath Roy v. Radhanath Mookerjee 9 Cal. 773.

Notes:— Ref: 24 Cal 725 F B.

639.—S. 293 Civil Procedure Code (1882)—Question for Court executing decree——Defaulting purchaser—To answer for loss by resale—Description of property—Difference at sale and re sale– Suit.

An appeal will lie against an order made under S. 293 of the Code of Civil Procedure. 3 W R 3, 7 W R 110; 16 W R 14 and 1 All 181 fol.

Brijnath Sahai v. Moheep Narain Singh 16 Cal 535.

Kali Kishore Deb Sarkar v Guru Prasad Sukul 25 Cal 99=2 C W N 408.

Rajendranath Roy v Ram Charan Sinha 2 C W N 411.

Appeal-*Contd.*

12 Execution of decree—*Contd.*

Notes—diss. 12 All 397; 14 All 201 F B Fol; 25 Cal 99. Dist: 23 Mad 73. Ref 2 C W N 411; 18 Mad 439.

(v-9 (a) Appeal from a ministerial order

640.—Ministerial order.

M obtained a mortgage decree for the sale of an eight-annas share belonging to SK and one another. Before the sale in execution of the decree, SK applied to the Subordinate Judge that M sought to put up for sale an eight-annas share which was exempted from sale, she having paid the amount due from her before the decree was passed The Court passed the following order:—It is ordered that the objection be disallowed and that a copy of this *rubkar* be sent to the sale officer in order that it may be notified at the time of the sale that the eight-annas exempted share is not being sold. SK appealed to the High Court. *Held* that the order was a purely ministerial one which did not fall within the scope of s 244 and consequently no appeal lay.
Sitla Koer v. Markande. 7 W N 134.

(v-9 (b) Order accepting payment in foreign circle currency notes.

641—Decree for pre-emption—Civil Procedure Code, Sections 214 and 244—

A successful plaintiff in a pre-emption suit paid part of the purchase money in foreign circle currency notes. The Court in the first instance accepted the notes in payment without any objection, and afterwards allowed the plaintiff two more days to supply currency notes of the Lahore Circle, or other legal tender, which order was complied with.

Held, that the order of the lower Court was correct. Currency notes are money in the ordinary acceptation of the term, although they may be notes of a different Circle from that in which they are tendered. The words "purchase money" are not defined, and there is nothing either in Section 17, Punjab Laws Act, or in Section 214, Civil Procedure Code, 1882, to put a restricted or technical meaning upon them. P R 70 of 1890, distinguished.

Held, also, that an appeal lay from the order in question under Section 244 (c), Civil Procedure Code, the order relating to the execution of the decree. **Iftikhar Ali v SahibRam 67 P R 1892.**

(v 9 (c) Order rejecting application requesting to send case to Magistrate.

642 & 643—Order rejecting application under s. 643 of the Code of Civil Procedure—

The appellant who held a decree against the respondent, S P, preferred an application to the Court executing the decree, in which he accused the respondent and his servant of fraudulently removing certain property in order to prevent it from being taken in the execution of the decree an offence punishable under s. 206 of the Indian Penal Code; and he prayed the Court to send the case, under s. 643 of Act X of 1877, to the Magistrate. The Court rejected the application.

Held, the order did not fall under s. 244 of Act X of 1877, and was not appealable.
Krishna Ram v Sarju Prasad 1 W N 14.

(v-9 (d) Order execution of a decree passed under Specific Relief Act S 9.

644—Appeal from order passed under—An order passed under S. 9 of the Specific Relief Act is not appealable. **Thomas Souza v Gulam Mohidin Beari. 13 M L J 214=26 Mad 438.**

(v-9 (e) Questions in Execution.

644A C. P. C. O 21 r.58 (1882 S.278)—Attachment—Investigation of claim—Order—Appeal. No appeal lies from an order passed, under s. 278 of the Civil Procedure upon the application by a person not a party to the suit, or by a party to a suit applying in a different character to raise the attachment. **Dayaram v Govardhandas. 6 Bom L R 462= 28 Bom 458.**

Notes:—Dist. 36 Cal 130. Ref. 11 Bom L R 754.

(V(10)) Person other than party to suit.

645—Act XXIII of 1861, s. 11—No one but a party to a suit can appeal under s. 11 of Act XXIII of 1861, against an order passed in such suit. **Caemmerer v Birch. Ex-parte Brooks 1 M H C 8**
Kalub Hossein v Deen Ali. 4 N W 2

Appeal-*Contd.*

12 Execution of decree—*Contd.*

646—Appeal—C P Code Secs. 332 and 244—

A appealed to the High Court making B alone a party and obtained a decree against B & C for possession which he executed C then applied to the Sub-Judge for possession on the ground that she was not a party to the decree of the High Court and her application was granted. The District Judge found that no appeal lay as C's application was under Sec. 332, of C P Code, C not being judgment-debtor.

Held, that C was a judgment-debtor under the original decree of the Sub-Judge; that as C was a party to the suit Sec. 332 did not apply and that the Sub-Judge's order was under Sec. 244 from which an appeal lay. **Vigneshvarbhatta v G. P. J. 1 1891 P 45.**

(V(11)) Liability of defaulting purchaser.

647—Liability of a purchaser for default. Civil Procedure 1882 Ss. 244—293—306 Appeal from order under s. 293—

A decree—holder having oblained leave to bid at a sale in execution of decree made a bid through his agent of Rs. 90,000 but afterwards withdrew it and did not give deposit. The property was re-sold for a smaller sum on the following day under s. 306 of Civil Procedure Code. A petition was filed by judgment debtor to recover the difference it was rejected. *Held* on appeal—As the matter stands between parties to the suit the order rejecting petition is appealable. **Vallabhan v. Pangunni 12 Mad 454.**

648.— Civ. Pro. Code (1882) ss. 21, 244, 293 and 306—Default by purchaser to pay deposit—Order dismissing an application in execution against Purchaser.

A purchaser at an execution sale did not make the deposit of 25 per cent in accordance with sec. 306 of Civil Pro. Code alleging that he found after the sale that the property was burdened with an incumbrance. The property was auctioned a second time and sold for a smaller sum. The decree-holder in execution sought to recover the difference from the first purchaser. The original Court dismissed the application. Held that the order in question is appealable. Orders with reference to defaults by purchaser in such cases are like decrees and parties affected by them come within sec. 244 of the Code.

Amir Baksha Sahib v. Venkatachala Mudali 18 Mad 439=5 M L J 206.

Appeal-*Contd.*

12 Execution of decree—*Contd.*

Notes:—Fol: 25 Cal 99. Dist: 23 Mad 73. Ref: 11 Bom L R 699.

(v-11)—Purchaser. Objection by.

649—Purchaser, objection by-Act XXIII of 1861, s. 11—Civil Procedure Code. 1859, ss. 246, 247, 364.

Where the holder (G) of a simple money-decree who is at the same time a mortgagee, applies to a Civil Court to sell mortgagor's property in execution of said decree, such property having previously been sold in execution of K's decree and purchased by N (G's claim upon it being at the same time notified), and in his (G's) application inserts the name of N, and calls him a judgment-debtor in the room of the heir and representative of the deceased debtor; and a purchaser comes in and denies that he is a judgment-debtor or liable, and asks for the release of the property, and the Judge disallowed his objection:-*Held* that, if the Judge's order was made after investigation, then, under s. 246 of Act VIII of 1859, an appeal was barred ; if it was an order refusing to investigate the objection, then the appeal was barred either by s. 247 or by s.364, unless allowed by s. 11. Act XXIII of 1861. *Held*, also, that the objector was not a party to the suit, and that he was not entitled to appeal under s. 11. s. 223, Code of Civil Procedure, can have no bearing on such a case. **Narain Acharajee v Gregory 8 W R 304.**

Notes—Dist: 24 Cal 42 F B.

(v 12)—Purchaser substitution of for original party in record.

650—"Party to suit."

A Party who had sued, on the party of himself and of his minor brother, to recover possession of ancestral property alleged to have been alienated, sold his rights and interests in the suit to a third party, whose name was accordingly substituted in the place of plaintiff. *Held* that the substitution of such party for the plaintiff, in respect of part of the latter's share in the subject-matter of the suit did not make that party a party to the suit, and gave him no *status* which would enable him to appeal. **Saheb Roy v Choonee Singh 9 W R 487.**

Notes—Ref: 2 C L R 297; 12 W R 87.

(v-13)—Inventor.

651—Act XXIII of 1861, s. 11.— Party to suit

Appeal-*Contd.*

12 Execution of decree—*Contd.*

The first Court gave a decree to the plaintiff for possession of land against A, the original defendant in the suit, but exempted in the possession of B, an intervenor, whom the Court had made a co-defendant. The Appellate Court reversed so much of that decree as adjudicated upon the claim as between the plaintiff and B and confirmed its decree for possession against A. but awarded costs against B. *Held* that B continued to be a defendant in the suit and had a right of appeal under s. 11, Act XXIII of 1861, and that he was not as "a person other than the defendant" bound to come in under s. 230, Act VIII of 1859. **Huree Kishore Roy v Kalee Kishore Sein 8 W R 114.**

(v-14) Claimant under title created subsequently to suit.

652—Act XXIII of 1861. s. 11—Party to suit.

A female plaintiff obtained a decree against certain defendants, declaring certain ekrarnamhs, etc, void as against her husband and his representatives. After his death she proceeded to execute the decree as one for possession, and obtained an order, under s. 223, Act VIII of 1859, for delivery of possession of property in the possession of a third party as being a person claiming under a title created by the defendants subsequently to the institution of the suit. The third party appealed from that order. *Held* that this was not a case in which an appeal lay under s. 11, Act XXIII of 1861. inasmuch as the questions raised by the appeal were not questions between the the parties to the suit. **Ameeroonissa Khatoon v Abedoonissa Khatoon 16 W R 307.**

(w) Representative of deceased debtor.

653—Act XXIII of 1861, S. 11 — Execution of decree—Limitation.—

A decree was obtained in 1849, and execution issued in 1862. Several subsequent applications for execution were made, against one of which the objection was raised by some of the representatives of the judgment-debtor, that the decree was barred by lapse of time; but it was overruled by the High Court in special appeal. A further application was made, and was opposed by one of the representatives who had since attained his majority upon the ground that the suit was barred. The Munsif disallowed the objection.

Appeal-*Contd.*

12 Execution of decree—*Contd.*

On appeal the Judge reversed his decision. *Held*, in special appeal, that the terms of S. 11, Act XXIII of 1861, did not prohibit an appeal by a representative of a deceased judgment-debtor against an order passed in execution of a decree against his ancestor. **Bishtu Narayan Bandopadhya v. Ganga Narayan Biswas, 3 B L R A C 40=11 W R 368.**

654—The decree-holders in execution of a simple money decree against the legal representative of the judgment-debtor, and which provided that it was, to be enforced against the judgment-debtors property, attached and sought to sell a house as coming within the scope of the decree. The judgment-debtors objected to the attachment and proposed sale on the ground that the house was their own private property and not the property of the debtor, having been validly transferred to them during the debtor's life-time. *Held* that S. 244 applied, and an appeal lay from the order of the first Court. **Mulmantri v. Ashfak Ahmad, 9 All 605.**

Notes:—Ap: 12 All 313 F B. Ap: 12 All 73. Dist: 11 All 74; 12 All 313 F B. Ref: 15 Cal 437; 17 Mad 399.

655—Person alleged but not brought on the record. A certain judgment-debtor having died, application was made by the decree-holders to execute the decree against his widow, not as his legal representative, " but as his wife and heir ". Notice was issued on this application to the widow to show cause why execution should not be had against her, but nothing further appears to have been done at that time to bring the widow on to the record as the legal representative of the deceased judgment-debtor. Subsequently another application was made by the decree-holders alleging that the widow had misappropriated certain moveable property of the deceased judgment-debtor and notice having been served on her she appeared and *inter alia* disputed the Court's jurisdiction over her under S. 244 of the Code of Civil Procedure. Orders were passed on this last mentioned application but it does not appear that any issue was then raised as to the widow being either the legal representative of her deceased husband in the sense of S. 234 of the Code of Civil Procedure or his representative in the sense of S. 244. *Held*, in appeal from the order of the Court on the widow's objection to the se-

Appeal-*Contd.*

12 Execution of decree—*Contd.*

cond of the above mentioned applications, that on the facts as stated above the widow had never been brought on the record as the representative of the deceased judgment-debtor and therefore no appeal could lie from that order by virtue of S. 244, Code of Civil Procedure. **Vilayati Begam v. Intizar Begam, 13 W N 106.**

656—Civil Procedure Code 1882, S. 244—Representative of judgment-debtor—Agreement for satisfaction of judgment-debtor.—

The High Court in 1883 passed a money-decree against a zamindar and it was sent to the District Court for execution. Certain villages of the judgment-debtor were attached and on the point of being sold. These villages were mortgaged by the judgment-debtor to third persons subsequently. The decree-holder was paid by the zamindar certain sums for postponing the sale, both before and after the mortgage. It was also agreed after the mortgage between the parties that interest was to be calculated at a higher rate than what was mentioned in the decree. Subsequently when the decree-holder brought the lands to sale he did not give any credit for the sums he received while computing the amount then due and calculated interest at an enhanced rate. The mortgagee contended that the computation was faulty in both respects and the District Judge upheld the contention. The judgment-debtor remained silent throughout the contest. *Held*, that the mortgagee comes under Sec. 244 and the order of the District Judge is appealable.

Paramananda Das v. Mahabeer Dossji, 20 Mad 378.

(w-2) Assignee of decree.

657—Act XXIII of 1861, S. 11 — Act VIII of 1859, S. 208—Assignment of decree.—

Under S. 11, Act XXIII of 1861, no appeal lay from an order passed under S. 208, Act VIII of 1859, substituting the assignee of a decree in the place of the original decree-holder.

Megh Narayan Singh v. Radha Prasad Singh, 4 B L R A C 200=13 W R 224.

See contra, Framji Rustomji v Ratansha Pestanji, 9 B H C 49.

Notes:—See 13 W R 224.

657*A*—Assignee of Decree—Civil Procedure Code 1882, Ss. 2, 244 cls. (a), (b) and (c)—Execution.—B's ancestors mortgaged to A their share in a certain mehal. After B became entitled to this share, A obtained his mortgage-decree and applied for execution, in which, the right, title and interest of B was sold and purchased by C. After the sale, B obtained a decree against D for possession of certain lands which were proved to belong to this mehal. E then obtained a decree against B, in execution of which the right, title and interest of B in this very mehal was sold and purchased by F. C and F transferred their rights under their respective purchases to E. E, thereupon, as purchaser of the right, title, and interest of B from F, applied to execute the decree obtained by B against D. The application was rejected by the Subordinate Judge, but the District Judge allowed it on appeal. B, upon this made an application to the High Court, to set aside this order.—*Held*, that the order ought to be set aside, because no appeal lay from the order of the Subordinate Judge, as the order is not a decree within the meaning of Ss. 2 and 244 (cls. a, b and c) of the Code. **Mohabir Singh v. Ram Baghowan Chowbey, 11 Cal 150.**

Notes:—Ap. 12 Mad 511.

657*B*—S. 144 (1) (1882 S. 583)—Execution by assignee of decree—Assignee not party to appeal—Restitution in execution.—

Under S. 583 of the Code of Civil Procedure the decree of the appellate Court has to be executed and by the very scope of the section it can only apply to the parties to the appeal, it cannot be executed against a person who was no party to the decree of the Appellate Court and who has not derived any interest subsequent to such decree. (19 All 136; 20 All 139 Ref: and Fol:) **B L Frizoni v. Raja Ram Narain Singh, 5 C W N 426.**

658.—On an application for substitution of the name of the assignee in place of that of the original decree-holder, the following order was made:

"That the objections taken by the judgment-debtor be disallowed with costs and the name of the purchaser of the decree be substituted in place of the original decree-holder, and that the case be struck off the miscellaneous file and a report be called for from the execution department." *Held* that the above order was an order

Appeal-*Contd.*

12 Execution of decree—*Contd.*

coming within the provisions of s. 244 of the Code of Civil Procedure, and not merely an order preliminary to something to be done in the execution department; and, being such, was appealable. **Pesche v. Aulad Fatima 11 W N 87.**

(w-3) Surety.

659.—Order between judgment-creditor and surety—Act XXIII of 1861, s. 11—Civil Procedure Code, 1859, s. 204.

By virtue of s. 11 of Act XXIII of 1861 and the provisions of s. 204 of the Code of Civil Procedure, an appeal lay from an order passed in a matter between a judgment—creditor and sureties on behalf of a judgment-debtor for the performance of the decree. **Bhikaji Vithal Ambikar. 4 B H C 119.**

Ghazee Lall Jha v. Sheo Narain Singh. 8 W R 24.

Notes:—15 W R 538 Appr. 28 Mad 117=14 M L J 430.

659A.—Civ. Pro. Code. 1882, ss 253, 336—Release of judgment-debtor on finding surety undertaking that he should apply to be declared an insolvent—Dismissal of application for want of prosecution—Execution of decree against surety—Appeal—Revision—Court Fees Act, sch. II, Art. 11.

H. M. Surety under s. 336 of the Code of Civil Procedure for a judgment-debtor, agreed to produce him in Court when required, and to arrange that the debtor, within one month, filed an application to be declared an insolvent. The judgment-debtor duly filed an application to that effect. But his application was dismissed for default of prosecution after one appearance. The District Judge refused to execute the decree against the surety on the ground that the obligation of the surety was discharged. The decree-holder appealed to the Chief Court on a two-rupee stamp. *Held*, that an order refusing an application under ss. 253, 336 of the Code of Civil Procedure for recovery of the decree amount from a surety was not appealable, the decree-holder's remedy being by an application for revision, and that such order, not being a decree or an order having the force of a decree, within the meaning of Art. 11 of the second schedule to the Court Fees Act, an *advalorem* fee need not be paid. **Lillo Mal v. Harji Mal, 72 P R 1902.**

Appeal-*Contd.*

12 Execution of decree—*Contd.*

660.—Execution of decree—Act VIII of 1859 ss. 204 and 363—Act XXIII of 1861, ss. 11 and 36.

Where a person becomes a surety in the course of the proceedings on an appeal to pay all such sums as may be decreed against the plaintiff on appeal, the decree, when passed, can be executed against the surety under s. 204 of the Civil Procedure Code, and an appeal will lie from an order made in execution of such decree against the surety. **Akhut Ramana v. Ahmed Yousafeji 7 B L R 81=15 W R 538.**

Notes:—See 15 W R 538.

(w 4) Purchaser of interest in suit.

661.—Assignment of interest in subject-

The purchaser of the right, title, and interest of the defendant in a suit in and to the land the subject-matter of that suit, has no right as such to appeal from a decree passed against the defendant. **Gajadhar Prasad v. Ganesh Tewari 7 B L R 149=15 W R 485.**

Beet Bhunjun Singh v. Jowhur Doss. 4 W R, Mis, 17.

Kristomonee Thakoor v Bissumbhur Doss. 5 W R 215.

(w-5) Purchaser at sale in execution.

662.—Interlocutory order obtained by purchaser at execution sale.

No appeal lies from an interlocutory order obtained by a purchaser at a sale in execution of a decree, who was not a party to the original suit. **Bhoondur Mul v. Gunga Pershad. 2 W R Mis., 50.**

Notes:—Fol: 8 M L J 273. Ref: 22 Mad 197.

663-664.—Order refusing to put purchaser at sale in execution in possession.

The order of a Munsif declining to put the purchaser at a judicial sale of immoveable property, in possession thereof, was open to appeal under s. 11, Act XXIII of 1861. **Goruppa Bin Rachappa. 1 B H C 90.**

665.—Ss. 244 and 318——Decree-holder auction purchaser—Agreement between auction-

Appeal-*Contd.*

12 Execution of decree—*Contd.*

purchaser and judgment-debtor not to take possession of property—Question arising in execution of decree.

Where a decree holder himself purchases the judgment-debtor's property in execution. and after such purchase enters into an agreement with the judgment debtor not to take possession of the property for consideration received.

Held: that in an application by such auction-purchaser under S. 318 of the Civil Procedure Code, to be put in possession, the validity or otherwise of the agreement can be enquired into and decided as a matter arising in execution under S. 244, Civil Procedure Code.

Muttia v. Appasami. 13 Mad 504.

Notes.—Disappr: 1 C W N 658. Fol: 8 M L J 193; 28 Mad 87=*14* M L J 475; 26 Mad 740; 13 M L J 237; *14* M L J 474. Dis: 15 Mad 226; (1904) W N 46; 26 All 365; 19 Mad 29; Ref: 16 Mad 20; 17 All 222 F *B*; 31 All 82 F B; 6 A L J 71 F B; *33* Mad 136.

666—Purchaser in execution of decree—Order refusing to recognize purchaser.

No appeal lies from an order of a Judge refusing to recognize the position of a purchaser of a decree. **Lalla Ojhee Lall v. Looft Ali Khan 2 W R Mis., 33.**

Chundee Pershad Misser v. Nilanund Singh. 2 W R Mis., 38.

667.—Purchaser at sale in execution—Act XXIII of 1861, s. 11—Representation of decree holder and the auction-purchaser.

An appeal did not lie under s. 11, *Act* XXIII of 1861, from an order in execution, in which the representative of a decree-holder was on one side and a stranger (the auction-purchaser) on the other. **Luchmun Pershad v. Ameer Ali. W R 1864, Mis, 15.**

668.—Act XXIII of 1861, s. 11.

An auction purchaser of property sold in execution of decree is not "a party to the suit," he is not therefore entitled to appeal from an order passed as to the execution of decree. **Luchmee Narain v. Bairow Pershad. 1 Agra, Mis., 5.**

(w-6) Objector not party to suit.

669.—An appeal does not lie by an objector who is not one of the parties, *i. e* who is neither the decree-holder nor the judgment-debtor.

Luchmiput Singh v Lekraj Roy. 2 W R Mis, 56

Raghoonath Narain Singh v. Ram Churn Sahoo. 2 W R Mis, 48.

Gossain Jhunmi Pooree v. Anund Moyee Dossee 3 W R Mis, 9

Soodha Monee Dossee v. Brojonath Mozoomdar 4 W R Mis, 14

(w-7) Third party.

670—Order excluding property from sale—

No appeal lies from an order passed at the instance of a third party for excluding a particular property from sale in execution of decree. **Saheb Jehan v Asudoollah. 5 W R Mis 28**

670 A—Order passed in execution of decree between party to suit and a third party—

No appeal lies from an order passed in execution of a decree between either of the parties to the suit and a third party, but a regular suit may be brought to set aside the order. **Gobindnath Sandyal v Ramcoomar Ghose. 6 W R 21.**

Notes—Ref. 11 W R 488.

(w 8) Rival decree-holder.

671—Act XXIII of 1861. s. *11*—Act VIII of 1859, ss. 270, 271—Proceeds of sale in execution.

An appeal did not lie, under s. 11 of Act XXIII of 1861, from an order made under ss. 270 and 271 of Act VIII of 1859 with regard to the claims of the several rival decree holders in respect of the proceeds of property sold in execution of a decree. **Misri Kooer v Maheswar Buksh Singh. Murder Kooer v Maheswar Buksh Singh; Gurdi Misree v Maheswar Buksh Singh. Sriongo Kooer v Maheswar Buksh Singh B L R Sup Vol 13 Marsh 527 W R F B 116.**

Choonee Lall v Pultoo Bhukut 6 W R Mis 74.

Ally Hossein v Dhunput Singh W R 1864 Mis 19.

Jungee Lall Mahajan v Brijo Beharee Singh 2 W R Mis 21.

Afzooloonissa Begum v Parbutty Koonwar 2 W R Mis 41.

Appeal-*Contd.*

12 Execution of decree—*Contd.*

Mahomed Khan Kuzulbash v Thakoor Singh 3 W R Mis 1.

Jugobundhoo Shah Poramanick v Official Assignee 21 W R 194.

672—Act XXIII of 1861, s. 11—Attachment under s. 237, Act VIII of 1859—

One of several decree-holders, who had obtained separate decrees against the same judgment-debtor, attached, under s. 237 of Act VIII of 1859 a fund in the hands of the Collector belonging to the debtor, being the surplus proceeds of a sale for arrears of Government revenue, and the fund was subsequently attached by the other decree-holders. The fund was not sufficient to satisfy all the decrees in full. The principal Sudder Ameen, by order of Judge, heard the various execution cases together, but recorded separate orders in each case for the rateable distribution of the fund amongst the creditors. On appeal by the first attaching creditor, who claimed to be entitled to be paid the amount of his decree in full, to which appeal the rival decree-holders, as well as the judgment-debtor, were made parties—*Held*, (*per* Peacock, C J and Seton-Karr. Jackson, and Hobhouse, JJ) that the several orders of the Principal Sudder Ameen were substantially only one order made upon one hearing in one case, to which all the execution-creditors in the several suits were parties; that the rival decree-holders were properly made respondents in the appeal, and could not be struck out; and that the question to be determined being one between the rival decree-holders, and not between the parties in each suit, the case was not appealable under s. 11, Act XXIII of 1861. *Held*, *per* Macpherson, J that though no appeal would lie as regards the rival decree-holders, the appeal was maintainable as regards the judgment-debtor alone. **Deen Dyal Sahoo v Radha Muddun Mohun Doss. Hattee Lall Bhuggut v Radha Muddun Mohun Doss. Kanya Lall Pundit v Radha Muddun Mohun Doss. B L R Sup Vol 927 9 W R 223.**

(W-9) Co-defendants.

673—Appeal by defendant against co-defendant—

One defendant cannot be allowed to appeal as against his co-defendants. **Kashee Chunder Roy v Doorga 11 W R 410**

Appeal-*Contd.*

12 Execution of decree—*Contd.*

Notes—3 B L R 65. Fol. 17 W R 151 Dist. 16 W R 140.

674—Rival defendants—

In a suit for possession, where a second defendant is admitted (though improperly) upon the record, and both defendants claiming under different titles, issues are raised between the plaintiff and each of them, and the suit is dismissed, the decision on these issues cannot be regarded as a decision between the rival defendants, so as to give one a right of appeal against the other. **Kalee Kinkur Bachusputty v Kisto Mungle Bhuttacharjee 11 W R 462.**

(w 10) Assignee of interest in suit.

675—Civil Procedure Code, Act X of 1877, Sections 244, (e), (c), 278, 283—"Representatives" Appeal——Intervenor Execution proceedings.

Having regarde to Sections 278 and 283 of the Civil Procedure, there is no appeal from an order made in execution proceedings upon a claim prefered by persons intervening in such proceedings. A person who has acquired an interest prior to the suit from one of the parties there to and who is no party to the suit, cannot be considered a "representative" within the meaning of section 244, Cl (c) of Civil Procedure Code. **Rashbehary Mookhopadhya v Surnomoyee. 7 Cal 403= 9 C L R 79.**

Notes—9 C L R 79. Ref. 24 Cal 62 F B; 13 Mad 1.

(w 11) Attachment.

676—Objected to by the judgment-debtor on behalf of others—order against decree-holder—Civil Procedure Code (1882) Ss. 244, 280, 283—Where property, which is the subject matter of attachment, is claimed by a judgment-debtor, either as his own property under whatever right, or as the representative of others in which capacity he has been sued, the question between him and the attaching creditor is properly one between parties to the suit under S. 244 of the Civil Procedure Code. But where the judgment-debtor raises the objection on behalf of third parties who are unrepresented before the Court, the order passed thereon must be regarded as an order under S. 280 of the Code, and the only mode in which that order can be contested is in a regular suit

Appeal-*Contd.*

12 Execution of decree—*Contd.*

as provided by S. 283. A judgment-creditor attached certain property in executing a decree against a judgment-debtor in his private capacity. An objection was raised by the judgment-debtor to the effect that the property attached had been dedicated by him some time previous as wakf under a registered wakfnamah, and that it was as mutwali under the deed that he was in possession of it. The lower Court found that the document created a valid wakf and allowing the objection released the property from attachment. On the appeal of the judgment creditor it was contended that the order was one under s. 244, and was thus appealable. *Held*, that no appeal lay, as the order was under S. 280. As provided by S. 283 the proper remedy of the judgment-creditor was by way of a regular suit. **Roop Lall Das v Bekani Meah; Mohinee Mohan Roy v Bekani Meah 15 Calc 537.**

(w-12) Order on claim by trustee for release of trust-property attached under personal decree against trustee.

677 —Ss 244 and 278—Judgment-debtor—Claim as Trustee—Appeal.

When in the course of the execution of a decree, the judgment-debtor puts forward a claim to attached property in the capacity of trustee for third persons not parties to the suit, the claim is one to be dealt with under S 278, C P C and not under S 244. Therefore no appeal lies against the order passed on such a claim 17 Mad 399 overruled, and 4 I A 65, distinguished. **Ramanathan Chettiar v Vava Levvai Marakayar 23 Mad 195 X 64.**

(w-13) Co—Decree-Holders.

678—Co-decree holders— Question arising between them—Order—Civil Procedure Code (1882) s 244 Art (C) s. 588—

A decree-holder and an assignee of a share after decree applied several times jointly for execution. A subsequent application was made by the original decree-holder alone. The Court granted this application, directing that the proceeds arising from such execution should only be paid over to the co-decree-holders, jointly. *Held* that the question in dispute was one between co-decree holders, and not between parties to the suit or their representations as contemplated by art (C) s. 244 of the Civil Procedure Code, and so no appeal would lie from such order. **Gyamonee v Radha Romon. 5 Calc 592.**

(w-14) Collector.

679—Civil Procedure Code, 1877. s. 244—Refusing execution of order for costs—

A Subordinate Judge admitted a plaint in *forma pauperis*, but, holding that he had no jurisdiction to try the suit, returned the plaint to the plaintiff for its presentation in the proper Court, and ordered each party to pay his own costs. After the presentation of the plaint in another Court, and before the termination of the suit, the Collector applied to the Subordinate Judge for execution of the order as to costs, by seeking to recover the amount of the stamp duty from the plaintiff. The Subordinate Judge refused to execute the order, on the ground that the *pauper* suit was still pending in another Court. His order was affirmed by the District Judge on appeal to the High Court,—*Held* that there was no appeal; and, therefore, no second appeal, under s 244, cl (c) of the Civil Procedure Code (Act X of 1877, against the order of the Subordinate Judge refusing execution of the order as to costs, inasmuch as the question was not between the parties to the suit. **Collector of Ratnagirl v. Janardan Kamat 6 Bom 590.**

See Collector of Trichinopoly v Sivaramakhrishna Sastrigal 23 Mad 73

(x) Decree-holder in character of purchaser.

680—Decree-holder as purchaser - order in execution of decree-fraud-Concellation of sale in execution of Decree—Civil Procedure Code (1882 ss. 2, 244, cl, (c) 311, and 588 cl. 16:—

In a case where a Jndgment creditor was himself the purchaser at a sale in execution and the amount for which he so purchased the property of his judgment-debtor was set off against the amount due to him under his decree and where on the application of the Judgment-debtor, the Court passed an order setting aside the sale on the ground of fraud practised by the judgment creditor on the Judgement-debtor in connection with the sale, in consequence of which fraud the property had been sold at an undervalue—*Held*, that inasmuch as the order involved the decision

Appeal-*Contd.*

12 Execution of decree—*Contd.*

of a question between the parties to the suit relating to the execution, discharge or satisfaction of the decree (the decree having been satisfied as far as the purchase money bid by the decree-holder went, and the order cancelling that pro tanto satisfaction) though not appealable under the provisions of s 588 cl 16 was appealable as a decree under the provisions of the Code s. 2 and s. 244 cl. (c).

Ballodeb Lall Bhagat v Anadi Mohapattro 10 Cal 410.

(x 1) Purchase by decree holder at auction sale.

681 —Decree-holder also auction purchaser.

A Decree-holder on a mortgage suit purchased the property in execution of his decree and obtained an order for possession. *Held* that the order was under s. 319 of the Code of Civil Procedure and not under s 244 of the Code of Civil Procedure; and hence no appeal lay. (17 All 22 Ref)

Ghulam Shabbir v Dwarka Prasad. 18 All 36=A W N (1895) 149.

Notes—Fol 1 C W N 658. Ref, 6 A L J 71 F B, 31 All 82 F B, 23 All 476 1 C W N 658; 1 S L R 172—5 M L T 185. Not Fol 7 C L J 136.

(x 2) Representative of Decree-holder

682—Civil Procedure Code ss 244 and 308—Order cancelling sale—

One who had attached a decree and obtained leave to bid at the sale of land ordered to be sold in execution, and to have the purchase-moey and the amount due under the decree set off against each other, became the purchaser for a sum less than the amount due under the decree. The Court made an order under Civil Procedure Code s. 308 cancelling the sale and ordering a re-sale on the ground that the purchaser had not paid the full amount due on his purchase within the time limited. *Held* that the petitioner was the representative of the decree-holder within the meaning of Civil Procedure Code, s. 244, and an appeal by him lay against the order. **Sah Man Mull v Kanagasabapathi 16 Mad 20**

Notes; Fol 29 Mad 318. Ref; 11 C W N 133 Dist 6 C L J 437.

Appeal-*Contd.*

12 Execution of decree—*Contd.*

(x 3) Execution proceedings at instance of attaching creditor.

683-684—C.P.C. Ss. 244 273, 311, 312 588—Attachment of decree,person attaching not party to the decree.

Although by attachment of a decree, belonging to his Judgment-debtor, a decree holder becomes entitled under S. 273 Civil Procedure Code, to execute the decree attached, he does not thereby become a party to or transferee of the attached decree within the meaning of S. 244 Civil Procedure Code.

K, in execution of a decree which he obtained against S attached a decree belonging to S under S. 273, Civil Procedure Code. The decree attached was then executed and some properties were brought to sale in such execution. S thereon applied to the Court to set aside the sale on various grounds but his application was refused.

Held that against that order, S was not entitled to appeal under S 244 Civil Procedure Code, but that he had a right of appeal under sections 311 and 588 of Civil Procedure Code.

Sami Pillai v Krishnasami Chetti. 21 Mad 417=8 M L J 77

(x 4) Question between auction purchaser and applicant to set aside sale under S. 310A of C. P. C. (1882).

685 —Question arising between the purchaser at an auction sale and applicant to set aside sale under s. 310 A of the Civil Procedure Code (1882)

There is no appeal from an order under S. 310 A of the Civil Procedure Code as it decides a question between the auction purchaser and the applicant under s 310 A and not between the parties to the suit or their re-presentatives.

Bungshidhar Haldar v Kedar Nath Mondal I C W N 114.

Notes:—Fol: 5 C W N 63; 6 C W N 57 Ref. 5 C W N 821 F B; 29 Cal 1 F B; 9 C W N 137, 13 C W N 591=5 C C 377,

686 -C.P C.S.47; O 21 r 89 (1882 Ss.244,310 A) Appeal—Order under S. 310-A—Applicability of.

An order under s 310-A is appealable under s. 244, C P C (1897) 1 C W N 703 foll.

Phulchand Ram v. Narsing Pershad Misser 28 Cal 73.

Appeal-*Contd.*

12 Execution of decree—*Contd.*

Notes:—Ref: 30 Mad 507=17 M L J 291=2 M L T 347; 25 Mad 244 F B; 29 All 275=4 A L J 135=(1907) W N 61, 7 C L J 282; 13 C W N 591; 5 O C 377.

(x 5) Order under C. P. C. (1882) s. 310A. setting aside sale.

687—Order setting aside a sale—Civil Procedure Code (1882), S. 310A—Deposit on one property of several sales in lots.

Where at a sale in execution of a decree the properties attached were sold separately in "nine" lots, and the judgment-debtor prayed to have the sale of one of the properties set aside under s. 310A of Civil Procedure Code (1882) by tendering the balance due under the decree after the deduction of the amounts bid by the decree-holder for some of the properties and the amounts deposited by the other purchasers, and an order was made thereupon setting aside the sale :—Held that an appeal lay under s. 244 of the Civil Procedure Code, against the order made under s. 310A, as the parties stood in the position of decree-holder and judgment debtor, and the order was made upon an application to set aside the sale. **Kripa Nath Pal v Ram Lakshmi Dasya. 1 C W N 703.**

Notes; Dist 5 C L J 204, Ref 13 C W N 591 Fol; 28 Cal 73.

688—C. P. C. S. 47 ; O 21 r 89 (1882 Ss. 244,310-A-Application to set aside the sale on the ground of the decree-holder's fraud—Appeal.

An applicatian by the judgment-debtor to set aside sale of his property, execution of a decree passed against him on the ground that the sale was brought about by the fraud of the residents (who included the decree-holder) of the village where the lands were situate, falls within the purview of s. 244, C. P. C. (1882). 30 Cal 142 concurred in.

An appeal lies from an order passed under s. 310-A, C. P. C. (1882), when it also falls within s. 244 of the Code (9 Bom L R 15=31 Bom 207 foll) **Harihar Kant v Rama Pandu 11 Bom L R 1113.**

(y) Appeal by some of the parties to a suit.

689—Practice—Parties—Appeal by some of the parties to a suit—Decree in appeal binding parties who were not parties to the appeal—Civ. Pro. Code. Sec. 244, cl (c)—Decree Execution.

The plaintiff filed a suit in ejectment against A, B C.. The Subordinate Judge decreed the claim. On appeal, the District Judge rejected it. The plaintiff then preferred a second appeal to the High Court, which finally decided in plaintiff's favour. To this second appeal A was not made a party. In execution of the High Court's decree, A was dispossessed, but was restored to possession by the Subordinate Judge under Sec. 332 of the Code of Civil Procedure. This order was reversed on appeal by the District Judge. A thereupon applied, to the High Court, under Sec. 622 of the Code of Civil Procedure to set aside the District Judge's order as *ultra vires*, on the ground that Sec. 244 of the Code was not applicable to the case. A not having been a party to the appeal in which the decree under execution was passed, and that, therefore, no appeal lay to the District Judge from the Subordinate Judge's order.

Held, that A being a party to the suit, though not to the appeal in which the final decree was passed, the District Judge had jurisdiction to hear the appeal under Sec. 244, cl. (c) of the Code of Civil Procedure. **Gowri v Vigneshvar P. J. 1892, p 82=17 Bom 49.**

Notes:—Ref: 23 Mad 301 F B, 30 Cal 134 : 6 C W N 10 ; 8 Bom L R 558 ; 15 C P L R 106. Fol 6 Bom L R 697. Rel : 31 Bom 33.

(z) Application by exonerated defendant.

690.—Application by exonerated defendant Civil Procedure Code (1882) S. 244—Right of appeal.

When a decree is not passed against a defendant but his rights are invalid in execution, he has a right to come in under sec. 244 of Civil Procedure Code, and he can bring an appeal against an order made in such proceedings. 7 Mad 255 referred to. 15 Mad 226 and 19 Mad 331 referred to. **Vibhudapriya Thirthasami v Vidianidhi Thirthasami. 22 Mad 131.**

Notes:—Diss: 23 All 346 ; 12 W R 66. Ref: 23 Mad 561 F B ; 15 C P L R 110. Doubt: 30 Mad 72 ; 2 M L T 34 ; 16 M L J 433.

Appeal-*Contd.*

12 Execution of decree—*Concld.*

(Z (1)) Order of imprisonment in execution of decree.

691—693—Execution—Imprisonment.

An appeal does not lie from an order of imprisonment in execution of a decree. **Gooldad Khan v Karim Khan. P R 22 of 1871**

13 GROUNDS OF APPEAL.

(a) Order granting leave.

694—Leave to institute suit.

An appeal lies from an order granting leave to the plaintiff to institute a suit under cl. 12 of the Letters Patent. **Ismail Hajee Hubub v Mahomed Hajee Yoosuf. Rohim Bye v Mahomed Hajee Joosuf. 13 B L R 91=21 W R 303.**

(b) Order refusing leave to sue.

695—Where at the time of filing the plaint an application for leave to sue was granted under cl. 12 of the Letters Patent, leave being reserved to the defendant to move to have the order set aside, and the plaint was then filed, but in the settlement of issues the defendant questioned the Jurisdiction of the High Court, and the Court eventually withdrew the permission to sue in the High Court,—*Quære*—Whether the order appealed against, finally deciding that leave ought not to be granted to institute a suit for want of jurisdiction cl. 12 of the Letters Patent, was an appealable order? **Radha Bibee v Mucksoodun Doss. 21 W R 204.**

(c) Order in insolvency proceedings under S. 15 of Letters Patent.

696—Letterss Patent. S. 12—Judgment—An order by a single Judge dismissing an application by the judgment-creditor of an insolvent that a sum in the hands of Official Assignee attached in execution of the decree obtained by the judgment-creditor against the insolvent be paid over to the judgment-creditor is a judgment within the meaning of section 15 of Letters Patent and is appealable. **Punithuvela Mudaliar v Bhashyam Aiyangr. 12 M L J 282=25 Mad 46.**

Notes:—Dist: 26 Mad 230; Ref: 9 C W N 14 Dist. 12 M L J 368.

Appeal-*Contd.*

13 Grounds of Appeal—*Concld.*

(d) Appeal from a Letters Patent Appeal whether allowed.

697—701—Appeal under S. 10 of the Letters Patent from a Letters Patent appeal—Whether allowed—Pre-emption—Wajib-ul-arz——*Custom* or contract—Partition of village—No new Wajib-ul-arz framed—Hissadar deh-Meaning of—*Construction* of document.

An appeal lies under S. 10 of the Letters Patent from the opinion of Judge who has differed from his colleague in an appeal under the same section.

The *wajib-ul-arz* of an undivided village gave a right of pre-emption, first, to a near co-sharer (*hissadar karib*) and then to a co-sharer in the village (*hissadar deh*). Subsequently the village was divided by perfect partition into *mahals*. No new *wajib-ul-arz* was prepared. In a suit for pre-emption by the co-shares in one of the *mahals* consequent upon a sale of property situated in another *mahal* to a stranger:—

Held, that the right might be enforced notwithstanding the partition. Meaning of the words '*deh*' and '*mahal*' discussed by *Karamat Husain*, J.

Jiwan Ram v. Tondi Ram 8 A L J 1072.

14 MADRAS ACTS.

(a) Madras Forest Act S 10.

702—Madras Forest Act S. 10—Judgment as to title to land. Appeal to High Court on the judgment of District Court on appeal. The District Court gave a decision under S. 10 of the Forest Act 1882. An appeal from the judgment of a Forest Settlement Officer the decision of the District Court is appealable to the High Court.

Kamaraju v Secretary of State for India. 11 Mad 309.

Notes—Ref: 12 Mad 405; 7 M L J, 13 Diss: 29 Bom 480=7 Bom L R 497; 28 Mad 257; 15 M L J 147.

(b) Madras Rent Recovery Act (Mad. Act VIII of 1865.)

703—Order of Collector.

By Madras Act VIII of 1865, an appeal from

Appeal-*Contd.*

14 Madras Acts—*Contd.*

the decree of the Collector lies to the Civil Court.

Olaga Sundaram Pillay v. Muttien Chetty. **4 M H C 227.**

(c) Madras General Clauses Act.

703A.—S. 8—Appellate jurisdiction of High Court in cases instituted under enactments in force at time of institution of suit, but repealed before hearing of appeal—Civil Procedure Code, S. 540.

A sued on 5th August 1897 in the District Court for the office of kurnam. In October, 1897, a notification was published under S. 2 of Madras Proprietary Estates Village Service Act (II of 1884), the effect of which was that, from the date of the notification, S. 11 of Regulation XXV of 1802 and Regulation XXIX of 1802 ceased to apply to the office of kurnam. The District Judge dismissed the suit. A appealed to the High Court. It was contended that the High Court had no jurisdiction to hear it. *Held*, that it had, for where the lower court had jurisdiction to entertain the suit when it was instituted, and the parties had a right of appeal when the suit was instituted, the appellate jurisdiction of the High Court is saved by S. 8 of the Madras General Clauses Act, 1891, unless the right of appeal is expressly taken away. The right of appeal was conferred by S. 540 of the Civil Procedure Code. **Sadashiva Pillay v Kalappa Mudaliar.** **24 Mad 39.**

Notes.—*Ref*: 32 Mad 140.

(e) Madras Estates Land. Act I of 1908.

703B.—S. 192 (a)—Suits under the Act—Remand by District Judge—Whether appeal lies—Civ. Pro. Code (Act XIV of 1882), Ch. XLIII.

No appeal lies to the High Court from an order of remand by a District Judge in a suit instituted under the Madras Estates Land Act, 1908, as Chapter XLIII of the Civil Procedure Code of 1882 does not apply to such a suit.

Krishnasami Iyer v. Vaithilinga Tambiran **12 Ind Cas 146.**

(f) Procedure to be followed in the hearing of appeal.

704.—Procedure.

The Civil Court, in hearing an appeal from the decision of a Collector under the Act, must be guided by the Civil Procedure Code.

Subramaney Pillay v Perumal Chetty. **4 M H C 251.**

Notes.—*Ref*: 5 M H C R 129. *Disap*: 19 M L J 760.

705.—S. 10—Order to eject tenant.

An application was made under s. 10 of the Rent Act (Madras Act VII of 1865) to eject a tenant. An order passed on such an application is non-appealable to the District Court.

Mahomed Yakub Saheb v Mahomed Jaffer Ali Saheb. **4 Mad 167.**

Notes.—*Diss*: 22 Mad 436. *Ref*: 7 Mad 572.

706.—Ss. 10, 69, 73—Collector's order ejecting a tenant.

The decision of a Collector ejecting a tenant under s. 10 of the Rent Recovery Act Madras (1865) is appealable. Such a decision even though there is the word 'order' in the section referred to is a judgment coming under sec 69. 4 Mad 167 not followed. **Narasimhaswami v Lakshmamma.** **22 Mad 436.**

Notes.—*Fol*. 25 Mad 453. *Appr*: 30 Mad 43 F B; *Ref*: 17 M L J 129 F B; 30 Mad 473 F B.

(g) Adjudication that plaintiff has failed to prove default on behalf of defendant.

707.—Ss 69, 10—Adjudication that plaintiff has failed to prove default on behalf of defendant—"Judgment"—Appeal.

An order passed under S. 10 of the Rent Recovery Act which amounts to an adjudication that the plaintiff has failed to prove default on behalf of the defendant, is a judgment within the meaning of S. 69 of the Act, and an appeal lies therefrom, 22 Mad 436 foll. **Venkata Papayya Rao v Venkata Subbayya.** **25 Mad 453.**

Notes.—*Ref*. 30 Mad 473 F B.

(h) Excusing delay in presenting an appeal.

708.—S. 69—Court cannot excuse delay in presenting appeal.

Under S. 69 of the Madras Rent Recovery Act a Court has no power to excuse delay in present-

Appeal-*Contd.*

14 Madras Acts—*Concld.*

ing an appeal from a judgment of the first Court in a suit by a tenant to set aside a distraint by a landholder under the Act. **Bhujanga Rao v Venkanna. 24 Mad 558.**

15. MANAGEMENT OF ATTACHED PROPERTY.

(a) Order postponing sale to enable debtor to raise amount.

709.—Civil Procedure Code (Act VIII of 1859), s. 243—Civil Procedure Code, 1882, ss. 305, 503—Order postponing sale—Act XXIII of 1861, s. 11.

An appeal lay from an order passed under s. 243 of Act VIII of 1859, postponing the sale of the property attached in order to enable the judgment-debtor to raise the amount of the decree against him (Jackson, J., dissenting).

Hanuman Prasad v Ajodhya Prasad. 1 B L R F B 7=10 W R F B 5.

Notes—*Dist*: 13 W R 242. *Con*: 12 W R 66: 3 B L R Appx 107, 108.

(b) Order refusing application to appoint a manager.

710.—An appeal lay from an order refusing the request of a judgment-debtor for the appointment of a manager under s. 243, Act VIII of 1859. **Bisram Singh v Inderjeet Koonwar. 2 W R Mis 49.**

Notes.—*Ap:* 8 W R 132.

711.—Quaere.

Is a refusal to make an order on an application for the appointment of a manager an order from which an appeal lies under s. 11, Act XXIII of 1861? **Nuzmooddeen Ahmed v Abdool Azeez. 13 W R 242.**

(c) Order of manager.

712.—Civil Procedure Code, 1859, s. 243.

There was no appeal against the order of a manager appointed under s. 243, Act VIII of 1859 **Bhoobun Moyee Debea v Mooty. 1 W R Mis 11**

Notes.—*Dist*: 10 W R F B 5.

16. MEASUREMENT OF LANDS.

(a) Order of Deputy Collector

713.—An appeal from the decision of a Deputy Collector in a suit under s. 9, Bengal Act VI of 1862, lay, not to the Collector, but to the Zilla Judge. **Erskine & Co v Gholam Khezur. 9 W R 520.**

Notes—Fol: 15 W R 426.

(b) Question as to standard pole of measurement

714.—Where a question as to the standard pole of measurement in use in a pergunnah is properly raised and determined between parties by the Revenue Court in a proceeding under Bengal Act VI of 1862, section 9, the determination is final. **Neem Chand Sahoo v Ram Golam Singh. 24 W R 424.**

(c) Order of Collector in Survey & Measurement of Lands.

715.—An appeal lay to the Judge from the decision of a Collector in matters of survey and measurement falling within ss. 9 and 10, Bengal Act VI of 1862. No appeal lay from the decision of a Collector under s 11 of the same Act. **Taruck Nath Mookerjee v Meydee Biswas 5 W R Act X 17.**

Notes.—Disap: 17 W R 62. Fol: 11 W R 562; Con: 14 W R F B 4. Ref: 11 W R 556.

(d) Order of Deputy Collector as to standard pole of measurement.

716.—No appeal to the Judge lay from the decision of a Deputy Collector under s. 11, Bengal Act VI of 1862, on the question of the standard pole of measurement. **Rakhal Das Mokerjee v Tunoo Poramanic 7 W R 239.**

Notes—Ap: 11 W R 510; 592; 14 W R F B 4. Ref: 6 B L R 1 F B.

(e) Order of Collector as to standard of measurement.

717. - Bengal Act VI of 1862, ss. 9 and 11.

When the right of a proprietor to make, under s. 9, Bengal Act VI of 1862, a measurement of a tenure, is disputed solely on the ground that the proper standard pole of measurement under s. 11 is not employed, the Collector has power to enquire into and decide the true length of the standard pole, and an appeal lay from his decision. **Manmohini Chowdhrain v. Premchand Roy. 6 B L R 1=14 W R, F B. 4.**

Appeal-*Contd.*

16 Measurement of Lands—*Concld.*

(f) Order in Measurement Proceedings.

718—Decree.—Civil Procedure Code (Act X of 1877), ss 2 and 540.—Beng. Act VIII of 1869, s. 37, Order under.

An order made under section 37, Bengal Rent Act (Bengal Act VIII of 1869), is a decree within the meaning of the definition contained in the Civil Procedure Code (Act X of 1877), and an appeal lies therefrom under the provisions of section 540. **Brojendro Coomar Roy v Krishna Coomar Ghose. 7 Calc 684 =9 C L R 444**

719—Beng Act VIII of 1869. s. 38.

An appeal lies to the High Court from proceedings taken under Beng Act VIII of 1869, s. 38. **Ahmed Ali v Nittyanund Roy. 24 W R 171.**

See Abdool Baree v Nittyanund Koondoo. 21 W R 103

where an appeal was heard, though the question was not raised.

720—Beng Act VIII of 1869, s. 38.

There is no appeal against an order made by the Civil Court, under s. 38 of Bengal Act VIII of 1869, directing the measurement of lands. 22 W R 491, followed. 15 W R 23, and 245, cited. **Kally Churun Dutt v Protab Chunder Ghose. 5 C L R 484.**

17. N. W. P. ACTS.

(a) N W P Rent Act (XVIII of 1873) S. 148.

721—Decision of Collector—Act XVIII of 1873, ss. 148, 189—Determination of title.

C sued J for the rent for certain land, alleging that he was the tenant of such land and J was his sub-tenant. J disputed C's right to receive rent for such land, alleging that he was not his sub-tenant but S's, and had paid such rent to S. Under the provisions of s. 148 of Act XVIII of 1873, S was made a party to the suit. The Collector decided on appeal in the suit that S and not C, was the tenant of such land, and J was her sub-tenant, and not C's and had paid such rent to S. *Held* that there was no determination by the Collector of the title to such land but as incidental to the question who was entitled to receive the rent, and consequently the decision of the Collector was not appealable to the District Judge. **Chotu v Jitan. 3 All 63.**

Appeal-*Contd.*

17 N. W. P. Acts—*Contd.*

Notes:—Fol: 13 All 364. Ref: 10 All 347.

722—Intervenor—Appeal.

M sued I and another for rent in the Court of the Collector. The defendants pleaded payment to V who was accordingly brought on to the record as a co-defendant under s. 148 of the North-Western Provinces Rent Act (XII of 1881). The Collector decided in favour of V. The plaintiff appealed to the District Judge making all three persons respondents. The District Judge reversed the decision of the Collector and ordered the whole costs to be paid by V, who thereupon appealed to the High Court. *Held* that the District Judge had no jurisdiction to entertain the appeal so far as the party brought in under s. 148 was concerned, and, that being so, had no power to award costs against him. **Anand Ram v Mausuma Begum. 13 All 364=11 W N 107.**

723—ss. 148, 183, 189-Landholder and tenant -Suit for arrears of rent-Right to rent disputed by third person-Appeal by intervenor.

K sued B for arrears of rent, such arrears not exceeding Rs.100. His right to receive rent was disputed by H, a third person, who was made a defendant under the provisions of s. 148 of Act XVIII of 1873. The suit was tried by an Assistant Collector of the second class, who decided that K was entitled to the rent. H and B appealed to the Collector, who decided that H was entitled to the rent. K thereupon appealed to the District Judge, who affirmed the decision of the Collector. K then appealed to the High Court. *Held* that the Collector was not competent to entertain an appeal by H; that as between K and B all that the Collector could decide was whether or not K was entitled to the amount of rent claimed; that the District Judge had no jurisdiction to entertain K's appeal; and that K's appeal to the High Court was not entertainable, the District Judge not having decided any question of proprietary right that would justify such an appeal. **Kishna Ram v Hingu Lal. 4 All 237.**

Notes:—Over. 13 All 575; Fol: 13 All 364.

724—s. 189—Question of title—Suit for arrears of rent.

Where the defendant pleaded in answer to plaintiff's suit for arrears of rent that defendant no longer held as tenant, but as sub-proprietor under a settlement made direct with defendant by the

Appeal-*Contd.*

17 N. W. P. Acts—*Contd.*

Settlement Officer,—*Held* that under s. 189 of Act XVIII of 1873 the suit involved a question of proprietary title, and that an appeal lay to the Judge of the District, although the amount in suit was less than Rs.100. **Bishesar Singh v Sugundhi. 1 All 366.**

724A—Jurisdiction—N W P Rent Act (XII of 1881), S. 189—Powers of Subordinate Judge in charge of the office of District Judge—Revenue Court Appeal.

Held, that a Subordinate Judge in temporary charge under S 10 of Act No, XII of 1887 of the office of the District Judge had power to take up and decide a Revenue Court appeal which was pending on the file of the District Judge.

Rahmat Ali Khan v Abdullah. 1901 A W N 129.

725—Suit above Rs. 100—Second appeal-District Judge.

This was a suit for arrears of rent, Rs. 105-8-0 instituted in the Court of an Assistant Collector of the 2nd class, who dismissed the suit, and in appeal the same decision was upheld by the Collector. Then the plaintiff preferred an appeal to the District Judge. *Held*, on reference by the District Judge that a second appeal did lie to the District Judge. **Raja Singh v Sulka. 6 All 398=4 W N 137.**

726—N W P Rent Act, Amendment Act (XIV of 1886), s. 5-"Rent payable by the tenant"-Rate of rent.

The words "rent payable by the tenant" in s. 189 of the North-Western Provinces Rent Act (XII of 1881, as amended by Act XIV of 1886) mean the rate of rent payable by the tenant, and not merely the actual amount of money which is due at any given time by the tenant to his landlord as rent. The appeal therefore given by that section is limited to cases in which the Court of first instance has determined the rate of rent.

Radha Prasad Singh v Pergash Rai. 13 All 193=(1891) A W N 83. See also Bhagwan Din v Mosai. 13 All 195.

Notes:—Fol: 14 All 50. Ref: 21 All 247.

727—"Rent payable"—Rate of rent—Appeal.

The words "rent payable by the tenant" in s. 189 of the North-Western Provinces Rent Act (XII of 1881) (as amended by Act XIV of 1886) mean the rate of rent payable by the tenant and not merely the actual amount of money which is due at any given time by the tenant to his landlord as rent. Where a *zemindar* sued a tenant for rent of certain alluvial land the amount claimed not being above Rs. 100 and the tenant objected that there was a custom in the village by which rent was paid in case of alluvial land only on the culturable portion, and that during some of the years in suit a less portion of the land than that for which rent was claimed had been culturable:—*Held* that in such a suit the rate of rent was in dispute and an appeal would therefore lie (13 All 193) followed (10 W N 229) overruled. **Radha Prasad Singh v. Mathura Chaube. 14 All 50=11 W N 219,**

Notes:—Ref: 16 All 51; 21 All 247.

728—The criterion to be used in deciding whether an appeal lies under section 189 of Act No. XII of 1881 is whether the decision would merely affect a particular year or whether it would supply a plea of *res judicata*, if not appealed against for all succeeding years in which the landlord and tenant stood in the same relation as when the suit was brought (14 All 60 Ref)

Mohib Ali Khan v E. S Martin 16 All 51=13 W N 204

Notes— Ref 21 All 247.

729—Rent—Revenue.

The term "rent" as used in s. 189 of Act No. XII of 1881 cannot be extended so as to include revenue. Hence where a plaintiff sued to recover arrears of revenue alleged to be payable to the plaintiff by the defendants, under an agreement the defendants being admitted to be inferior proprietors of the land in respect of which the revenue claimed was payable, it was *held* that no appeal lay to the District Judge under s. 189 of Act No XII of 1881. **Tilakdhari Rai v Sogra Bibi 18 All 302=16 W N 71.**

730 'Rent payable by the tenant' not in issue—Landholder and tenant.

Certain defendants, being sued by the zamindars for the rent of land held by them, pleaded in effect that, whatever the rent of the land in suit might be, they were entitled to retain it under

Appeal-*Contd.*

17 N. W. P. Acts—*Contd*

an agreement between them and the predecessor in title of the plaintiffs in lieu of interest payable to them on account of mortgage given by the said predecessor in title. *Held* that the case was not one in which an appeal would lie to the District Judge under s. 189 of the W N P. Rent Act, inasmuch as the rent payabale by the tenant was not in issue in the suit. **Deocharan Singh v Beni Pathak** **21 All 247 = (1899) W N 47**

Notes—Ex: 23 All 283 = (1901) A W N 75

731 S. 89 and s. 93 Question as to rate of rent payable by the tenant not in issue in the appeal

Under s. 189 of Act XII of 1881, an appeal lies in a suit under s 93 of the Act, where the rent payable by the tenant *has been* a matter in issue and has been determined. It is not necessary that the rent payable by the tenant should be a matter in issue in the appeal. **Sarju Prasad v Haidar Khan** **18 All 463.**

732—N. W. P. Rent Act (XII of 1881) Section 93 189—N W P Tenancy Act (Act II of 1901) section 180 clause 2, section 175 Letters Patent, section 10, No Appeal lies under section 180 clause (2) Act II of 1901 to a District Judge, from the appellate order of a Collector which does not decide a question of jurisdiction. When the Collector's decision was passed under Act XII 1881 and the appeal was filed after the coming into force of Act II of 1901 *held*, that the latter Act governed the right of appeal. An appeal lies under section 10 of the Letters Patent from the judgment of a single Judge disposing of a rent appeal. Section 175 of Act II of 1901 has not the effect of modifying section 10 of the Letters Patent. **Zamin Ali v Genda** **26 All 375 = A W N 48 = 1 A L J 105.**

733—s. 191—Third appeal to High Court.

An appeal lies to the High Court from a decree of a District Judge passed in appeal from an appellate decree of a Collector. **Jairam Rai v. Dulari Chand** **5 All 309 = 3 W N 147.**

(b) N. W. P. Land Revenue Act XIX of 1873

734—Ss. 113 and 114—Partition.

Where in the course of carrying out an order for a partition and of assigning the lands to each co-sharer, certain co-sharers claimed certain plots of land as belonging to them in severalty and demanded that the same should be assigned to them, and the Collector decided that some of such plots were held in severalty and one was held in common—*Held* that his decision was not passed under s. 113 of Act XIX of 1873, and was therefore not appealable under s. 114 of that Act. **Shibban Lal v Tiloke Chand** **2 All 619.**

Appeal-*Contd.*

17 N. W. P. Acts *Contd.*

735—Order for partition by Assistant Collector confirmed by Collector—Objection subsequently made to mode of partition-Question of title.

Upon an application made under s 83 of the N W P Land Revenue Act (XIX of 1873) for partition of a share in a mehal, no question of title or proprietary right of the nature contemplated by s 113 was raised, nor any serious objection made by any of the co-shares, and the Assistant Collector recorded a proceeding setting forth the rules which were to govern the partition, and this proceeding was confirmed by the Collector under s 131. An Amin was ordered to carry out the partition, and, in taking steps to do so, stated the principle upon which he proposed to distribute the common land. An objection was then for the first time raised by two of the co-sharers in the Court of the Assistant Collector to the inclusion of a particular piece of land in the partition, on the ground that it appertained exclusively to their share. This objection was disallowed by the Assistant Collector, and, on appeal by the District Judge. *Held* that, at the stage of the proceedings when objections were taken, it was too late to determine questions of title under s 113 of the Act; that accordingly the Assisstant Collector could not be said to have done so that the objections could, therefore, only be regarded in the light of objections to the mode in which it was proposed to make the partition; and that consequently there was no appeal from the order of the Assistant Collector to the District Judge or from the District Judge to the High Court. **Ota Ram v Ishur Das** **9 All 445.**

736—Question of title—Appeal from order under first part of s 113.—

No appeal lies to the High Court from a decision of a Collector or Assistant Collector under the first part of s 113 of the North-Western Provinces Land Revenue Act (XIX of 1873), declin-

Appeal—*Contd.*

17 N. W. P. Acts—*Concld.*

ing to grant an application for partitton until the question in dispute has been determineed by a competent Court. **Imtiaz Bano v Latafat-un-nissa** **11 All 328.**

737.—Formal notice—Appeal.

A Collector or Assistant Collector trying a question of title raised in the course of the hearing of an application for partition under the N.-W P Revenue Act, (Act XIX of 1873) is not bound to cause a formal decree to be drawn up embodying the result of his order or decision on such point. An appeal will lie from the "order" or "decision" of such Collector or Assistant Collector. **Niaz Begam v Abdul Karim Khan** **12 W N 92=14 All 500.**

738.—*Held* that a Revenue Court acting under s 113 of Act No XIX of 1873 was not precluded from dealing with an objection brought before it merely by reason of such objection not having been filed within the time limited by the Court for filing objections, the Court not having up to that time taken any action under s 113 of the said Act. W N 1887 p 81 distinguished.

Tulsi Prasad v Matru Mal **16 W N 30= 18 All 210.**

(18) Orders.

Appeal—Orders. See Superintendence of High Court C P C S 115 **(1902) 26 Bom 551.**

Appeal—Orders. See C P C O 21 r 89.

Appeal—Orders See C P C O 21 r 89. **30 All 379.**

Appeal—Orders. See Resistence or odestruction to execution of decree **88 P J 174.**

Appeal—Orders. See Injunction-under C P C **95 P J 175,**

Appeal—Orders. See Resistence or obstruction to execution of decree **95 P J 445.**

Appeal—Orders. See C P C S 90. **96 P J 129.**

Appeal—Orders. See C P C S 72 **5 P R 1910 (Rev).**

Appeal—Orders. See C P C O 47. rr, 7, 9. **62 P R 1895.**

Appeal—*Contd.*

18 Orders—*Contd.*

Appeal—Orders. See C P C O 47, rr, 7, 9. **27 All 695.**

Appeal—Orders. See C P C O, 21, r 89. **27 All 263.**

Appeal—Orders. See Sale in execution of decree-Resale **120 P R 1891.**

Appeal—Orders. See C P C S 95 **24 Mad 62**

Appeal—Orders. See C P C O. 21 r. 89. **7 C L J 282.**

Appeal—Orders. See Sale in execution of decree **7 Ind Cas 718.**

Appeal—Orders. See Sale in execution of decree—Distribution of sale—proceeds **36 Cal 130**

Appeal—Orders. See Resistence or obstruction to execution of decree **1 Ind Cas 785.**

Appeal—Orders. See C P C O 47 rr 7, 9. **14 M L J 321.**

Appeal—Orders. See Sale in execution of decree—Distribution of sale—Proceeds **12 Bom L R 365.**

Appeal—Orders. See C P C O 47 rr 7, 9 **5 C W N 485.**

Appeal—Orders See C P C O 21, r 89 **6 C W N 57.**

Appeal—Orders. See C P C O 21, r 89 **2 M L T 347.**

Appeal—Orders. See Resistence or obstruction to execution of decree **2 W N 125.**

Appeal Orders See Resistence or obstruction to execution of decree **1 W N 98.**

Appeal—Orders. See Injunction—Civil cases **10 W N 167.**

Appeal—Orders. See C P C O 47, rr 7, 9, **33 P R 1902.**

(1) Interlocutory order.

739.—Isolated issue of law.

An appeal will not lie from the separate determination of an isolated issue of law or fact before

Appeal-*Contd.*

18 Orders—*Contd.*

the taking of evidence on the remaining issues.
Court of Wards. **7 W R 222.**

Notes:—Dist: 7 W R *330*,

740.—Appeal from interlocutory order Civil Procedure Code (Act XIV of 1882) Section 108.

No appeal lies to Her Majesty in Council from an order which is a purely interlocutory order, directing procedure ; such appeal only lies if the order is a final order in the sense of section 595 (a) as modified by section 594 of the Civil Procedure Code. The mere fact that the High Court, apparently on the assumption that it was such an order, have certified the sufficiency of the amount and value of the suit cannot make appealable an order which does not fulfil the statutory conditions.

Rai Radha Kishen v Collector of Jaunpur.
3 Bom L R 78=5 C W N 153=
11 M L J 65=23 All 220=
28 I A 28 P C.

741.—Interlocutory order.

In the execution of a decree by persons claiming to be the legal representatives of the deceased decree-holder, the Court passed an order in the following terms :—" That the sale be adjourned, the Collector be required to strike off the execution case, if within the term to be fixed by him, none of the persons applying for execution file a certificate to recover the debt ". *Held*, that the order was not a " decree " within the meaning of section 2 of the Code of Civil Procedure, or appealable under section 244 or otherwise.

Champa Lal v Mahesh Sitla Bakhsh Singh
8 W N 82.

742.—Interlocutory order—*Quære.*

Whether an interlocutory order can be made the subject of an appeal. **Bamasoondery v Nilmoney Chunder, Cor 5.**

743.—An appeal does not lie from an interlocutory order passed under the Land Acquisition Act declaring that the claimant has no locus standi. **Gaulstawn v Secretary of State.**
10 C W N 195.

744.—Section. 2—(1882 Section 2) Order rejecting appeal as out of time—Decree—Second Appeal.

Appeal-*Contd.*

18 Orders—*Contd.*

An order rejecting an appeal as being presented out of time is a decree, and a Second appeal lies to the High Court from such decree. 7 All 42 ; *9* Bom 452 ; 12 Cal 30 ; 16 Mad *285* and 22 Mad 156 Fol.

Saminatha Aiyar v Venkatasubba Aiyar
13 M L J 300=27 Mad 21.

745.—Interlocutory order Code of Civil Procedure, Section 588, cl. (6)—Order to amend the plaint—Jurisdiction.—

Held, that an order of the Court of First Appeal returning the plaint for amendment is an interlocutory order and is appealable to the Court of the Judicial Commissioner.

Hon'ble Maharaja Pertab Narayan Singh v Raghunath Bakhsh and Bhagwan Bakhsh.
2 0 C 5.

745A.—Sections 47, 51. O 40, r. 1—Decree, execution of—Preliminary objection to hearing of appeal—Right to begin—Interlocutory order in execution proceedings—Receiver—Appointment, effective—Court's duty when appeal preferred.

It cannot be assumed that there is a right of appeal in every matter which comes under the consideration of a Judge, such right must be given by a Statute or by some authority equivalent to a Statute ; consequently, if the right of appeal is challenged, it is incumbent upon the appellant to establish the right to appeal. But unless the objection was obviously sound, the appellant could hardly be expected to answer by anticipation the grounds that might possibly be assigned by the respondent in support of the objection. The practice, therefore, usually followed in the Calcutta High Court, has been to require the respondent at the outset to indicate concisely the ground upon which his objection is based.

The expression " an order relating to execution of a decree " is comprehensive enough to include an order relating to the stay of execution thereof.

An interlocutory order which does not conclusively determine the rights of the parties in controversy in the execution proceedings is not a decree within the meaning of Section 47 read with Section 2 of the Code of Civil Procedure.

Appeal-*Contd.*

18 Orders-*Contd.*

On the plaintiff applying to execute the decree, the Court ordered that he might be allowed to do so if he fulfilled certain conditions at different stages of the proceedings. The Court determined various questions as to the character of the conditions to be imposed and called upon the decree-holder to comply with them. Before the time for compliance was over, the judgment-debter appealed :

Held, that the orders were interlocutory and were not orders determining a question relating to execution within the meaning of S. 47.

Section 51 of the Code is to be read with r 11 of O XXI and r. 1 of O XL. When a Court appoints a Receiver for purposes of execution of a decree, the order is one under r. 1 of O XL read with Section 51.

If a Receiver is appointed without any direction given as to security, the order takes effect at once, and he is validly in possession though no security has been given. If the appointment is conditional upon the furnishing of security, the giving of security is a condition precedent, and there is no effective appointment till security has been given.

Upon an appeal preferred under cl. (8) of r 1 of O. XLIII, the Court is bound to consider not only whether a Receiver should have been appointed, but also, whether a suitable person has been selected.

No appeal lies till a final order for the appointment of a Receiver has been made.

Srinivas Prosad Singh v. Kesho Prosad Singh, 14 C L J 489.

746 - Illegal order—

The plaintiff obtained a decree in the Court of first instance. The defendant appealed. The lower Appellate Court improperly directed the Court of first instance to settle the matter in dispute in accordance with a decision of a former Judge in the matter, and allowed the parties ten days after the return of the case to file objections. *Held* that the proceeding of the lower Appellate Court was unwarranted by law, and must be taken to be, if anything, an interlocutory order, and, as such, unappealable. **Lukh Ram v Bunsee Dhur. 5 N W 180.**

Appeal-*Contd.*

18 Orders—*Contd.*

(I (a))—Order dealing with the whole case

747—Execution proceedings, final order in—An order dealing with the only point in dispute between the parties and not intended to be incorporated in any other order to be passed later, dealing as it were with the whole case, is a final order and, therefore, appealable. **Narayana Pattar v Gopala Krishna Pattar. 28 Mad 355.**

(2) Order dismissing part of claim before Final decree.

748—Order directing part of the claim dismissed before final decree—Civil Pro. Code 1877 s. 540.

In a suit the defendant put in a written statement when certain preliminary issues were framed and decided with the order, that part of the plaintiff's claim is dismissed and part is to be tried on merits (which trial would include the taking of an account from defendant). *Held* that the plaintiff cannot bring an appeal because the Civil Pro. Code allows appeal against a portion of a decision when the decision relates to the entire suit, and also the defendant cannot bring an appeal because there is no final order to take an account. **Venkatagiri Raja v Mahomed Rahimtulla Saheb. 3 Mad 13.**

(3) Order rejecting application for refund of stamp duty.

749—An appeal does not lie from an order of the lower Court made on an application for refund of sufficient stamp duty and penalty, after a case remanded to it had been compromised. Redress should be sought by way of motion rather than as an appeal. **Ramanooj Doss v Government. 2 W R Mis 36.**

(4) Order of Munsif dismissing suit for under-valuation.

750—An appeal will lie from an order of a Munsif dismissing a suit as beyond his jurisdiction because it was under-valued.

Johan Buksh v Meher Bibee *alias* Mohur 7 W R 183

Notes—B L R Sup 625 = 2 I J N S 111. Ref. 9 W R 363.

Appeal-*Contd.*

18 Orders—*Contd.*

(5) Order disallowing appointment of ministerial officer.

751—Act XVI of 1868, s. 9—

A party whose appointment by a Subordinate Judge or Munsif is disallowed by a Zillah Judge on the ground that he is not qualified for the appointment has no right of appeal to the High Court against the Judge's order. **Shoshee Kishen Mookerjee** **14 W R 328**

(6) Order of Magistrate dismissing ministerial officer.

752—Commissioner of Revenue and Circuit—

The Commissioner is the proper authority to whom an appeal lies from the order of a Magistrate dismissing a ministerial officer from his post, and the order of the Commissoner passed in appeal is final. **Parbhu Narayan Singh** **3 B L R A C 370; 12 W R 393.**

(7) Order giving possession to purchaser.

753—Civil Procedure Code, 1859 s. 264—

No appeal lay from an order of a Court giving possession under s. 264 Act VIII of 1859 to a purchaser at a sale in execution of a decree.

Omirto Moyee Dossee v Gooroo Doss Roy. **17 W R 395.**

753 A—Civil Pro. Code 1882 Ss. 556 and 558—Dismissal of an-in default—Appeal treated as an application for revision—

Held, that, where an appeal had been heard on a particular date and the Court, after hearing the argument in the case, appointed an Amin to prepare a plan of the disputed land and the case was adjourned to another date to consider the report and the appellant did not appear on the adjourned date, the appeal should not have been dismissed in default but decided on the merits. *Held*, further, that where on such an adjorourned date the Court dismisses the appeal under s. 556 no application under s. 558 is maintainable and no appeal lies against an order refusing such an application. The proper procedure, in such a case would be to apply for revision of the said order (18 All 119 Ref.). **Shio Singh v Subh Karan Singh** **8 O C 261.**

(8) Order refusing to grant possession.

754—Civil Procedure Code, 1859 ss. 259, 263.

Appeal-*Contd.*

18 Orders—*Contd.*

No appeal lay from an order refusing to grant possession, under ss. 259 and 263, Act VIII of 1859. **Gopal Chunder Ghose v Raj Chunder Dutt.** **2 W R Mis 9.**

(9) Order admitting claim of dar—Patnidar.

755—Civil Procedure Code 1859 s. 269—

No appeal lay from an order admitting the claim of a dar patnidar who has intervened under s. 269, Act VIII of 1859. **Jadub Churn Thakoor v Bholanath Singh Roy.** **5 W R Mis 51.**

(10) Order on application to evidence.

756—A second appeal will lie against a decree in appeal against a decretal order as amendment is wrong, but that no amendment should have been allowed under the circumstances. Semble, that S. 629, Civil Procedure Code, would apply according to its spirit to an order by the Appellate Court. **Bala v. Bhiva,** **P J (1889), 13=13 Bom 496.**

756 *A*—C. P. C. O 9 r 13 S. 114, O 47 rr 1 rr 7, 9—(1882 Ss. 108, 623 and 629)

Review—Application by representatives of a deceased party. *Held*, that notwithstanding s. 108 of the Code the terms of s. 623 were sufficiently wide to admit of an application being made by the representatives of a deceased party who would be materially affected by the decree, and that having regard to the provisions of s 629 no appeal lay against the order admitting the application for review except on the question of limitation. **Debi Das v Narain Parshad** **9 O C 35.**

757—Order on review—

Plaintiff's suit was dismissed by the Original Court He petitioned for review of judgment whereupon notice was given to the defendant under Section 378 Civil Procedure Code. The Court, after hearing the parties, affirmed its judgment Plaintiff appealed to the Deputy Commissioner, who dismissed the appeal on the ground that "the order rejecting the application for review was final." On special appeal, the Chief Court *held*, that the appeal to the Deputy Commissioner would lie, and remanded the case to be disposed of by him on its merits. **Mussammat Prem Kour v Punjab Singh.** **P R 3 of 1873.**

Appeal-*Contd.*

18 Orders—*Contd.*

(11) Order rejecting review.

758—Civil Procedure Code 1859.s. 378—

No appeal lies from the order of a Judge ejecting an application for a review of his order dismissing an appeal for default of prosecution.

Chowdhry Ruttun Persad v Hunooman Jah W R 1864 Mis 20.

759—Under Section 378, Act VIII of 1859, an order rejecting an application for review of judgment is final. **Cally Dass Sircar v. Janokeenath Roy, 1 W R Mis 7.**

(12) Order rejecting application for review of order dismissing execution proceedings for default in payment of process-fees.

760.—Civil Procedure Code (Act XIV of 1882), Sections 2, 244 (c), 540, 623 and 629.

That an application for review of an order dismissing an execution case for non-payment of process-fees is not an application under section 244, cl. (c) of the Code of Civil Procedure, but one for review. and no appeal lies therefrom.

Pudmanund Singh v Doorga Pershad Doobey 4 C W N 39.

Notes:—Fol· 27 Cal 414.

(13) Order disposing of application for review on the merits.

761.—Where an application for review is disposed of as upon a re-hearing on the merits, an appeal lies from the order so passed

Amanut Ali v Bindhoo. 13 W R, 138.

(14) Order granting review.

762.-Civil Procedure Code (Act XIV of 1882) Section 629.

No appeal lies from an order granting a review of judgment, except in the cases set forth in section 629 of the Civil Procedure Code (Act XIV of 1882). **Bombay and Persia Steam Navigation Company v S S "Zuari" 12 Bom, 171.**

Notes · — Ap: 16 Cal 788. Fol: 22 Cal 3 ; 24 Cal 878 ; 18 All 44.

Appeal-*Contd.*

18 Orders—*Contd.*

Ref· 22 Cal 984 , I C W N 388, 21 Bom 328.

763—Section 629, Civil Procedure Code, 1882 (=O. XLVII, rr 7, 9, present Code) — Judgment, review of—Appeal from order granting review.

An appeal does not lie from an order granting a review of judgment, except in the cases set forth in section 629, Civil Procedure Code (1882) (12 Bom 171, R.) **Mahabir Prasad v Nathin Thakur. 1 C W N 338.**

764.—High Court and Letters Patent, cl 15 —" judgment "—Order granting review of judgment—Civil Procedure Code (1882) Sec 629.

Two Judges of the High Court decided a second appeal in favour of the respondents on the 1st June 1888. An application for review was filed on the 24th July 1888. The two Judges were not able to sit together till the month of March 1889 on account of variouts reasons. The matter came up before them on the 6th March 1889, when they issued a rule and called upon the respondents to show cause why a review should not be granted. The rule was not made returnable on the 28th March 1889. On that day one of the Judges was out of India on furlough and the rule was heard and made absolute by the remaining Judge sitting alone ; *Held*, that the order was not a judgment within the meaning of cl. 15 of the Letters Patent ; and that no appeal would lie therefrom, the order being final under Section 629 of the Code of Civil Procedure. 12 Bom. 171 9 Mad 253, approved.

Abboy Churn Mohunt V Shamant Lochun. Mohunt. 16 Cal, 788.

Notes :—Ref : 9 C W N 502.

765.—Cl. 15—Judgment-Single Judge refusing application for review —Appeal.

An application for review was made before one of two Judges of a Division bench which decided the appeal, the other Judge having left the court. The application was refused, the judge holding that no case had been made out for a rehearing. *Held*, that the order refusing the application for review was not a ' judgment

Appeal-*Contd.*

18 Orders—*Contd.*

within the meaning of Section 16 of the Letters Patent and was not appealable. 12 W R, 459 ; 3 C W N 347; 16 Cal 788 Ref to; 26 Cal 193 Dist.

Mulji Virji v Bangabashi Saja.
9 C W N 502.

Notes :—Ref : 33 Cal 1323=10 C W N 986.

766.—Order granting review of Judgment—Civil Procedure Code (1882) S. 629.

There is no appeal from an order granting a review of judgment except as provided by section 629 of the Civil Procedure Code. 12 Bom, 171, followed. **Har Nandan Shai v Behari Singh.**
22 Cal 3.
Mahabir Prasad v Nathni Thakur.
1 C W N 338.

Notes :—Fol: 22 Cal 984=24 Cal 878.

767.—Appeal against an order admitting review—Maintainability of review—Civil Procedure Code Section 629, cls. (a), (b) and (c).

Held, that no appeal lies from an order granting an application for review of judgement except on the grounds stated in clauses and of Section 629 of the Code.

Kedar Nath v Muasamat Mamola.
12 O C 151=2 Ind Cas 834.

768.—An order for review can only be challenged upon the grounds stated in sec 629 of the Civil Procedure Code, and that too, in general final appeal, 22 Cal, 3 followed. **Baroda Churn Ghose v Gobind Proshad Tewary.**
22 Cal 984.

Notes:—Fol : 24 Cal 878. Ref : 14 M L J 321 : 27 Mad 602.

769.—Further appeal from order passed on appeal from order admitting review—Act X of 1877, Section 629—Act XVII of 1877, Section 38.

Held, that as Sec. 629 of the Civil Procedure Code allows an appeal from an order admitting a review, the order passed on such an appeal and reversing that of the Court of original jurisdiction becomes itself appealable under Sec. 38 of the Punjab Courts Act, as such an order is not declared by any other law in force to be final. **Mangat Rai v Khan Chand.**
P R 133 of 1882.

Appeal-*Contd.*

18 Orders—*Contd.*

770.—C. P. C. S. 626 & 629. Ground.

No appeal will lie from an order granting a review of judgment except under the conditions specified in s. 629 of the Code of Civil Procedure. (12 Bom 171) followed.

Daryai Bibi v Badri Prasad
18 All 44=15 W N 151.

771.—Jurisdiction—Appeal admitted from order of Lower Court—Review by Lower Court of order appealed from—An appeal from a certain order treated as an appeal from another.

By order dated the 22nd March, the Commissioner dismissed plaintiff's suit on appeal. On the 29th May, plaintiff applied for a review of that order. On the 9th June, the case came on before another Commissioner, who first made an order to the effect that he was incompetent to review his predecessor's judgment, but on the same date he suspended action on that order, and referred the question for the opinion of the Chief Court. On the 22nd June, plaintiff filed an appeal in the Chief Court from the order of March 22nd, and the appeal was admitted on the 25th June. On July 6th, the Commissioner, having received the Chief Court's order, calling for the files, rejected plaintiff's application for review. On July 11th, on receipt of the Chief Court's reply to his reference, stating that he was competent to review his predecessor's judgment, he directed the Case on review to proceed, and on the 6th August reversed the order of March 22nd. Plaintiff took out execution of the order of August 6th. Leave was granted to him by the Chief Court to allow his appeal, admitted on June 25th, to be amended and to stand, not as an appeal from the order of March 22nd, but as a special appeal from the order of August 6th. The defendant appealed from the order of August 5th, on the ground that it was made without jurisdiction, an appeal having been admitted by the Chief Court before the Commissioner granted the review.

Held, upon defendant's appeal, that the action of the Commissioner on June 9th was to continue the application for review pending that his order of July 6th concluded the proceedings on review; and that his order of August 6th, which must have been based upon fresh proceedings commenced after the plaintiff's appeal was admitted by the Chief Court (June 25th), was with-

Appeal-*Contd.*

18 Orders—*Contd.*

out jurisdiction, and must be set aside.

Held,—afterwards, but on the same day, on plaintiff's appeal -that the Commissioner's order of August 6th having been reversed by the Chief Court, the plaintiff might revert to his original application and treat his appeal as from the decision of March 22nd, and this notwithstanding that he had taken out execution of the order of August 6th **Jey Gobind v. Ram Pershad P R 6 of 1870.**

772—Appeal–no appeal lies from an order granting review of Judgment except in cases specified in S 629 of the Civil Procedure Code; Bom; 171, Followed 22 Cal; 3 and 22 Cal; 984, referred to. That the Court which has granted the review has done so without sufficient reasons is not a valid ground of appeal under s. 629. **Munni Ram Chowdhry v Bishen Perkash Narain Singh 24 Cal; 878.**

Notes—Ref 28 Mad 557.

773—The Tahsildar decreed plaintiff's claim, and defendant applied for review of Judgment. Notice was issued to plaintiff, and after hearing the parties, the Tahsildar recorded "decree as before. Application rejected ".

Held (Melvill, J., dissenting) that an appeal lay from the Tahsildar's order on review, as it was a Judgment, on review affirming his previous judgment, and not a mere order rejecting a petition for review— **Sowaya v Pir Bakhsh P R 31 of 1875.**

774—Order Granting a review in a suit of the nature of a Small Cause Court valued at less than Rs 500—

An order granting a review was passed by an appellate Court in a suit of a nature cognizable by a Court of small causes and valued at less than Rs 500, without recording any reason for it. An appeal which was preferred against the order the High Court under s. 629 of the Civil Procedure Code:-*Held* that the order was bad being contrary to the Provisions of s. 625 of the Code of Civil Procedure. It was also further *Held*, upon the objection of the respondent that no appeal lay against the above order that the appeal was allowed under S. 629, the provisions whereof are not controlled or superseded by S 591 of the Code. Questions raised in a review application are quite different from those raised in a suit; a review can only be granted on special grounds and it may be well that although an appeal is not allowed from the final decree in the suit an appeal is allowable from an order granting a review, which could reopen the case after it had been disposed of.

Gyanund Asram v Bepin Mohun Sen 22 Cal 734

See Manicka Mudaliar v Gurusami Mudaliar 23 Mad 496.

Notes—Ex: 23 Mad 496.

(15) Order amending decree.

775—Review—Final order on review as to Costs Appeal— —Civil Procedure Code (Act X of 1877) section 206.

On the 28th July 1878, a decree was pronounced by the Subordinate Judge in favour of the plaintiff except as to portion of his claim. Subsequently on the 3rd February 1879 the defendant applied by petition for review of judgment on a number of grounds and *inter alia*, on the ground that he was entitled to costs in portion to the amount of the claim of the plaintiff which had been disallowed. The Court disallowed all the grounds upon which the review was sought save that as to costs upon which it passed the following order;—" the last ground as to proportionate costs seems to be valid. It was a clerical mistake. No reason was given for disallowing the costs. I allow this ground."

Held, that the order must be treated as a final order in the suit and not as an order rejecting an application for review but allowing the amendment of a clerical error which might have been rectified under section 206 of the Code of Civil Procedure without granting the review and an appeal will lie from it if brought within the time prescribed for bringing an appeal against a similar decree.

Joykishen Mookerjee v Ataoor Rohoman 6 Cal 22=6 C L R 575

Notes— Ref 28 Cal 177; 5 C W N 792; 22 Mad 364; 9 C W N 605. Fol; 3 C L J 188.

Appeal-*Contd.*

18 Orders—*Contd.*

776—C P C O 20 r. 6 (1882—S. 206)—Order disallowing amendment of decree—Appeal.

No appeal lies from an order either granting or refusing an application under S. 206 C. P. C. If the original decree is wrong, parties should appeal They cannot get it set aside by applying unsuccessfully for its amendment and then appealing against the order disallowing amendment.

Kishen Pershad v Radha Madho Pershad 1 A L J 701=24 All 268

777—C P C O 20 r 6 (1882 Sec. 206)—Decree—Appeal—amendment.

A Decree, an appeal against which has been dismissed, cannot be amended by Court which made it. The application for amendment must be presented to the Court of appeal.

No appeal lies against an order amending a decree but if such order has been made without jurisdiction, the High Court can set it aside on revision.

An appeal may lie from the decree as amended.

Kumar Rameswar v Bhaba Sundari 11 C L J 81=5 Ind Cas 304

777 A—S. 206 C. P. C.—An order passed under s. 206 of the Code of Civil Procedure is not appealable under s. 588 of the Code of Civil Procedure. **Raghunath Das. v Raj Kumar 7 All 276=5 W N 256**

Surta v Gangu. 7 All 411=5 W N 256

Notes—Fol 15 All 121; Dist 14 All 226 F B; Con 7 All 411, Ref 3 All 661 F B; 8 All 492 519; 10 All 51, 21 All 140.

777 B—S. 152—(1882 C P C S 206)—Amended decree appeal—An order directing amendment of a decree is not appealable but an amended decree is appealable **Brojolsl Rai v Tara Prasanna 3 C L J 188**

777C C.P.C. O. 20 r, 6 S 115: (1882 Ss. 206,622 623)—Order amending decree—Appeal—Second appeal Review.

An order under S. 206 C P. C. amending a decree is not a decree and no appeal lies against such an order, and the proper remedy is by an application under S 622 C P C 7 All 875 ref to and foll; 6 Cal 22 ref to, 25 Cal 268 dist; 8 All 377 and 11 All 814 explained.

Nalinakshya (Raghu Nath) Ghoshal v Nabakshar Hossain Chowdhry. 5 C W N 192=28 Cal 177

Notes—Ref· 31 Bom 477=9 Bom L R 547; 3 C L J 188 Dist 3 C L J 188

777D—"An appeal shall lie from the decree" —Finding not embodied in decree.

In a suit to obtain possession of certain property and to set aside a deed, called a deed of endowment (*wakfnama*), on the ground that the defendant had fraudulently obtained its execution, the defendant pleaded (i) that the deed was a valid one and (ii) that she was in possession of the property in satisfaction of a dower debt, and her possession could not be disturbed so long as the debt remained unsatisfied. The Court of first instance held that the deed was invalid but that the defendant was entitled to remain in possession of the porperty till her dower-debt was satisfied, and the Court passed a decree which merely dismissed the suit, without embodying the finding as to the deed. On appeal by the Plaintiff to the District Judge, the defendant filed objections under s. 561 of the Civil Procedure Code in regard to the first Court's decision that the deed of endowment was invalid. The Judge dismissed the Plaintiff's appeal, affirming the finding as to dower, and, refusing to decide the question of the validity of the deed, as being unnecessary for disposal of the claim, disallowed the defendant's objection. The defendant appealed to the High Court. *Held* by the Full Bench (Oldfield and Mahmood, JJ., dissenting) that if a decree is upon the face of it, entirely in favour of a party to a suit, such decree being the thing which by law is made appealable and nothing else, that party has no right of appeal therefrom. If, in the judgment of which such decree is the formal expression, findings have been recorded upon some issues against that party and he desires to have formal effect given to them by the decree, so as to allow of his filing objections thereto under s. 561 of the Civil Procedure Code, or of appealing therefrom under s, 540, he must take steps under s. 206 to have the decree properly brought into conformity with the judgment, so that there may be matter on the face of it to show that something has been decided against him; but if he fails to take this course, the decree, though

Appeal-*Contd.*

18 Orders—*Contd.*

in general terms will stand good at finally deciding the issues raised by the pleading upon which the ultimate determination of the cause and the decree itself rested. The findings in a judgment upon matters which subsequently turn out to be immaterial to the grounds upon which a suit is finally disposed of, as to the Plaintiff's right to any portion of the relief sought by him as declared by the decree, amount to no more than *obiter dicta* and do not constitute a final decision of the kind contemplated by s. 13 of the Civil Procedure Code. *Held* also that, in the present case, the question as to the validity or otherwise of the deed of endowment of Straight, *J.*, in 2 All 497 approved and followed.

Per Oldfild, J.,—*contra*, that the decree, to agree with the judgment and fulfil the requirements of s. 206 of the Civil Procedure Code, should contain the material points for determination arising out of the claim and material for the decision thereon; that if this has not been done, the defect is a good ground of appeal, notwithstanding that the decree, on its face, may be altogether in favour of the appellant, and notwithstanding that he may not have applied for amendment of the decree under s. 206, or for review of judgment; and that in the present case, the defect in the decree would afford a good ground.

Per Mahmood, J., that inasmuch as the provisions of s. 13 of the Civil Procedure Code relate as well to the trial of issues as to the trial of suits, and in the present case the validity or otherwise of the deed was a matter directly and substantially in issue between the parties, and was adjudicated upon, the finding of the first Court upon that issue was not a mere *obiter dictum* but would be binding upon the defendant as *res judicata* notwithstanding the fact that the suit against her was dismissed on the ground that she held possession of the property in lieu of dower; that whatever has the force of *res judicata* is necessarily appealable; that the word "from" as used in s. 540 or s. 584, and the expression "objection to the decree" in s. 561, refer not only to matters existing upon the face of the decree, but also to those which should have existed but do not exist there; and that the defendant in the present case was aggrieved or injured by the omission in the decree of the first Court, and was therefore entitled to file objections to it, and, for

Appeal-*Contd.*

18 Orders—*Contd.*

the same reason, to appeal to the High Court from the decree of the lower appellate Court. Also per Mahmood, J., that it was doubtful whether the reliefs contemplated by ss. 206 and 623 were open to the defendant; but that, even conceding that she ought to have sought her remedy under either of those sections, her neglect to do so did not make her incapable of obtaining the same result by the exercise of her right of appeal. 7 *Bom* 484; 1 All 480; 2 All 843; 6 All 319; N W P 4 H C Rep 1874 p. 19 referred to. **Jamaitunnissa v Lutfunnissa. 7 All 606=5 W N 89.**

Notes:—Ref: 6 C L J 631; 22 Mad 364; 18 *Bom* 597; 8 All 354 F B; 17 All 174. Fol: 28 All 865=3 A L J 171=(1906) W N 44.

777E—A decree affirmed by the High Court was amended by the Court of first instance. On an execution being sought of the amended decree, the judgment debtor objected that that was not the decree which could be executed. The Court disallowed the objection and ordered execution to proceed *Held* that this was a "decree" and not an order under s. 206 of the Code of Civil Procedure. **Muhammad Suleman Khan v Fatima. 11 All 314.**

Notes—Ex: 5 C W N 192. Ref: 28 Cal 177: 17 All 478; 9 C W N 605.

(16) Order rejecting insufficiently stamped document

778—Stamp—Document requiring a stamp—Admissible in Evidence-decree Appeal-Document admitted by the Court of First Instance.

When a document is admitted by the Court of First Instance as not requiring a stamp, its admissibility cannot be questioned in special appeal. 16 W R 6 followed. **Khoob Lall v Jungle Singh 3 Cal 787=2 C L R 439**

Notes—Appr 13 *Bom* 449; F B Fol 8 M L J 66

(17) Order refusing to allow document to be filed.

779.—No appeal lies from the refusal of the Judge of an Appellate Court to allow a fresh document to be filed. **Beckwith x Kishto Jeebun Buckshee. Marsh 278: 2 Hay, 286.**

Notes—fol: 7 W R 489; 7 *B* L R Appx 26. Ref: 1 WR 100; 23 All 121. 6 C L J 273; 11 C W N 893 F B; 35 Cal 34 F B.

Appeal-*Contd.*

18 Orders—*Contd.*

780—Appeal.

No appeal lies under s. 588 of the Code of Civil Procedure from an order dismissing an application under s 483, of the Code for an order for the attachment of some property to meet any decree which the applicant might obtain under s. 90 of Act IV of 1882. **Amba Prasad v Narain Das 18 W N 18**

(18) Order compensating defendant for loss of property attached

781—Held that no appeal lies to the District Court from an order made by a Munsif compensating a defendant for loss of property attached before judgment under s. 84 of Act VIII of 1859.

Trikam Goverdhan v Dullabh Kuber. 2 B H C 389 2nd Ed 367.

(19) Order for Compensation release of attached property.

782—No appeal lies from an award of compensation on release of attached property.

Hurosoonduree Dossee v Bungseemohun Dass. 3 W R Mis 28

Huro Soondery Chowdhrain v Bungshee Mohun Doss 8 W R 332

(20) Order releasing property from attachment.

783—Order releasing property from attachment—Claim to property attached —Civil Procedure Code, ss. 86, 246.

The plaintiff sued to recover a money debt, and applied for attachment of certain property before judgment. The application was opposed by the wife of the defendant, who claimed an interest in the property. She was made a defendant by the Court of first instance, which made a decree in favour of the plaintiff for the debt, but releasing the property from attachment, thus allowing the wife's objection. *Held* that, notwithstanding the irregularity of thus disposing of the claim by an order contained in the decree, such irregularity did not affect the nature of the order releasing the property from attachment and no appeal thereform lay to the Judge. **George v Ram Ruttun. 3 Agra 272**

784—Proviso—Appeal

This is an appeal by a judgment-debtor whose moveable property has been attached in execution of a claim for money under an order by the Subordinate Judge of Mainpuri. The appellant had applied to the Court below under the last clause of s. 245 of the Code of Civil Procedure representing that whereas the claim against him was inconsiderable, being some Rs. 1,300 or 1,400 only, and whereas landed property of his worth Rs. 40,000 had been attached in execution and Rs. 300 belonging to him were impounded in the Court, still the decreeholder has unnecessarily and injuriously procured an order of attachment against the appellant's household property consisting of chandeliers, lamps plants and the like perishable articles. The Subordinate Judgi disposed of the application in the following words: "No part of the property under attachment can be released. When the judgment-debtor pays into Court the whole amount of the decree, the attached property will be released. Ordered that the petition be disallowed" *Held* that the order amounted to a decree as defined in s. 2, Code of Civil Procedure and was appealable as such. That the order of the Court below was very perfunctory and inadequate which is simply amounts to a refusal to exercise jurisdiction. The case must be remanded under s. 562 Code of Civil Procedure. **Jaswant Singh v. Bishun Lal. 8 W N 155.**

785—Civil Procecure Code (Act X of 1877) Section 588 cl (j)—Order refusing in execution to attach land or releasing it.

Held, that an appeal lies, under Section 588 cl j of Act X of 1877 from an order refusing in execution of a decree to attach the land of a judgment debtor, or releasing it from attachment on the ground that it is insufficient for the judgmnet-debtor's support. **Pohlo Mal v Mt. Gowri P R 4 of 1879**

786—Attachment of property in execution—Claim by judgment-debtor on behalf of a Thakur as its *shebait*.

Where a property is attached in execution of a decree and the judgment debtor objects on the ground that although he is in possession of the same, such possession is not on his account but on account of two idols (or Hindu deities) and the property is *debutter* and he has no personal right in it: *Held*—That the objection does not fall under the provisions of sec 244 Civil Procedure Code but it is

Appeal-*Contd.*

18 Orders—*Contd.*

a claim under sec 278 and no appeal lies against an order passed in such a case. *16* Cal 1 (1888) 17 *Cal* 711 (1890) 23 Bom 246 (1898) 2 All 752 (1880) 7 All 36 (1884) 15 *Cal* 437 (1888) and 2 Bom 237 (1898) referred to. **Bhajahari Pal v Ram Lal Das 6 C W N 63**

787-S 115 (1882 s.622)-Civil Procedure *Code* (Act XIV of 1882) sec 278—Attachment—investigation of claim —Order—Appeal.

No appeal lies from an order passed under s. 278 of the *Civ* Pro Code upon the application by a person not a party to the suit or by a party to a suit applying in a different character to raise the attachment. **Dayaram Jagjivan v Govardhandas Dayaram 6 Bom L R 462 = 28 Bom 458**

Notes—Dist 36 *Cal* 130; Ref 11 Bom L R 754.

788—Certain property having been attached in execution as belonging to the judgment-debtor, a portion was claimed by a third party and released from attachment. *Held* that no appeal by the judgment-debtor lay from the order of release. **Sham Soonder Koonwar v Rughoonath Suhaye 11 W R 264**

789—No appeal lies from the order of a *Court* releasing a property from attachment, on the ground that it is in the possession of the judgment-debtor, not on his own account, but on account of, or in trust for, some other person. **Radha Kishen v Ameerudeen 11 W R 204.**

Notes—Fol 21 W R 365.

790-Where property attached in execution is released at the instance of an intervenor, under s. 246 *Civil* Procedure *Code* and retained in his possession the decree-holder has no right of appeal. **Ajoodhya Dass 12 W R 354**

791—*Civ* Pro. 1877 ss. 278, 280, 283.

An objection was made to the attachment of certain property in the execution of a decree by the judgment-debtor, on the ground that such property was in his possession not as his own property but on account of an endowment This objection was one of the nature to be dealt with under section 278 and following sections. The *Court* executing the decree made an order against the decree-holder releasing the property from attachment. *Held* that such order was not appealable, the fact that the objection was made by the judgment debtor notwithstanding, and the decree-holder's proper remedy was to institute a suit under the provisions of section 283. **Shankar Dial v Amir Haidar 2 All 752**

Appeal *Contd.*

18 Orders—*Contd.*

Notes.—Fol 7 All 36; 15 *Cal* 437; 6 *C* W N 63 Dist 16 *Cal* 503; 7 All 547 *9* All 605: Ref 16 *Cal* 1; 10 Mad 117; 23 Bom 237: 8 All 626.

792—Appeal by decree holder.

Where parties holding a decree which declares that they have a lien to be satisfied by the sale of certain property proceed to attach and sell the property, and in pursuing this course are met by an objection under Act VIII of 1859, s, 246, and that objection is adjudicated unfavourably to them, no appeal lies from such adjudication, though the parties are at liberty to bring a suit to establish their rights. **Mittoo Lall v Mahtab Kooeree 19 W R 98.**

793—Civil Procedure Code, 1859, s. 246—Act X of 1859, s. 106.

Where land is attached in execution of a rent-decree, and on an application either under Act VIII of 1859, s. 246, or under Act X of 1859, s. 106, it is released from attachment by order of a Court of competent jurisdiction, such order is not subject to appeal, and can only be impugned by a regular suit. **Urjoon Sahoy v Nilmonee Singh Deo 20 W R 90.**

Notes.—Dist: 3 C L R 146.

(21) Order dismissing claim to attached property.

794—Execution of decree-The heris of the deceased obligor of a bond were sued thereon, on the ground that they were in possession of the property of the deceased, and a decree was made in this suit for the recovery of the amount claimed, " from the property of the deceased." In execution of this decree, the plaintiff caused certain property to be attached as belonging to the deceased. The defendants objected to the attachment on the ground that the property belonged to them The *Court* executing the decree proceeded to investigate this objection, and finding that the property did not belong to the defendants, but to the deceased, disallowed it. *Held*, that the proceedings upon such objections were taken under

Appeal-*Contd.*

18 Orders—*Contd.*

s. 281 of the Code of Civil Procedure and the order disallowing it was therefore not appealable.

Awadh Kuari v Raktu Tiwari 6 All 109=3 W N 230,

Mul Mantri v Ashiak Ali. 9 All 605.

Seth Chand Mal v Durga Dei. 12 All 313. =10 W N 137.

Sanwal Das v Bismillah Begam. 19 All 480 =17 W N 115.

Notes:—Over: 12 All 313 F B. Not Fol: 16 Cal 1; 9 All 605. Con: 15 Cal 437. Ref: 8 All 626.

795—Appeal.

An objection to the attachment of property under s. 278 of the Code of Civil Procedure having been disallowed, an appeal was preferred by the judgment-debtors who had taken no part in the objection before the Court of first instance. *Held* that the appeal was not maintainable.

Bachi v. Sheo Karan Singh. 6 W N 77.

796—Civil Procedure Code, 1859, s. 240.

Where a claim under s. 246 of Act VIII of 1859 is dismissed, there is no appeal from the order of dismissal. **Bukshee v. Bungsheedhur. 6 W R Mis., 46**

(22) ORDER ON APPLICATION TO ADD PARTY.

797—Civil Procedure Code, 1859, s. 73.—

No appeal lies against an order passed on the application made before decree under s. 73 of the Civil Procedure Code, except in case of an appeal from the decree itself as provided for in s. 363 1 Mad., 197, does not conflict with this ruling, as the petition there was presented in the course of a regular appeal then pending in the High Court.

Muthayammal v. Tirumala Gaundan. 4 M H C 22.

798—Civil Procedure Code. 1859.

The action of the Court under s. 73 Act VIII of 1859, is a matter of discretion, and upon a true construction of ss. 363 and 350, not a matter of appeal; but an appeal will lie after decree against interlocutory orders, if they affect the decison on the merits or the jurisdiction of the Court.

Ridhnath Sahoy v. Gopee Sahoo 14 W R 90 See Upendra Krishna Deb v Nobin Krishna Bose. 17 W R 370 Note. 3 B L R O C 113.

Appeal-*Contd.*

18 Orders—*Contd.*

(23) Order refusing application to add party

799—Orders—s 32 C P C.

An order refusing an application under s. 32 of Act X of 1877 by a person to be added as defendant is not appealable. **Kariman Bibi v Misri Lal. 2 All 904.**

Notes—Fol: 21 Cal 539.

(24) Order rejecting application to add party

800—Civil Code ss. 32 and 588 cl 2.

An order rejecting an application under s. 32 of the Civil Procedure Code to be made a party to a suit is not appealable under cl. 2 s. 588.

Abirunnissa Khatoon v Komurunnissa Khatoon 13 Cal 100

801—S.588 C P C—Order making defendant plaintiff.

Where a Court having of its own motion added certain persons as defendants to a suit subsequently transferred the names of such parties from the array of defendants to the array of plaintiffs, it was *held* that the last mentioned order transferring the names was appealable. **Achambit Rai v. Hans Raj Rai. 16 W N 101.**

802—Civ. Pro Code Ss. 32, 588 (2) appeal against order that a plaintiff made defendant.

An appeal certainly lies from an order whereby a party who is plaintiff is made defendant under section 588 clause (2). **Lakshmana v Paramasiva. 12 Mad 489.**

803—Civil Procedure Code 1882 Sections 372 588 (21)—Application to be brought on to record in substitution for plaintiff—Dismissal of such application—Appeal.

Held, that there is no appeal from an order dismissing an application to be made a party, under Section 372 of the Code of Civil Procedure. Section 588 (21) only allows an appeal from an order disallowing objections to an application under that section.

19 All 142; 22 All 380; 24 Mad 252 distinguished 24 All 532 : 4 Calc W N 108 cited.

Mussammat Sahib Nur v. Muhammadji 57 P R 1903.

804—Order striking out party—Revision.

Held that an order by the appellate Court striking off the name of a defendant made a party

Appeal-*Contd.*

18 Orders—*Contd.*

under s. 32 of the Code of Civil Procedure was appealable and therefore not open to revision by the High Court under s. 622 Code of Civil Procedure. **Jaipragash Singh v. Har Shankar Prasad. 2 W N 53**

805—In this suit one B was added as a co-defendant by the first Court. The plaintiff appealed from this order to the District Judge, who hearing the appeal as one under s. 588 cl (2) cancelled the lower Court's order. The original defendant then appealed to the High Court. *Held* that no such appeal lay. The defendant's remedy was by revision. **R H Skinner v. C W Kinloch 6 W N 138.**

(25) Order dismissing petition for examination of witness

806—Civil Procedure Code, *1859* Ss. 162, 162. The order of a Court dismissing a petition under s. 162 and 163, Act VIII of 1859, is final. But the Court is bound to show in the face of its judgment, that judicial discretion has been used, and the limit of its powers not exceeded. **Ram Surun Singh v. Gooroo Dyal Singh 1 W R 83**

Haro Chand Poramanick v. Krishto Mohun Giree 1 W R 297

Neem Chand Dey v. Anund Coomar Roy Chowdhry 7 W R 147

Notes.—App: 3 W R 68; 3 W *R* 13.

807—No appeal to a Division Court lies against an order of a single Judge of the High Court dismising an application for the Court's extraordinary jurisdiction under s 25 of the Provincial Small Cause Courts, Act. **Hiralal Achharatlal v Bai Asi P J (1897) 313**

(26) Order as to expenses of Witness.

808—Civil Procedure Code, 1859 s. 151.

An order was made directing the realisation (under s. 151 Civil Procedure Code, 1859) by attachment and sale of the expenses of a witness after he was discharged without being required to give evidence. A miscellaneous appeal having been filed from the order, the High Court issued a rule to show cause why the appeal should not be allowed. On no cause being shown the appeal was filed. **Bijoy Kishen Mookerjee v. Joy Kishen Mookerjee 12 W R 430**

Notes:—Ref 16 W R 218.

Appeal-*Contd.*

18 Orders—*Contd.*

(27) Order suspending execution for cross decree

809—No appeal lies from the order of a lower Court suspending the execution of a decree pending the result in a cross-decree held by the judgment-debtor. **Smith v Bulwant Singh 2 W R Mis 24**

(28) Order staying execution of decree.

810—Civil Procedure Code. 1859 s. 209.

No appeal lies against an order, under the last clause of s. 209 of the Code of Civil Procedure, staying the execution of a decree. The High Court however, in the exercise of its extraordinary jurisdiction, will examine the judicial propriety of such an order. **Gambhirmal v. Chejmal Jodhmal 11 B H C 151**

Notes:—Dist: 7 Cal 733.

811—C.P.C. O 41 r.5, S,47 (1882 Ss.545, 244) Order refusing stay of execution—Decree—appeal—Discretion of the lower court—Appellate Court. functions of.

An order passed by an appelate Court under S. 545 C P C refusing to stay execution is one against which no appeal lies. 12 Bom 279 doubted. Courts of appeal should not lightly interefere with a discretion deliberately exereeised by a lower Court. **Ramchandra v Balmukund 6 Bom L R 780=29 Bom 71**

812—Civil Procedure Code, (1877), Sections 243 and 244—Appeal—Stay of Execution proceedings. An order under section 243 of the Civil Procedure Code is not an order determining a question between the parties within the meaning of Section 244 of the Code and is not appealable.

Chutto Lall Dass v. Ramesharee Dasee, 9 Cal 214=12 C L R 53.

Notes:—Not Fol: 13 Cal 111; 10 All 389. Disap: 23 Mad 568. Ref: 8 C W N 257.

813—Stay of execution pending suit between decree-holder and judgment-debtor — Appeal from order staying execution—Civil Procedure Code, S. 243.—

An appeal lies from an order passed under S. 243 of the Civil Procedure Code, staying execution of a decree pending a suit between the de-

Appeal-*Contd.*

18 Orders—*Contd.*

cree-holder and judgment-debtor. The plaintiff instituted a suit against defendant for recovery of money and other relief, which was ultimately dismissed in appeal by the High Court, and he was ordered to pay defendant Rs. 1,000 as costs of the litigation. Plaintiff then brought this suit against defendant in the Court of the Subordinate Judge of Farukhabad,and while it was pending, defendant applied to the Court to execute his decree for costs. Plaintiff then applied for stay of the execution, and his application was refused by the first Court, but granted by the District Court. On appeal by defendant to the High Court, *held*, that an appeal lay from the order, and the Judge's order was correct. 8 W R 392, disapproved. **Kassa Mal v. Gopi, 10 All 339.**

814—Bond of security—Civil Procedure Code (1882), Ss. 545, 588.—

The execution was ordered to be stayed pending appeal by the Court which passed the decree, on the debtor's furnishing security to the amount of Rs. 70,000, under the provisions of S. 545 of the Code of Civil Procedure. The debtor raised an objection to the amount of security ordered to be furnished, and on that ground appealed to the High Court. The contention of the decree-holder was that no appeal lay. *Held*, that the order was appealable. and also, on the facts, the security required was excessive.

Udeyadeta Dev v. Gregson, 12 Cal 624.

Notes:—Fol: 12 Bom 30.

(29) Order releasing surety for stay of execution.

815—No appeal will lie from an order by a District Judge, releasing a surety from security taken from him by the High Court, to enable a decree-holder to take out execution of his decree pending an appeal to the Privy Council, although it is an improper one. **Abedoonissa Khatoon v. Ameeroonissa Khatoon, 17 W R 464.**

(30) Order rejecting application to stay execution etc. for want of sanction of Court under S. 462.

816—Civil Procedure Code, S. 462—Decree by the consent of guardian of minor defendant.—An application was made for staying execution of, and setting aside a decree which was made by the consent of the guardian of a minor defendant as there was no sanction of the Court under Sec. 462 Civil Pro. Code. It was rejected. *Held*, that the order of rejection was non-appealable. **Arunachallam v. Murugappa, 12 Mad 503.**

Notes:—Ref: 17 M L J 288.

(31) Order rejecting petition for execution by transferee of decree.

817—Order rejecting petition for execution by a purchaser at a Court sale.—

The petitioner, claiming to be the transferee by operation of law of a decree, by virtue of his purchase of the decree-holder's interest at a sale held in execution of another decree, applied for execution. Under Section 232, Civil Procedure Code, the Subordinate Judge rejected this petition. *Held*, no appeal lies from the order of the Subordinate Judge, rejecting the petition.

Sambasiva v. Shrinivasa, 12 Mad 511.

Notes:—Fol: 14 Mad 478 Ref: 16 All 483. Ex: 25 Mad 545.

(32) Order refusing stay of execution pending suit between decree-holder and judgment-debtor.

818—Civil Procedure Code (1882), Ss. 243 and 588.—An appeal lies from an order refusing stay of execution under the Civil Procedure Code S. 243, pending suit between a decree-holder and his judgment-debtor. **Lingum Krishna Bhupati Devu v. Kandula Sivaramayya, 20 Mad 366.**

Notes:—Ref. 8 C W N 257.

819—Letters Patent, S. 15—C. P. C., Ss. 244, 608—"Judgment"—Order refusing stay of execution—No appeal lies.—

An order refusing a stay of execution is not a "judgment" within the meaning of Art. 15 of the Letters Patent, and therefore no appeal lies from such an order under that section. No doubt, an order determining a question referred to in S. 244 C. P. C., is for the purposes of the Civ. Pro. Code, a decree under the special words of S. 2,although it is not a decree under the general words of that section. But it does not follow that, because the Legislature have provided that for a special pur-

Appeal-*Contd.*

18 Orders—*Contd.*

pose an order under a special section should be technically a "decree", that such an order is a "judgment", within the meaning of Art.15 of the Letters Patent **Durga Prasada Naidu v. Mallikarjuna Prasada Naidu, 11 M L J 238.**

(33) Order refusing application to be declared insolvent.

820—Civil Procedure Code (Act X of 1877), Sections 351, 588, Cl. (17)—Insolvent, Application to be declared—Insolvent, Order refusing application—Appeal under Section 388. cl. (17) of Act X of 1877.

An order disallowing an application to be declared an insolvent is as much an order made under Section 351 of Act X of 1877, as an order granting such an application, and is, therefore, appealable under Section 588, cl.(17) of that Act. 4 Cal 888, followed; 6 C L R 135, dissented from.

Nubbi Buksh v. Chasni, 6 Cal 168= 7 C L R 282.

821—Order refusing application to be made insolvent—Act X of 1877, Ss. 344, 588, Cl. 17—Appealable order.—

Held, that an order refusing to grant an application under S. 344 of the Civil Procedure Code to be made an insolvent is appealable under Cl. 17, S. 588 of the same Code.

Gopal v. Gidar, P R 124 of 1882.

822—Civil Procedure Code (1882), Ss. 351, 588, cl. 17.—

An order, made under S.351 refusing to grant an application to be made an insolvent, is not liable to be appealed against. The appeal allowed under S. 588, cl. 17, so far as an order under S 351 is concerned, is on behalf of the judgment-creditor only. **Juggutjeebun Gooptoo v. Harocoomar Pal, 5 Cal 719.**

Juggubun Goopta v. Hurro Koomar Pal, 6 C L R 135.

Notes:—Disap 6 Cal 168.

823—Companies Act—Ss. 169, 177, 185, 189, 201, 202—Appeals from Court's orders regarding winding up of a Company—Position of liquidators—Delegation of powers by liquidators, validity of An appeal lies from any order or decision made by the Court, in the matter of the winding up of a Company, whether the winding up be compulsory, voluntary or under supervision. The language of the first part of S. 169 is taken from S. 124 of the Companies Act of 1862, substituting the words "by the Court" for by any Court having jurisdiction under this Act. The right of appeal conferred by S. 124 extends to all decisions in the matter of the winding up of a Company, and the substitution of the words "by the Court" does not restrict the right of appeal to cases, in which a company is being wound up compulsorily by the Court.

Kesavaloo Naidu v. Murugappa Mudali, 16 M L J 537=30 Mad 22.

824—Order under S. 351, C. P. C. and Sections 353, 588, 589—Appeal — District Court—Divisional Court.—

The appeal from an order under Section 351, Civil Procedure Code, passed by a District Court in an insolvency case lies to the Divisional Court under Section 589 of the Code, whatever the value of the claim may be, under *Punjab Government Notification* No. 940, dated 24th October 1886.—

Kahn Singh v. Ghulam Muhammad, 85 P R 1890.

825—An appeal lies against an order passed under s. 351 of Act X of 1877, although it was an order refusing to declare petitioner an insolvent.

Bavachi Packi v. Pierce Leslie & Co., 2 Mad 219.

Notes.—Ap: 17 All 218 F B.

826.—Civil Procedure Code, (1877) s. 588 (n).

An appeal would lie under s. 588 (n) from an order dismissing an application to be declared an insolvent. **Mumtaz Hossein v Brij Mohun Thakoor. 4 Cal 888.**

Notes:—Appr: 6 Cal 168.

827.—Civil Pro. Code. 1882 ss. 344, 588—Insolvent Judgment-debtor.

On the arrest of a debtor on civil process he petitioned the Court from which process issued, alleging therein his inability to pay the debt with a prayer that he should be declared insolvent & released. On the same day an order was passed by the Court directing his release and ordering the creditor to proceed against his property. *Held*, that such an order is appealable.

Komarsami v Govindu 11 Mad 136.

Appeal-*Contd.*

18 Orders—*Contd.*

(34) Order dismissing petition of insolvent debtor.

828.—Order rejecting application of insolvent debtor—Provincial Small Cause Courts Act (IX of 1887) S 24-Petition for Insolvency in execution of a decree in small cause suit. Civil Procedure Code Ss 344, 588.

In execution proceedings as regards a decree of a small cause suit passed by a District Munsiff having insolveney jurisdiction the judgment-debtors filed a petition to be declared Insolvents under s 344 of Civil Pro. Code. Petition dismissed by the District Munsiff. *Held* order of dismissal is appealable to District Court. **Vaikunta Prabhu v Moidin Saheb 15 Mad 89.**

Notes:—Ref: 23 All 56; Not Fol 19 M L J 68.

829.—District Court—Order rejecting an application to be declared an insolvent.

An appeal from an order passed by the first-class Subordinate Judge rejecting an application to be declared an insolvent, under s 344 of the Civ Pro Code 1882, where the subject is Rs 5,000 in value, lies to the District Court, under s 589 of the Code. **Manekshah v Dadabhai, 5 Bom L R 591= 27 Bom 604.**

Notes:—Ref 6 C L J 38; 19 M L J 68.

(35) Appeal against order of a subordinate Court on a petition of insolvency.

830.—Civil Procedure Code s 589—Act VII of 1888 s 56 Act X of 1888 S 3-Appeal from order on an insolvency petition to Subordinate Court.

The decree of the Madras Court of Small Causes was transferred for execution to the Subordinate Court of South Malbar. In execution the judgment-debtor was arrested, who applied to the District Judge to be declared an insolvent. The District Judge under section 360 transferred the application to the Subordinate Court of South for disposal, and on 25th July 1888 the judgment-debtor was declared an insolvent. On 5th November 1888 an appeal was preferred to the High Court. *Held*, that no appeal lay to High Court, **Sitharama v Vythilinga 12 Mad 472**

Notes:—Fol 15 Mad 89; 19 M L J 68. Ref 23 All 56.

830A.-C.P.C.S. 104; O 43 r 1; (1882 ss.588,360)-Order by Subordinate Judge on Insolvency petition presented in execution of a Small Cause decree—Appealability to the District Judge.

Held that orders passed by a Subordinate Judge in insolvency matters are appealable to the District Judge under s 588 even where such appealable orders are made in execution of a small cause decree (12 Mad 472: 15 Mad 89; 23 All 56, 27 Bom 604 relied on; 17 Mad 377 not Fol:) **P S Sami Aiyer v Ayilam Vythi Pattar 4 M L T 455=19 M L J 68.**

831.—Appeal—Appeal from insolvency order-Civil Procedure Code 1882, section 588 (17) and 589.

By Punjab Government Notification No 940, dated 24th October 1888, the Divisional Court is deemed to be the District Court per proviso (a), Section 589 Civil Procdure Code, 1882, consequently in all suits where the subject-matter is not more than Rs 5,000, an appeal from an order under Section 351 (a) of the Code lies to the Divisional Court. 17 Mad 377, distinguished. **Bhagwan Das v Jai Ram Das 58 P R 1901.**

(36) Order refusing to discharge surety insolvent.

832.—s 336 C P C—An order, refusing to discharge a surety under s 336 of the Code of Civil Procedure for an insolvent judgment-debtor filing his petition, where the surety was entitled to his discharge, is not appealable **Baima Mal v Jamna Das 15 All 183.**

(37) Order releasing from attachment after acquired property of insolvent judgement-debtor.

833.—s 588 (17)—s 357 C P C Insolvency.

A judgment-debtor, who had been declared an insolvent, received some property by inheritance. Some of the scheduled creditors applied under s.357 of the Code of Civil Procedure for sale of this property. The Court purporting to act under that section, made an order on such application, allowing property to be relieved on payment by the insolvent of one-third of the scheduled debts. *Held* that the order was appealable as an order under s 357. **Ganeshi Lal v Musarraf Ali 16 All 234=14 W N 71.**

Appeal-*Contd.*

(18) Orders—*Contd.*

834.—Civil Procedure Code (Act X of 1877), Ss. 353, 588 (17), and 589—Order reversing on review previous order granting appellant priority in distribution of assets of insolvent—Appealable order.

An order reversing on review of judgment a previous order granting the appellant's priority in the distribution of assets of an Insolvent in proceedings conducted under Chapter XX of the Civil Procedure Code, *held*, to be an order passed on an application such as is contemplated by the second clause of S. 353 of the Code, and therefore to be appealable under S 588 (17), the appeal lying, under S. 589, to the Chief Court.

Alliance Bank of Simla v. Walsh. **P R 66 of 1883.**

(38) Order giving possession to mortgagor on payment after expiry of time.

835.- Suit for foreclosure—putting mortgagor in possession on payment after expiry of time —Transfer of Property Act (IV of 1882) S. 87.

In a mortgage-suit a foreclosure decree was passed granting three months for the discharge of the debt. On failure of payment the decree-holder after making an application got the possession of the property. The mortgagor who had no notice of the application by the mortgagee, applied, got the extention of time, made payment & obtained possession—*Held* that the mortgagee could bring an appeal against the order.

Narayana Reddi v Papayya. **22 Mad 133**

Notes:—8 M L J 205. Fol: 27 Cal 705, 3 C L J 533. Dist: 4 C L J 317. Diss: 25 Mad 244 F B; 289. Ex: 27 Mad 40. Ref: 32 Cal 253 F B=9 C W N 81.

836.—Ss. 318 & 319 C P C.—Appeal.

No appeal will lie from an order made under s. 318 or s. 319 of the Code of Civil Procedure.

Dhunda v Durga. **13 W N 122.**

837.—S. 318 C P C.—Appeal.

Held, that an order under s. 318 of the Code of Civil Procedure putting an auction purchaser in possession of the property purchased, was not open to appeal as an order under s. 588, nor as a decree as it is not so within the meaning of s. 2 of the Code of Civil Procedure. **Narain Singh v Pargash.** **6 W N 45.**

(39) Order on investigation of claim.

838.—C obtained a decree in the First Class

Appeal-*Contd.*

(18) Orders—*Contd.*

Subordinate Judge's Court in a suit the subject matter of which exceded Rs. 5000. In execution of the said decree, he attached some land of less value than Rs. 5000 as the property of his judgment-debtor B, and he was obstructed by C. A petitioned under section 226 of Act VIII of 1859, which petition became a suit wherein eventually A's claim was rejected. *Held*, that an appeal from this decision lay to the High Court and not to the District Judge, as the second suit cannot be regarded as a fresh suit, but the continuation of the original suit. **Ravloji alias Dinkarranbin Tamajiran v Dholapa bin Raghu.** **P J (1879) 507=4 Bom 123**

Notes.—Diss: 4 Bom 515 F B; 14 Bom 627. Dist: 22 Cal 830; 6 Bom L R 301. Ap; 8 Mad 548 F B. Ex: 4 Mad 220. Ref: 13 Mad 520.

(40) PROCEEDINGS IN NATURE OF FRESH SUIT.

839—Fresh suit, Proceedings in the nature of s. 331 Civil Procedure Code (1882)-Specific Relief Act (1 of 1877) s. 9—Jurisdiction of Subordinate Judge—

Under s.9 of the Specific Relief Act, A obtained a decree against B and others, for possession of certain land. When he went to take possession he was obstructed by a third party. His application for removing the obstruction presented to the Munsif was registered as a reguler suit under s. 331 of the Civil Procedure Code and he was given a decree, which was reversed by the Subordinate Judge on appeal. The plaintiff appealed against the order of the Judge to the High Court on the ground that the proceedings under S. 331 were merely a continuation of the original suit under s. 9 of the Specific Relief Act, and as no appeal lay against a decision passed under that Section, no appeal lay to the Subordinate Judge—*Held*, that proceedings under s, 331 of the Code are in the nature of a fresh suit between the decree—holder and a third party, and therefore an appeal lay to the Suborpinate Judge. 4 Bom 123, distd. 13 Mad 520 referred to. 4 Mad 220 **Nasir Ali Fakir v Meher Ali** **22 Calc 830**

(41) Order for delivery of Land.

840—Obstruction by mortgagee in possession —Civil Procedure Code, 1859, ss. 229, 231.—

Appeal-*Contd.*

(18) Orders—*Contd.*

On a complaint by a decree-holder, under s 226 of the Civil Proeedure Code, against a mortgagee in possession of the land, and two other persons who resisted the execution of the decree, the Munsif passed an order for delivery of possession, but without having numbered and registered the claim as a suit, as directed by s. 229 of the Code, which, in his opinion, did not apply to the claim of a mortgagee in possession; and the senior Assistant Judge, though of opinion that the Munsif was in error in not proceeding under s. 229, ruled that there was no appeal from his order, as the claim had not been numbered and registered, and investigated. *Held*, that the irregular procedure of the Munsif should not prevent the Court from correcting his error: and that his order, which could only have been made under s. 229 was subject to appeal under s. 231, and should therefore be reversed, and the case remanded, that the claim might be numbered and registered as a suit, and an order passed thereon after the investigation, as directed by s. 229 of the Code. **Musabhai v Shaunuddin Hismuddin 4 B H C 35**

Notes—Ap 5 M H C R 183. Ex 21 W R 39. Ref: B H C R Cr 29; 13 W R Cr 17.

841—Civil Proeedure Code ss. 328, 331—Obstruction to execution of decree — Dismissal of decree-holder's petition –

Obstruction was offered to the execution of a decree for partition of certain property by one claiming to be entitled to occupy part of the land in question as a mulgeni tenant. The decree-holder presented a petition to the Court under Civil Procedure Code s. 328; this petition was rejected, and the claim was not numbered and registered as a suit. *Held* that an appeal lay against the order rejecting the petition. **Gopala v Fernandes 16 Mad 127.**

Notes—Diss 9 Bom L R 936: Fol 7 C L J 98; Ref 13 C W N 724.

(42) Order numbering & registering as suit objection of obstruction to execution of decree.

842—Civil Procedure Code, Secs 328 and 331 —Execution of decree—Obstruction to the delivery of possession—Complaint made more than a month from the time of the obstruction—Claim numbered and registdered as a suit—Objection with respect to limitation in appeal.—

Although no appeal lies against an order passed under Sec. 331 of the Civil Procedure Code numbering and registering as a suit a complaint made at a time beyond a month from the time of the obstruction in an application under Sec 328, such order can be objected to when the final order which is appealable as having the force of a decree under Sec. 331 is appealed against. The Judge in appeal is bound to entertain the objection that is then made, and to dismiss the application when he finds that it has been wrongly admitted. **Lala v Narayan P. J 1895 p 504 =21 Bom 392**

(43) Order rejecting claim to possession.

843—Civil Procedure Code 1859, s. 230.—

No appeal lies against an order of the Court refusing to entertaion an application under s. 230 Act VIII of 1859, by a party other than a defendant, who diputes the title of the decree-holder. **Rasul Bibi v Mobarik Ali 2 B L R A C 303 note: 11 W R 186.**

844—Person not party to suit—Civil Proceedure Code, 1859, s. 230.

There is no appeal from an order passed under s. 230 Act VIII of 1859, rejecting an application by a person, not a party to the suit, alleging that he is being dispossessed by the Court Ameen in execution of decree. **Khellut Chunder Ghose v Prosunnomoye Dossee W R 1864 Mis 24**

Goluck Narain Dutt v Bisto Prea Dossee 1 W R 140

845—Civil Procedure Code, 1859, s. 230—

Where an application was made to the Civil Court, under s. 230 of the Civil Procedure Code, by the petitioner disputing the right of a decree-holder to dispossess him of certain immoveable property, and the Civil Judge rejected the application, *Held* that s. 231 of the Civil Procedure Code did not give the petitioner a right of appeal to the High Court. **Srinarasimma Chariyar v Narasimma Chariyar 5 M H C 183**

846—Civil Proceedure Code, 1859, s. 230—

Where an application for the remedy provided in Act VIII of 1859, s. 230, is refused by a Munsif

Appeal-*Contd.*

(18) Orders—*Contd.*

in the exercise of his discretion, no appeal lies against the order of refusal. But where the application is admitted and filed, the opposite side called upon to meet it, and the claim subsequently rejected, the order of rejection is a decision between the parties on the merits of the application within the scope of s. 231 from which an appeal lies to the Judge. **Mookandee Misrain v Sheo Lochun Pattuck 21 W R 39**

(44) Order allowing claim to Possession.

847—Civil Procedure Code 1859 ss. 230, 231 Suit under s. 15 Act XIV of 1859—

S brought a suit under s. 15 Act XIV of 1859, obtained a decree and took possession. After this *B* applied under s. 230 Act VIII of 1859 alleging that he had been in possession and was dispossessed by S in execution of a decree against another party. The Munsif decreed the case in favour of B. *Held* that the latter was not a proceeding under the former suit, and the decision upon it was appealable under s. 231 Act VIII of 1859.

Brohmo Moyee Dabee v Burkut Sirdar 13 W R 264

(45) Order refusing to set aside an injunction

848—s 496 Appeal -An appeal will lie under s. 588 cl (24) of the Code of Civil Procedure from an order under s. 496 of the Code refusing to set aside an injunction (6 Calc 168) referred to.

Zabada Jan v Muhammad Taiab 15 All 8: 12 W N 140

(45 A) Order for issue of notice made under S. 494.

849—Civil Procedure Code ss. 494, 588-order for issue of notice under s. 494.

Plaintff made a petition to subordinate Court praying for the issue of a temporary injunction under s 493 of the Civil Procedure Code.The Judge declined to pass order without hearing the other side and accordingly notice was issed The plaintiff appealed. The district Court made an order granting temporary injunction. *Held* that the Judge exercised a jurisdiction not vested in him by law in that no appeal lay from an order of the Subordinate Judge.

Luis v Luis. 12 Mad 186.

Notes—Ref 14 M L J 471 F B.

Appeal-*Contd.*

(18) Orders—*Contd.*

46 Order rejecting plaint as insufficiently Stamped.

850.—Court Fees' Act VII of 1870, Sec. 7, cl. iv sub-cls. (c) and (d)—Valuation of suit-Valuation of a suit for injunction-Injunction-Appeal -Order rejecting plaint as insufficiently stamped.

A suit for a declaration of right and for an injunction falls under Sec. 7, clause iv sub-clauses (c) and (d) of the Court Fees' Act VII of 1870. The valuation of the relief sought in such a suit rests with the plaintiff, and not with the Court.

A sued B and C (1) for a declaration of his title to certain property, and (2) for an injunction restraining C from paying, and B, from receiving an allowance of Rs. 2,400 a year out of the income of the property in dispute. A valued each of the reliefs sought at Rs 130, and affixed a Court-fee stamp of Rs. 20 to the plaint.

The Court of first instance rejected the plaint as insufficiently stamped holding that the claim for the injunction sought should be valued at ten times the annual allowance paid by *C* to B, as provided by Sec, 7 clause ii of Act VII of 1870,

On appeal to the High Court:—

Held, that the suit fell under Sec. 7, clause iv, sub-clauses (c) and (d) of the Court Fees' Act, and that plaintiff had a right to put his own valuation on the relief sought.

Held also, that the order rejecting the plaint as insufficiently stamped was appealable. **Sardar Singji v Ganpat Singji. P J 1892, p. 144 =17 Bom 56.**

Notes:—Ap: 32 Cal 734=9 C W N 690. Ref: 11 C W N 705: 6 C L J 427; 19 Bom 198; 23 Bom 486.

851.—An appeal lies from an order rejecting a suit failure to pay necessary Court fee on the plaint, whether such order is regarded as a regular decree dismissing the suit or an order rejecting the plaint.

Miya Abdul Kadar Abdul Satar v Miya Gsfarbhai Usmanbhai. P J (1897) 272.

852.—Section 12, Act VII of 1870—Appeal from order rejecting plaint for want of proper stamp.

Plaintiffs sued for a declaratory decree, and wrote their plaint on a stamp of ten rupees. The

Appeal-*Contd.*

(18) Orders—*Contd.*

Court of first instance held that the plaint also asked for consequential relief, and required the plaintiffs to value their claim accordingly. The plaintiffs failed to comply with this requisition, and the Court rejected their plaint under Section 31, Act VIII of 1859

Held, that an apppeal on the ground that the original Court had wrongly construed the plaint would lie under Section 36, Act VIII of 1859, from the order rejecting the plaint, notwithstanding Section 12, clause 1 of the Court Fees Act, although the appeal involved the determination of the amount of the stamp fee.

Pir Mahomed v Gulam Hyder. P R 42 of 1874.

852A.—Section *12*—Decision of trying Court as to valuation of suit, if open to question in appeal against decree dismissing suit for non-payment of additional Court-fee on day fixed—Civil Procedure Code (Act XIV of 1882), Section 2-Valuation by plaintiff if determines forum of appeal.

Where the Court in which a suit was instituted held that it had been undervalued and directed the plaintiff to pay additional Court-fees by a certain date, but the plaintiff having failed to do so the suit was dismissed.

Held, that an appeal lay against the decree dismissing the suit, and in that appeal the decision of the first Court regarding the valuation of the suit could be questioned, Sec. 12 of the Court Fees Act notwithstanding.

Held, further, that an appeal lay to the Court of the Judicial Commissioner, although the Subordinate Judge valued the suit at Rs. 5,000, inasmuch as the plaintiff throughout contended that the value was below Rs 5,000 as stated in the plaint. (12 C L R 148 ; 28 Cal 334, relied on.) **Prokash Chandra Sarkar v Bishambhar Nath Sahi. 14 C W N 343= 5 Ind Cas 18.**

(47) Order rejecting plaint for want of jurisdiction.

853.—Civil Procedure Code, 1859, Section 14.

Whether the Court acting under Section 14, Act VIII of 1859, enquires into and determines the preliminary question of jurisdiction or rejects the plaint. The proceeding is open to appeal; and if it appears that jurisdiction has been unduly assumed, the subsequent enquiry of right must be set aside as carried on without jurisdiction.

Moheshur Buksh Singh v Collector of Ghazeepore. 2 Agra 214.

(48) Order returning plaint for presentation in proper Court.

854.—Subject matter of suit to redeem usu-fructuary mortgage——Appeal—Return of plaint—Act VIII of 1859—Act X of 1877, Section *584*.

A suit to redeem a usufructuary mortgage of certain lands was instituted in the Munsiff's Court. After the suit had been admitted and the parties called on to produce evidence, the Munsiff ordered the plaint in the suit to be returned to the plaintiff for presentation in the proper court. on the ground that the suit should have been instituted in the Court of the Subordinate Judge, the value of the property in suit being beyond the jurisdiction of a Munsiff. *Held*, that, under Act VIII of 1859, the Munsiff's order was appealable to the lower Appellate Court, and, under Act X of 1877, the Lower Appellate Court's order to the High Court.

Kalian Das v Nawal Singh 1 All 620.

Notes:—11 Bom 591.

855.—Revision—Munsiff returning plaint on ground that case was cognizable by Small Cause Court—District Judge on appeal reversing Munsiff's order and directing him to try the suit—Munsiff refusing to proceed on ground that if the case was not a small cause. the District Judge had no jurisdiction—Appealable order—Course of appeal.

A Munsiff having returned a plaint for presentation in the Small Cause Court, the District Judge on appeal reversed the Munsiff's order and directed him to receive the plaint and try the suit. Thereupon the Munsiff, holding that if the case was not a small cause the District Judge had no jurisdiction to hear the appeal, and ignoring the order of the District Judge that he should receive the plaint and try the suit, again returned the plaint to the plaintiff.

Appeal-*Contd.*

(18) Orders—*Contd.*

Held, that the last order of the Munsiff being open to appeal was not open to revision by the Chief Court, and though an erroneous order was nevertheless binding until set aside in due course of procedure by the District Judge.

But *held* further, that the said order was clearly an erroneous order, for as soon as the Munsiff had decided that the plaint presented was a plaint in a suit of nature cognizable by a Small Cause Court, that decision determined the course of appeal in the suit for the purpose of contesting the Munsiff's order, and the District Judge undoubtedly had jurisdiction to hear the appeal, such jurisdiction not depending upon the decision he might afterwards arrive at as to the nature of the case. **Harjas Rai v Nirmal Singh. 36 P R 1887.**

856.—C P C Sec. 101 ; O 43 r. 1 ; O 9 r 10 ; S. 107 (2) O 22 r. 11 (1882 Secs 588 Cl. (6) 57, 582) Order of Appellate Court returning appeal to be returned to proper Court—Appeal.

No appeal lies from the order of an appellate Court returning an appeal memorandum to be presented to the proper Court, though an appeal will lie from such order of the appellate Court returning a plaint, but is properly the subject of revision by the High Court, under S.622, C P C. 14 Mad 462 dissented from. **Raghunath Charan Singh v Shamo Koeri. 31 Cal 344.**

857.—Sale, suit to set aside—Value—Return of plaint—Waiver.

A suit to set aside a sale held under the Putni Regulation may be brought in any one of several Courts in whose jurisdiction the property or a part thereof is situated although the sale was held in the Collectorate of a District other than that in which the suit is to be brought. A *putni* was sold in the Burdwan Collectorate and a suit was instituted to set aside the sale in the Court of the Sub-Judge of Hugly in whose jurisdiction a portion of the property was situate. The Court returned the plaint for presentation to the proper Court; the plaintiff took back his plaint and presented it to the Burdwan Court: *Held*—That having regard to the action of the Plaintiff in presenting the plaint to the Burdwan Court, *i. e.*, in accepting and acting under the order of the Hughly Court it is not open to him to appeal from the order returning the plaint. **Beni Madhub Das v. Jotindra Mohun Tagore, 11 C W N 765.**

Appeal-*Contd.*

(18) Orders—*Contd.*

858 C P C O 41 r, 23; S.104; O. 43. r. 1 (1882 Ss. 562, 588)—Claims, inconsistent—Plaint, order rejecting a decree—Appellate order admitting plaint, not a decree—Second appeal.—Where the Court of first instance rejected the plaint on the ground that it contained two inconsistent claims and the Court of appeal held that the plaintiffs were entitled to press both claims in one suit and directed the first Court to proceed with the trial of the suit on its merits.

Held, on appeal by the defendant that the order of the Court of first instance was an order rejecting the plaint and therefore a decree, and the order of the appellate Court was an order admitting the plaint which not being a decree nor an order under S. 562 of the C P C was not appealable. **Braja Lal Mitra v Upendra Krishna Mitra. 6 C L J 214.**

859—Appeal from order of Appellate Court returning plaint for amendment or for presentation to proper Court—Civil Procedure Code, 1882, Sections 53, 582, 588 (6)—

Held, following 3 All 456, that an order of an Appellate Court returning a plaint for amendment or for presentation to the proper Court is not appealable under Section 588, (6) of the Civil Procedure Code, that clause being applicable only to orders passed by Courts of first instance. **Nidhu v Nihala. 15 P R 1898.**

859 A—Act VII of 1887 (Suits Valuation). S. 8—Value of a suit for redemption—Market value—Principal amount—Appeal from an order of Subordinate Judge. The value of the subject matter of the suit in a redemption suit is not the market-value of the property but the amount of a mortgage money. In a suit for redemption where the principal amount of a mortgage was Rs. 1,000 *held*, that the suit was cognizable by a Munsif and an appeal lay to the District Judge from an order of the Subordinate Judge returning a plaint for presentation to the proper Court. S. 8 of the Suits Valuation Act does not affect the law laid down in. 5 All 332 and 8 All 438. **Kedar Singh v Matabadal Singh. 5 A L J 713=A W N (1908) 296=31 All 44 =1 Ind Cas 703.**

Appeal-*Contd.*

(18) Orders—*Contd.*

860—A plaint may be returned under s. 57 at a stage of the case later than the presentation. **Abdul Samad v Rajendro Kishore Singh. 2 All 357.**

Notes:—Ref. 5 Bom 313 F B.

861—s. 588 (6)—Order directing lower Court to return plaint for presentation to proper Court—(Act X of 1877)—

The lower appellate Court (Subordinate Judge) decided on appeal by the defendant from the decree of the Court of first instance (Munsif) that the Court of first instance had no jurisdiction to entertain the suit, as the value of the subject matter of the suit exceeded the pecuniary limits of its jurisdiction; and ordered that the appellant's appeal be decreed, the decision of the Munsif be reversed and the record of the case be sent to the Munsif to return the plaint to the plaintiff for presentation to the proper Court. The plaintiff appealed to the High Court from such order as an order returning a plaint to be presented to the proper Court. *Held* that such order could not be regarded as one to which Art. (6) of s. 588 of Act X of 1877 was applicable. That relates to orders returning plaints for amendment or to be presented to the proper Court passed by a Court of first instance and not to an order by an appellate Court upon an appeal to it from the decree of a Court of first instance on general grounds. The plaintiff's proper course was to have preferred a second appeal. **Bindesri v Nandu. 3 All 456. 1 W N 12.**

Chattar Lal v Har Lal. 3 W N 165.

Notes—Diss. 21 Mad 234. Dist. 26 Cal 275. Ref. 22 Bom 963. Over. 25 All 174 F B.

862—Civil Procedure Code (1882) ss. 57, 582, 588, 589—Return of plaint—Presentation to the proper Court—order under Civil Procedure Code S. 528—Where the lower Court of Appeal passes an order returning a plaint under s. 57 by virtue of the powers conferred on it by S. 582, an appeal lies to the High Court under S. 589 such appeal is not prohibited by S. 588

3 All 456 distinguished.

Goor Bux Sahoo v Brij Lal Benka 26 Cal 275=3 C W N 243.

Notes:—Fol. 25 All 174 F B; 30 Cal 453. Ref. 31 Cal 344 Dist. 31 Cal 138.

Appeal-*Contd.*

(18) Orders—*Contd.*

863—C P C S. 107 (2) O 22 r 11; S. 104 O 43 r; S. 105(1882 Ss. 582, 588 (6) 589)-Return of plaint by Appellate Court—Appeal.

S. 582 gives the appellate Court power to return a plaint presented in a Court of a grade lower than that of the Court competent to try it for presentation to the proper Court. An appeal lies from such an order. 3 All 456 overruled 21 Mad 234 and 26 Cal 276 foll. **Wahid ullah v Kanhayi Lal. 1902 A W N 222=25 All 174 F B.**

Notes—Ref. 31 Cal 344.

864—Order returning Plaint presented to proper Court—Remand by Appellate Court—Second Appeal—Civ. Pro. 1877 ss. 57 (a) 562, 588—

The Court of first instance made an order returning the plaint in a suit to be presented to the proper Court, on the ground that it was not competent to try such suit. On appeal from such order the appellate Court, holding that the Court of first instance was competent to try such suit, made an order "decreeing the appeal," it subsequently made an additional order directing that the case "should be returned for retrial." On appeal to the High Court from such additional order, *held* that the appeal would not lie, as it was in reality one from an order passed in appeal from an order returning a plaint, which under the last clause of s. 588 of Act X of 1877 was final, and not an appeal from an order remanding a case under section 562, the character of the original order of the Appellate Court not being altered by the passing of the additional order. **Kishna Ram v Narsingh Sevak Singh. 3 All 855.**

Abdul Samad v Rajendro Kishore Singh 2 All 357.

865—Civil Procedure Code, 1877, ss. 57, 588 (6)—Institution of suit in wrong Court—Transfer of suit—Power of the Court to which suit is transferred to return plaint to be presented to the proper Court—Jurisdiction:—

A District Court transferred for trial a suit instituted in a Court subordinate to it to another Court subordinate to it. The Court in which the suit was instituted was not the one in which the suit should have been instituted, and consequently the Court to which it was transferred made an

Appeal-*Contd.*

(18) Orders—*Contd.*

order dismissing it, and directing the return of the plaint for presentation to the proper Court. *Held* that such order must be taken to have been passed under s. 57 of the Civil Procedure Code, and was therefore appealable under s. 588 (6).

Pachaoni Awasthi v Ilahi Bakhsh. 4 All 478.

Notes.—Ref: 31 Cal 344.

(48 (a)) Order returning plaint for presentation to proper Court.

865 A—Order returning plaint for presentation to proper Court—Submission to the order—Right of appeal, effect on. Where a plaint was returned for presentation to the proper Court having jurisdiction and the plaintiff submitted to the order and presented the plaint to such Court, *held*, that it was not now open to him to appeal from the order returning the plaint. 11 C W N 765, Fol. **Suraj Kunwar v Sardar Karam Singh. 11 O C 98**

865 B.— Plaint—Return of—Civil Procedure Code (Act XIV of 1882), Secs. 16, 17, 19, 57—Appeal.

Where a plaint has been returned to the plaintiff to be presented to the proper Court, it is not open to him to appeal from the order of return, after he has taken back the plaint and refiled it in the Court directed. **Beni Madhub Das v Jotendra Mohan Tagore. 5 C L J 580=11 C W N 765.**

(49) Order allowing amendment of plaint.

866.—Order allowing Amendment of Plaint—Civ. Pro. Code 1877, ss. 53, 588 (6).

The plaintiff in a suit applied for the amendment of the plaint. The defendant objected to the amendment, and a day was fixed by the Court for the "admission or rejection of the petition of amendment and the determination of the defendant's objections thereto." The Court, after hearing the parties, made an order allowing the "petition of amendment," and rejecting the defendant's objections. The defendant appealed from such order to the High Court. *Held* that, inasmuch as orders amending plaints then and there are not made appealable by Act X of 1877, and it was into this category, if into any at all, that such order must fall, such order was not appealable. **Rajindra Kishore Singh v Radha Prasad Singh. 3 All 354.**

Appeal-*Contd.*

(18) Orders—*Contd.*

867.—Civ. Pro. Code, s. 588, cl. 6—Appeal—Order returning plaint for amendment.

S. 588, cl. 6, C. P. C., is applicable to every order "returning a plaint for amendment". The clause, as it originally stood, mentioned specifically ss. 53, 54 and 57, but, as amended by Act VII of 1888, there is no such limitation.

Kuppachiammal v. Laden. 6 M L J 2.

868.—Practice— Appeal— Order directing amendment of plaint—*C.* P. C., ss. 53, 588, 591.

No appeal lies from an order by a Court under s. 53 of the C.P.C., directing an amendment of a plaint upon its file. (3 All 854, Fol.) Unless a statute specifically gives a right of appeal from a particular decree or order, no such appeal is entainable or can be preferred. 11 Mad 26. 8 All 354=A W N 1889, 7, Ref.

Muhammad Husain v Badri Prasad. A W N 1889. 83.

869-874.—Decree—C. P. C., 1882, ss 2, 582 and 588 (6)—Order by Appellate Court directing that plaint be returned for presentation to proper Court.

Held, that the order of the Divisional Court directing the plaint to be returned for presentation in a Court having jurisdiction is an order appealable under s. 588 (6) of the Civ. Pro. Code and is not a decree as defined in s. 2 of the Code. 26 Cal 275, 27 Mad 234, Fol.; 15 P R 1898, Not Fol. **Hira Lal v Kesori Mal P L R 1900, p. 137**

(50) Order of remand after former remand.

875.—There is no appeal from the order of a lower Appellate Court remanding a case a second time on the ground that the former order of remand had not been carried out.

Radhabullub Surma v. Anundmoyee Debia. W R 1864, Mis., 39.

876—S. 105, cl. (2), O XLI. r. 23, 25-Remand order—Appeal, if lie s after suit is finally disposed of on appeal,

Appeal-*Contd.*

(18) Oaders—*Contd.*

Where a suit has been remanded on appeal, an appeal from the order after the suit has been taken up by the first Court on remand and finally disposed of is incompetent.

S. 105, cl. (2) of the new C. P. C. has no bearing on this question but applies to the converse case. 32 Cal 1023=9 C W N 895; 12 C W N 590; Fol; 36 Cal 762, Fol.; 30 All 479, Fol.; 32 Mad 83, Dist. **Janaki Nath Roy Chowdhury v. Promotha Nath Roy Chowdhury. 15 C W N 830.**

877.—Suit for partition——C. P. C. s. 562—Remand—Appeal—Court-fee.

A District Judge, in appeal in a suit for a partition of a house, remanded the suit after deciding to what fractional shares the parties were entitled, in order that the partition might be carried out by the Court of first instance. The District Judge, however, erroneously described his order as an order of remand under s. 562 of the Code. *Held*, on appeal from such order, that the memorandum of appeal must be stamped as an appeal from a decree.

Umra Ali Khan v Abdul Subhan Khan. A W N 1908, 40=5 A L J 545.

Notes:—A W N 1889, 198 Foll.

878.—C P C O. 41 r. 23; S. 104; O. 43 r. 1, s. 105 (1882 Ss. 562, 588 cl. (28), and 591)—Remand, questioning the validity of the order of—Appeal against the final decree, objection as to the remand order taken in. *Held*, that although no appeal has been preferred under s. 588, cl. (28), Civil Procedure Code, against the order remanding the case under s. 562 Civil Procedure Code, the validity of the remand order can be questioned in second appeal preferred against the final decree passed in the case. It is not necessary that the appellant should appeal on other grounds as well; the appeal may be lodged against the final decree solely upon the ground that the remand order was illegal. (12 All 510); (18 All 19); (22 All 366); (14 Bom 32); (18 Mad 421); and (28 Cal 324) referred to. **Sri Harakh v Ram Dat. 9 O C 80.**

879.—Decree—Remand—Civ. Pro. Code, s. 562—Declaratory suit relating to two pieces of land dismissed *in toto* by first Court upon preliminary point—Appellate Court dismissing suit as to one piece, and remanding case as to the other piece—Inapplicability of Civ. Pro. Code, s. 562—Illegality of order—Scope of appeal from order of remand.

Plaintiff prayed for a declaratory decree of title to two plots of land, one in Lahore, the other in Ichra. The first Court dismissed the whole suit on the ground of want of jurisdiction. On appeal the Divisional Judge, agreeing with the first Court, confirmed the decree of dismissal as to the Lahore land, but reversed the decree as to the Ichra land, and remanded the suit as regards that portion of the claim under s. 562, Civ. Pro. Code, for a decision on the merits. Plaintiffs preferred an appeal under s. 588, to the Chief Court impugning the whole order of the Divisional Judge. Respondent contended that as the appeal was only from an order of remand under s. 562, Civ. Pro. Code, the rest of the order could not be attacked upon such appeal. *Held*, (i) that the appellant cannot be deprived of the right of appeal as to the Lahore land simply because of the *form* of the Divisional Judge's order, which while finally adjudicating upon the plaintiff's claim to the Lahore land, was not incorporated in any decree from which an appeal might be preferred. (ii) That s 562, Civ. Pro. Code, was inapplicable to the case, as the Divisional Judge, on appeal, did not *reverse the decree* of the first Court upon a preliminary point, but *upheld* it to the extent of the claim to the Lahore land, and reversed it *only in part*. (iii) The order was illegal also, because if acted upon it would result in two decrees being passed in one and the same suit, which is illegal. Unless the decree *as a whole* is reversed upon the preliminary point, a remand under s. 562, Civ. Pro. Code, is not permissible. (3 P R 1892. Fol.)

Amolak Shah v. Charan Das. 149 P W R 1908.

880.—Execution of decree—Bond given by surety for judgment-debtor—Suit by decree-holder against surety without impleading judgment-debtor—Amendment of plaint——Appeal—Civil Procedure Code, 1882, Section 53, clause (b) (ii) and (iii), and Section 562.

Plaintiff in execution of a decree against one D having attached certain land belonging to the latter, the defendant in the present suit became surety for D for the payment of Rs 50 a year.

Appeal-*Contd.*

18 Orders—*Contd.*

The Tahsildar in forwarding the security to the execution Court recomended that should there be any default by the surety in paying the annual sum, the decree-holder should obtain possession of the land. The execution Court, apparently considering the security sufficient, filed the proceedings and made no orders on the Tahsildar's recommendation. The surety made default in paying the Rs. 50 due for Sambat 1952, and plaintfff sued him in respect thereof. The first Court held that D. should have been made a co-defendant and that plaintiff should also have sued for the possession of the land attached by him as afforesaid. It therefore returned the plaint for amendment. - Plaintiff appealed to the District Judge, who remanded the case under Section 562 for decision on the merits.

Held, that as no decree had been passed by the first Court and the appeal to the District Judge was under section 538 (6) of the Civil Procedure Code, the District Judge erred in quoting Section 562 of the Code in his order, which should simply have set aside that of the first Court and directed it to decide the case on the plaint as it stood.

But *held* that, the order of the first Court in returning the plaint being wrong, the error in the order of the District Judge was immaterial.

Jahan Khan v. Chanda Singh. 59 P R 1869.

(51-52) ORDER OF REMAND.

881—Quære.

Whether, when a lower Appellate Court reverses a decree of a lower Court on the plea of limitation, and remands the case to be tried upon the merits, such decision is an order prior to decree from which no appeal will lie.

Mahomed Anjob v Gouree Pershad Sha 6 W R 61

Notes:—Fol: 7 W R 331. Ref: 2 All 752

882—Section 562.—And Section 588 (28) —Appeal from order of remand—Scope of such appeal.

Held, that under Section 588, Civil Procedure Code, no appeal lies from an order of remand where the party does not seek either to traverse the remand order passed by the Appellate Court, or its finding upon the preliminary point as to which it has differed from the first Court, but seeks to traverse the decision as to a preliminary point in which both the Courts have concurred and in regard to which no reference has been made under Section 562. **Sayad Muhammad Ishaq v Mohru Mal 28 P R 1902**

883-C P C O. 41 r. 23 ;S. 104; O 43 r. 1 (1882 Ss. 562, 588)—N. W. P. Tenancy Act (II of 1901 —Ss. 180, 193—Appeal order of remand—Rent suit.

An order passed by a District Judge remanding a rent suit for retrial does not amount to a decree. S. 588 of the Civil Procedure Code does not apply to proceedings in Rent suits, and therefore no appeal would lie to High Court against an order of remand under S. 562 of the Civil Procedure Code. **Zahur Ali v Sher Ali 3 A L J 20=(1906) A W N 5=28 All 283**

884—C P C O. 41 r. 23 (1882 S. 562)-Appeal-Remand-appeal—After remand, maintainability.

The fact that the appellant did not appeal from the order of the lower appellate Court remanding the case to the first Court did not have the effect of his losing the right of appeal from the final decision. **K S Bonnerjee v Rajchandra Dutt. 11 C L J 577.**

885—Order of remand—Completion of proceedings under—-Appeal from order of remand.

An appeal from an order of remand cannot be allowed, if the said appeal is preferred after the completion of proceedings under the remand order in the first Court. 12 Cal 45, Dist ; 129 P R 1884, Fol) **Mussammat Mehran v Fattah Din. 83 P R of 1886.**

Notes.—Not Fol 89 P R 1891 ; Dist, 65 P R 1887.

886-C P C O XXI, rr 23 and 25-Order passed under wrong rule, effct of—Redemption, suit for —Regulation XVII of 1806 or Act IV of 1882, proceedings under, necessary to extinguish title of mortgagor—Mortgagor, effect of expunging the name of—Mortgagee, adverse possession by.

Where an order of remand was made virtually under Order XXI, rule 23, but by a clerical mistake rule 25 was quoted ; *held*, that the order was appealable.

Appeal-*Contd.*

18 Orders—*Contd.*

Where no steps to foreclose a mortgage had been taken, either under Regulation XVII of 1806 or under Act IV of 1882, *held*, that a suit to redeem could not be held as barred merely on the ground that the Settlement Officer had expunged the name of the mortgagor from the *Khewat*. (32 Cal 296 ; 2 A L J 71 ; 1 C L J 584 , 7 Bom L R 1 ; 9 C W N 201, Fol ; 8 O C 33, Dist.)

Ange Lal v Jagdish Singh, 9 Ind Cas 431

886A—Suit adjourned from one date to another—Court's convenience—Failure of Court to direct witnesses to appear on adjourned date—Decree exparte on latter date—Defendant not prevented by sufficient cause from appearing—Appeal—Remand of suit—Court not bound to direct appearance of witnesses—Civ. Pro. Code, 1882, S. 162—Remand illegal—No appeal against order of remand—Appeal treated as revision—Civ. Pro. Code, 1908, O XLIII, r. 1, cl. (a), O XLI, r. 23.

A Munsiff adjourned the hearing of a suit from one date to another, not at the request of parties but for want of time, but failed to direct the witnesses who were present to appear on the adjourned date of hearing.

On the adjourned date, he passed an *ex parte* decree. An application to set aside the *ex parte* decree was refused. There being no appeal against the order of refusal, an appeal was preferred against the *ex parte* decree itself. The District Judge, on appeal, found that the defendants were not prevented by sufficient cause from appearing on the date fixed for hearing, but set aside the decree and remanded the case for disposal after giving the defendants an opportunity to adduce their evidence, on the ground that the District Munsif failed to direct the witnesses who were present to appear on the adjourned date.

Held that S. 162, Civ. Pro Code, 1882, does not impose any such duty on the trying Court, and that the order of remand was made without jurisdiction.

Held, also that, as no appeal lies against the District Judge's order of remand, because O XLIII, r. 1, cl. (a), Civ Pro Code, 1908, does not give an appeal against an order of remand which is not passed under O XLI, r 23 Civ. Pro. Code, 1908, the Civil miscellaneous appeal may be treated as a Civil Revision Petition. Reference :—(a) 24 Mad 200 Ref: **Vijayaraghaya Reddi v Kommarappa Reddi. 11 M L T 199,**

Appeal-*Contd.*

18 Orders—*Contd.*

887—Where the first Court held a suit barred by limitation and on the ground of *res judicata*, and the lower Appellate Court (in reversal of that Court's judgment) remanded the case for trial on its merits,—*Held* that an appeal lay from the lower Appellate Court's order of remand.

Kurumoonnissa Bibee v Gooroo Pershad Shah. 7 W R 331.

888-C P C O 41,r. 23 ; S. 104 O 43,r. 1 (1882 Ss, 562 and 588)—Order of remand—Whether appeal lies after suit is finally disposed of.

An appeal under S. 588, Civ. Pro. Code, cannot be entertained, if preferred after the suit has been finally disposed of by the lower Court. (9 C W N 895, Fol : 12 All 540 Dist.) **Salig Ram v Brij Bilas. 14 A L J 569= A W N (1907) 234=29 All 659= 4 A L J 569**

Notes:—Over: 30 All 479 F B=(1908) W N 195=5 A L J 447 F B Fol: 30 All 191=(1908) W N 76=5 A L J 270.

889-C P C O 41 r. 23 (1882-S 562)—Appeal-Order directing certain acts which could be passed only under S. 582—Order not warranted by section—Lower Court's decree not set aside—Informality—Appealability of.

Where an appellate Court directs the Court of first instance to do what could be directed only under S. 562, C P C, but the order is informal in that the lower Court's decree was not set aside: *Held*, that the order was in substance one under S. 562 and is therefore, appealable. **Lal Ram Saran Lal v Nem Narain Singh. 6 C W N 326.**

890—C. P. C. O. 41. r. 23 ; S. 104. O 43 r. 1 ; S. 105 (1882 Ss. 562, 588, 591)—Appeal from remand order after final decree.

An appeal from an order of remand passed under S. 562. C. P. C. cannot be entertained if presented after the final disposal of the suit. 12 Cal 45 dist. *Semble :* An order of remand under S. 562. C P. C. is an order which affects decision of the suit on the merits, and exception may be

Appeal-*Contd.*

18 Orders—*Contd.*

taken to the validity of such an order in an appeal from the final decision. **Madhu Sudan Sen v Kamini Kanta Sen. 9 C W N 895= 32 Cal 1023.**

Notes:—Ref: 6 L J 547 : 7 C L J 553 ; 12 C W N 590 : 36 Cal 762 . Fol: 4 A L J 569; W N (1907) 234 ; 10 C L J 113 ; 29 All 659 ; 7 C L J 107 ; 30 All 191=(1908 W N 76=5 A L J 270. Diss : 30 All 479 F B =(1908) W N 195=5 A L J 447.

891.-C P C O. 41, r. 23; S. 104; O. 43, r. 1 (1882 —Ss. 562, 588)—First Court rejecting plaint for multifariousness—Appellate Court reversing and ordering trial—Order under S. 562—Appeal—S. 588.

Where the first Court rejected the plaint on the ground of misjoinder of causes of action and of Defendants, and the lower Appellate Court upon appeal set aside the order and remanded the case for decision on the merits.

Held—That an appeal lies to the High Court under S. 588 against that order as an order under S. 562 C. P. C.

Ram Prosad v S M. Sachi Dassi. 6 C W N 535.

Notes.—*Ref:* 8 C L J 196. *Diss*: 120 P R 1907.

892.—C P C O. 41 r. 23, S. 104, O. 43 r. 1 (1882 Ss. 562, 588)-Order of remand-Appeal from, after decree in suit—C. P. Code, ss. 563, 588, 591—Pre-emption—Wajib-ul-arz—Arzidari land "Haqiat"—"Hissedar"—Deh.

An appeal lies from an order of remand passed under S. 562 C. P. Code, even though before the filing of the appeal, the suit has been decided in compliance with the order of remand.

Arazidars in District Basti are not members of the co-parcenary body in a village. A custom of pre-emption, recorded in a *Wajib-ul-arz* in respect of the transfer of a *haqiat* by a *hissedar* applies only to co-parceners, and no claim can be maintained in respect of the sale of *arazidari* land. 12 All 510 (F B) 12 Cal 45: 3 A L J R 40 Fol. and 29 All 659 overruled. **Uman Kuari v Jarbandhan Pathak. 5 A L J 447 (F B)=A W N (1908) 195= 4 M L T 162.**

Appeal-*Contd.*

18 Orders—*Contd.*

893.—Civ. Pro. Code, 1882 Ss. 562, 564—Against remand, when to be presented—Erroneous order carried out—Subsequent proceedings, whether void—Waiver—Final disposal of suit-date of—Validity of remand order when to be challenged—Alternative but not co-existent remedy—Per Stephen J.,

An appeal against a remand order, presented before the suit is finally disposed of under that order, that is, before the final decree in the suit has been passed, is good; but a party cannot wait till the final disposal of the suit and the appeal against the interlocutory order without appealing from the decree in the suit. Proceedings subsequent to an illegal order of remand might be valid under certain circumstances. (28 Cal 324=5 C W N 509, 5 C L J 71 Ref). Per Mookerjee J.—Although when a Court of first appeal, purporting to act under s. 562 of the Civ. Pro. Code, remands a case to the Court of first instance which had not decided the suit merely on a preliminary point, the order is erroneous, yet if the order of remand had been carried out subsequent proceedings are not void merely because of such error, and will be set aside only if it is established that the erroneous remand order has affected the merits of the case. The error does not affect the jurisdiction of the Courts, and consequently may be cured by consent. The provisions in ss. 562 and 564 of the Civ. Pro. Code were introduced for the benefit of litigants, so as to guard against a fresh trial of the whole cause in the Court of first instance and to protect them from the delay, trouble and expense of a fresh appeal; if, therefore, litigants find it the more advantageous course that the whole case should be retried and consent to such a procedure, an order of remand contrary to the provisions of s. 564 of the Civ. Pro. Code is not null and void. A party who has consented to such an order, is not entitled to treat it as void and incapable of being validated by consent or waiver. (28 Mad 437=15 M L J 236, *R.*) Under some circumstances, the final disposal of the suit may be taken to be the delivery of the judgment. When a litigant has the right to choose between two remedies which are not co-existent but alternative, he may select and adopt one as better adapted than the other, to work out his purpose; but once he has made his choice, and adopted one of the alternative remedies, his act at once operates

Appeal-*Contd.*

18 Orders—*Contd.*

as a bar as regards the other, and the bar is final and absolute. Where an order of remand has been made, its validity may be challenged directly and immediately by an appeal under s 588, cl. 28, or indirectly under s, *591*, when an appeal is preferred against the final decree in the suit. The party affected by the order of remand should make his election. He may, if he chooses, prefer an appeal against the order of remand, and obtain a stay of proceedings during the pendency of the appeal ; he may, on the other hand carry out the order of remand, take the chance of a successful termination of the suit in his favour, and, in the event of defeat, prefer an appeal against the final decree in which the validity of the order of remand may be questioned. He cannot, however, if he has carried out the order of remand and taken the full benefit of it, turn round and prefer an appeal against the order of remand. 5 C L J 580 Cons.

Bainkunta Nath Day v Nawab Salimullah Bahadur, 6 C L J 547=12 C W N 590.

Notes:—Fol 10 C L J 113=36 Cal 762=*1* Ind Cas 413; R 13 C W N 1197=10 C L J 420=2 Ind Cas 129, 6 Ind Cas 170=14 C W N 759.

894—C. P. C. O.4 1 r. *23* (1882 S 562)-appeal order of remand-after it is carried out maintainability of.

When an order of remand has been carried into effect before the filing out of an appeal against the order, the appeal is not maintainable 32 Cal 1023; 29 All 659 Fol. **Gulzari Mal v Kabir-un-nissa. 5 A L J 270=A W N 1908 76=30 All 191.**

895—Appeal from order remanding case under Section 562, Civil procedure Code—Completion of proceedings under remand order during pendency of appeal—Refusal to entertain appeal.

Where at the hearing in the Chief Court of an appeal from an order of remand under Section 562 of the Civil Procedure Code, it appeared that the said order had been already carried out and a new decree given by the first Court, which was itself under appeal in the Lower Appellate Court, the Chief Court declined to entertain the appeal from the said order of remand. **Ali Bahadar Khan v Raja Aladad Khan P R 129 of 1884.**

Appeal-*Contd.*

18 Orders—*Contd.*

Notes—Dist : 65 P R *1887* ; Not Fol · 89 P R *1891* Fol : 83 P R 1886 ; 117 P R 1886.

896—C P C S. 109-a—Appeal from order of remand passed by a Special Judge—*C* P C s. 588.

An appeal does not lie from an order of remand passed by Special Judge under the Bengal Tenancy Act. **Mothurchundra Majumdar v Tarasunkar Ghose. 7 C W N 440.**

897.—C P C 1882 s. *562*—Preliminary point—Decree in accordance with award.

In the Court of District Munsiff the award was unsuccessfully challenged on the ground that the arbitrator was interested, and the decree was passed in accordance with the award. In an appeal by the defendant it was decided that the objection was well founded and the subordinate Judge set aside the award and remanded the case for trial. The plaintiff appealed to the High Court. *Held* (1) that appeal could lie as the decision was on a preliminary point under s. 562 and not a judgment in accordance with award. **Krishnan Chetti v Muthu Palandi Vacha Makali Tevar 22 Mad 172.**

Notes.—Ref: 27 Mad *255* F B; 14 M L J *356*.

898.—Ss. 562, 584, 586, 588 (28), 589. An order on appeal from a decree in an original suit of the nature cognisable in mufassil Courts of Small Causes, under s. *562* of the Code of Civil Procedure, remanding the suit for retrial, is appealable, section *586* notwithstanding. as that section applies to appeals from appellate decrees and not to appeals from orders. **The Collector of Bijnor v Manager of the Estate of Chaudhri. 3 All 18.**

Notes.—Fol: 7 Bom 292. Dist: 24 Cal 774; 12 Mad 116 Ref: 19 Mad 391.

899.—There is a right of appeal from an order of remand by an Appellate Court, notwithstanding the provisions of sec. 586 of the Civil Procedure Code. **Mahadev Narsinh v Ragho Keshav P J (1883) 123=7 Bom 292.**

Notes—Dist: 24 Cal 774; 12 Mad 116. Ref: 19 Mad 391.

(53) ORDER OF REMAND ON SPECIAL POINT.

900.—Reversal of decree on appeal.

Appeal-*Contd.*

18 Orders- *Contd.*

In a suit for the enhancement of rent, the Collector dismissed the suit. On appeal the Judge held that the rent was liable to enhancement and remanded the case to the Collector to find what rate was equitable. *Held* that an appeal lay from the decision of the Judge, notwithstanding the remand to find the rates. **Neelmoney Singh Deo v Shobhun Bibee. Marsh 600.**

(54) ORDER OF REMAND MADE WITHOUT JURISDICTION

901.--Order of Remand—Want of Jurisdiction—Civil Procedure Code (1882) Ss. 562, 588—Proceedings taken by first Court pending appeal from order.

In a case, though a local investigation was suggested by the Courts, neither party desired to have it, and so a decree was made on the material then before the Court. The case was remanded on appeal for a local investigation to be held, at the first instance at the cost of the plaintiff. The lower Court, thereupon ordered the plaintiff to deposit the costs of the investigation, and on his default, dismissed the suit. The remand order was found to be made without jurisdiction. *Held*, that all proceedings taken by the Court of first instance after the remand and pending the appeal from that order were null and void, as the jurisdiction of that Court to hear the case after remand depended on the validity of the order for remand. An appeal, therefore, lay from the order of remand, notwithstanding the Court of first instance had subsequently made what purported to be a final decree in the suit. **Jatinga Valley Tea Company v Chera Tea Company 12 Cal 45.**

Notes—Ap; 12 All 510 F B. Dist: 32 Cal 1023 =9 C W N 895 Ref: 6 C L J 547; 30 All 479 F B=(1908) W N 195=5 A L J 447; 12 C W N 590.

901A.—Civil Procedure Code (Act XIV of 1882), Section 562—Appeal from order of remand—Rejection of appeal on ground that order has been carried out.

It is the practice of the Chief Court to reject appeals from orders of remand under Section 562, Civil Procedure Code, when at the hearing of the appeal it appears that such orders have been carried out by the Lower Court, whether the final order of such Court has been appealed against or not. P R 129 of 1884 followed.

Lachman v Muhammad Hosein. P R 117 of 1886.

Notes.—Not Fol: 89 P R 1891.

901B.—C.P.C.O.21, rr 97, 99, 103 (1882 S.335)—Decree—Execution—Resistence to Possession—Obstruction by manager of a joint Hindu family—Minor co-parceners not bound by manager's acts after partition.

V, as a manager of a joint Hindu family, offered obstruction to defendants in taking possession of certain land in execution of a decree. Some time after this, the minor step-brothers of V having separated from V and the lands to which the obstruction was offered having been allotted to the minor's share. V took no further part in the miscellaneous proceeding that followed the obstruction, and on the 6th August 1808, the Court passed an order under S. 335 of the Civ. Pro. Code, in favour to the same conditions as to appeal or otherwise as a decree, and an order by the District Judge on appeal, reversing the order of the First Court on the preliminary point and remanding the application for trial on the merits, is an order under S. 552 C P C and an appeal lies to the High Court against such an order. **Baranagore Jute Factory Co. Ld. v Raj Kumar Rai. 13 C W N 724= 1 Ind Cas 785.**

901C.—*Held* that no appeal would lie from an order made under s. 562 of the Code of Civil Procedure in an appeal under s. 588 from an order under s. 485 of the Code of Civil Procedure. 24 Cal 774 followed. **Thanday Lal v Sarman Lal. 19 W N 68.**

(55) Order Remanding Case.

902.—Civil Procedure Code, s. 588, cls. 16 and 28 and s. 622—Superintendence of High Court

Land having been sold in execution of decree one claiming that it had been held by the judgment-debtor benami for him applied that the sale cancelled. He was not a party to the decree, and on that ground his petition was dismissed. The Appellate Court was of opinion that it has been wrongly dismissed, and remanded the case to be disposed of on the merits. *Held*, on revi-

Appeal-*Contd.*

18 Orders—*Contd.*

sion, that the order remanding the case was not appealable, and consequently that the petition for revision was maintainable. **Timmanna Banta v Mahabala Bhatta** **19 Mad 167 = 6 M L J 24**

Notes.—*Ap*: 23 Bom 450.

903.—S. 104; O 43 r. 1; O 39 r 2 (1882 Ss. 588, 493)—Order under S. 588 final.

Where in an appeal against an order, the appeal court passes an order of remand. *Held*, that every order under S. 588 is final and no appeal lay. **Venkatapathi Naidu v Tirumali Chetti.** **24 Mad 447.**

904.—C.P.C.O 41 r.23 (1882 S.562) Practice—Order of remand—Appeal—Remand order carried out—Occupancy holding—Usufructuary mortgage made in 1898—Suit by mortgagee for possession in 1904—Agra Tenancy Act (II of 1901), Ss. 2 (4) 21—Retrospective effect.

The fact that an order of remand made by the lower Appellate Court has been carried out by the Court of first instance is no bar to the hearing of an appeal against the order of remand by making a usufructuary mortgage. (12 All 510 Fol: 15 All 219; 26 All 78 Ref:) **Babu Lal v Ram Kali** *(1906)* **A W N 28 = 3 A L J 40**

905.—S. 190—Applicability of ss. 562 and 528, C P C. to rent suits.)

S, 190 of Act No XII of 1881 makes s. 562 of Act No XIV of 1882 applicable to appeals from a Court of Revenue to a District Judge, and where in such a case a District Judge has made an order of remand under s. 562 of the Code of Civil Procedure an appeal will lie from such order to the High Court under s. 588, cl. (28), of Act No. XIV of 1882. **Partap Singh v Narain Das** **16 All 375 = 14 W N 120**

906. -C.P.C. Rule 17 of the Kumaon Rules.

The Deputy Commissioner of Naini Tal decided that a suit was barred by limitation, and also recorded findings on the other issues. The Commissioner reversed the finding on the point of limitation and remanded the case under s. 562 of the Code of Civil Procedure. *Held* that under Government Notification No. $\frac{28}{VII-569B}$ dated the 27th of June 1894, Rule 17, an appeal lies from such an order. **Hafiz Abdul Rahim Khan v Hari Raj Singh.** **22 All 405, 20 W N 157.**

(56) Order remanding appeal case for investigation.

907—Civil Procedure Code, 1859, s. 363.

No appeal lies from an order of the Judge remanding an appeal case to the Court below for further investigation as to the facts. **Haromohun Mookerjee v Shoonoyanee Mohunt Thakooraney** ... **Marsh., 469; 2 Hay 591**

(57) Order remanding case after local investigation.

908—Order remanding case after local investigation—Civil Procedure Code, 1859, s. 363.

An appeal lies from an order remanding a case for re-trial after local investigation, such order not being one under s. 363. **Jeebun Kissen Roy v Dwarkanath Roy Chowdhry.** **W R 1864, 363.**

(58) Order directing a local investigation.

909—Order directing a local investigation.

No appeal lies from the order of a Judge directing a local investigation by an ameen. **Bahadur Ali v Bhabo Soonduree Debia Chowdhrain,** **7 W R 425.**

Notes:—Ap , 3 Cal 228. Fol : 6 B H C R 161

(59) Order in case on appeal after compromise reported.

910—Civil Procedure Code, 1859 s. 363.

An appeal having gone down on remand from the High Court, the Zillah Judge considered he was bound to proceed with it, notwithstanding a representation made to him by petition that a compromise had been entered into between the parties. *Held* that, by s, 363 of the Civil Procedure Code, an appeal could not be preferred against this order of the Judge. **Soroop Narain Pandah v Soondur Porya.** **11 W R 505**

(60) Order remand in suit cognizable by Small Cause Court.

911—913—Order of remand in suit cognizable by Small Cause Court—Civil Procedure Code, ss. 588 (28) and 586.

Appeal-*Contd.*

18 Orders—*Contd.*

In a suit to recover Rs. 238 (being the purchase-money for certain land) on failure to perform the contract to sell the plaintiff the land, the Munsif decided the case on the issue of limitation only, and *held*, the suit was barred. The Judge held it was not barred, and made an order remanding the case for trial on the other issues. It was objected that, the suit being for a sum less than Rs.500 and of a nature cognizable by a Small Cause Court, no appeal lay against the order of remand. *Held*, following 3 All 18. and 7 Bom 293, that the right of appeal conferred by s. 588, Civil Procedure Code, is not controlled by s. 588, and therefore an appeal lay. **Chinntambi Gounden v Chinnana Gounden. 19 Mad 391**

914—C.P C.S.104; O. 43 r. 1; S.102 (1882 Ss. 588 cl. 28, 586)—Appeal from order of remand in a suit of Small Cause nature :

An appeal from an order of remand passed by the Appellate Court is specially given by Cl. 28 of S. 588, C. P. C., and S. 586. C. P. C., which bars a second appeal in suits of a Small Cause Court nature of below Rs. 500 in value does not exclude an appeal from an order of remand passed in such a suit. **Agandh Mahto v Khagah Aliullah. 11 C W N 862.**

915—Civil Procedure Code (Act XIV of 1882), Sections 562, 588 (28)-Appeal from District Judge's order of remand in Small Cause not exceeding Rs. 500 in value—Finality of such order on merits of the preliminary question-Punjab Courts Act (XVIII of 1884), Section 40.

Where on an appeal in a Small Cause not exceeding Rs. 500 in value, a District Judge remands the case under Section 562 of the Civil Procedure Code, the decision given by the District Judge upon the merits of preliminary question is not open to be attacked upon an appeal against the order under Section 562, and the only question open in such appeal is whether the right procedure has been followed in remanding under Section 562, Civil Procedure Code. **Dilawar Khan v Doulat Ram P R 126 of 1886.**

Notes:—Overr : 85 P R 1895 F A.

(61-62) Order in small cause court suit by judge without jurisdiction.

916—Transfer of Small Cause Court suit to Subordinate Judge—Appeal.

This suit was instituted in the Court of a Subordinate Judge exercising Small Cause Court jurisdiction. The Subordinate Judge retired shortly after, and the District Judge directed his successor, who was not invested with Small Cause Court powers, to try the suit This was done and the Subordinate Judge dismissed the suit. The District Judge entertained an appeal from his decree, and set aside his decision. *Held*, that the order of transfer made by the District Judge must be taken to have been made under s. 26 of the Code of Civil Procedure, and that consequently the Subordinate Judge who tried the case was a Small Cause Court, no appeal therefore lay to the District Judge. **Dost Muhammad v Kauleshar Rai. 5 All 274, 3 W N 49**

Notes.—Ref: 13 All 324. Diss: 31 Cal 1057,

(63) Interlocutory order in Small Cause Court suit.

917—Interlocutory order in Small Cause Court suit.

Although no appeal lies to the High Court from the final decree made in such a suit cognizable by a Small Cause Court, an appeal lies from an interlocutory order made in such a suit by a District Court. **Golam Husen v Musa Miya Hamad Ali. 8 Bom 260**

(64) Order of remand in Small Cause Court suit.

918—Small Cause Court Suit—Remand order—Civil Procedure Code (1882) ss. 562, 586, 588 (cl 28) and 589.

A Court while exercising appellate jurisdiction, passed an order under S. 562, of remanding a case of the Small Cause Court class as described in *S*, 586. Held that, under the express words of the second portion of S. 589 of the code, an appeal lies to the High Court from such an order. . **Kirte Mohaldar v Ramjan Mohaldar. 10 Cal 523.**

Notes.—Dist; 24 Cal 774.

(65) Order of Small Cause Court in execution.

919-920—No appeal lies to the High Court from the order of a Small Cause Court in execution. **Muttee Lall v Ram Das. W R 1864 Mis 38.**

Appeal-*Contd.*

18 Orders—*Contd.*

(66) Order of judge refusing to execute Small Cause Court decree.

921-An appeal lies from the order of a Judge refusing to execute a decree of a Small Cause Court. **Dellawar Ali v Dabee Pershad. 11 W R 203.**

922.—Civil Procedure Code (1852) Ss. 223, 228, 249, 632—Moffussil Small Cause Court Act (XI of 1865) Ss. 20, 21—Munsiff's order refusing to execute Small Cause Court decree sent to him for execution.

Plaintiff in a Small Cause suit, obtained a decree which he sought to execute under a certificate granted by the judge under s. 20 of the Mufussil Small Cause Court Act against the immoveable property of the defendant, situated within the jurisdiction of a District Munsiff. The plaintiff accordingly presented a petition to the District Munsiff under S. 249 of the Civil Procedure. Held, that an appeal lay to the District Court, **Perumal v Venkatarama 11 Mad 130.**

(67) Order of subordinate judge in over-valued Small Cause Court suit.

923—Valuation of suit—Act XI of 1865, ss. 5, 21—Subordinate Judge invested with the jurisdiction of a Small Cause Court.

A suit was filed in the Court of a First Class Subordinate Judge invested with the powers of a Small Cause Court up to Rs. 500. The claim was for Rs 530-7-3, as money had and received by the defendant to the plaintiff's use. The Subordinate Judge did not deal with the case under his Small Cause Court jurisdiction, but tried it as an ordinary suit, and gave the plaintiff a decree for Rs. 441-0-7. On appeal, the District Judge was of opinion that the claim had been recklessly over-valued, and he held, therefore, that the suit was one cognizable by a Small Cause Court, and that the appeal was barred. *Held*, reversing the decision of the lower Appellate Court, that as the claim or "*demand*" exceeded Rs. 500—the pecuniary limit of the jurisdiction of a Court of Small Causes under s. 5 of Act XI of 1865—and as the case was not "tried under" the Act, s 21 gave no finality to the decree of the Subordinate Judge, which was therefore, appealable. **Damodhar Timaji Gosavi v Trimbak Sakharam. 10 Bom 370**

Appeal-*Contd.*

18 Orders—*Contd.*

Notes:—*Ref:* 24 Cal 661.

(68) Order declining jurisdiction

924—An appeal lies from the decision of a Court upon the hearing of a cause that it has no jurisdiction on the ground that the suit has been instituted in the wrong district.

Dheraj Mahatab v Mudoosoodun Mookerjee Marsh 572

(69) Order of Mamlatdar in boundary dispute

925—In a case where boundaries of land are disputed, an appeal from the mamlatdar lies to the Collector. A District Judge has no power to entertain such an appeal. **Narayan Vayankatesh v. Dhandu Damodhar, 4 B H C 167.**

Notes:—Dist: 6 B H C R 72. Ref: 8 B H C R 185.

(70) Order allowing decree-holder to take credit for his decree as purchaser.

926—Civil Procedure Code, 1859, S. 270.—

Where a second decree holder is himself purchaser of a property sold in execution of his own decree, and instead of the money being deposited in Court, an order is obtained allowing the decree-holder as purchaser to pay the purchase-money by his decree being taken as a credit on account of the purchase, such order is not open to appeal under S. 270, Act VIII of 1859.

Rajaram Chowdhry v. Seetola Buksh Misser, 7 W R 113.

(71) Order directing prosecution for forgery.

927—No appeal lies from an order of a Civil Court directing a criminal prosecution for forgery committed before it. **Gunga Narain Sircar v. Azeezoonissa Beebee, 5 W R Mis 18.**

Eshan Chunder Dutt v. Prannath Chowdhry, Marsh 270=2 Hay 236.

(72) Order in execution of decree.

928—Power of Senior Assistant Judge.—

Held, that a Senior Assistant Judge is not competent to hear an appeal from an order made in the execution of a decree in a case in which he is not competent to hear an appeal from the decree itself. **Narbheram Kisandas v. Navnidram Kushiram, 5 B H C 46.**

Appeal-*Contd.*

18 Orders-*Contd.*

(73) Order making over proceeds of sale to Official Assignee.

929—No appeal lies from the order of a Judge making over to the official assignee the proceeds of property sold in execution. **Indur Chunder Doogar v. The Official Assignee, 11 W R 100**

Neet Lall v. Miller, 11 W R 420.

(74) Order rejecting appeal.

930—Civil Procedure Code, 1859, S. 336.—

An appeal is not admissible against an order passed under S. 336, Act VIII of 1859.

Gouree Sunkur 11 W R 556.

931—Dismissed as barred by time.—

Orders dismissing petitions of appeal as barred by time, if time had in fact expired, are final as regards appeal. P R 2 of 1869, provided that an opportunity had been given to appellant to explain the delay.—**Maddat Khan v. Mukarrab, P R 47 of 1875.**

(75) Order rejecting application to sue as pauper.

932—Civil Procedure Code, 1877, S. 588.—

No appeal lies under Act X of 1877 from an order made under that Act rejecting an application for permission to sue as a pauper.

Collis v. Manohar Das, 1 All 745.

933—Appeal—Dismissal of application for rejecting original application under S. 311 dismissed for default—C. P. C., S. 103:—

No appeal lies against an order rejecting an application purporting to have been made under S. 103 for reviving an application made under S. 311, C. P. C., dismissed for non-appearance. 10 Bom 433; 11 Mad 319; 10 W R 122 foll.—

Jung Bahadur v. Mahadeo Prasad, 8 C W N 160=31 Cal 207.

934—Effect of, on decree appealed against:—

The decree of the lower Court does not cease to be binding upon the parties by the mere fact of appeal, though the pendence of the appeal would open the whole question for the appellate Court.— **Rajah M. Bhaskara Setupati v. Narayanaswamy Gurukkal, 12 M L J 360.**

935—C P C S. 2; O 22 r. 10; s. 104, O 43 r. 1 (1882)-Ss. 2, 372, 588 (21)—Order allowing objection under S. 372—Order or decree—Appeal.—

Appeal-*Contd.*

18 Orders-*Contd.*

An order rejecting an application by an assignee under s. 372, C. P. C., to be brought on the record in the place of the plaintiff is not appealable; nor is such an order a decree within the meaning of S. 2, C. P. C. 22 All 380 and 19 All 142 distinguished; 4 C W N 403 ref. to.

Tej Singh v. Chebeli Ram, (1902) A W N 84=24 All 342.

936—Act VIII of 1859, Section 371.—

No appeal lies from an order refusing to allow an appeal in *forma pauperis*.-**Hurrie Singh v. Jeet Singh, P R 62 of 1870.**

(76) Order allowing withdrawal of suit.

937—Order allowing withdrawal of suit—Civil Procedure Code, 1882, s. 373—Withdrawal of suit—Appeal from order permitting withdrawal.—An order under s. 373 of the Civil Procedure Code permitting the withdrawal of a suit with liberty to bring a fresh one, not being made appealable by s. 588, or being a "decree" within the meaning of s. 2, is not appealable.

Kalian Singh v. Lekhraj Singh, 6 All 211.

Notes:—Foll: 18 Cal 322; 15 All 169; 16 All 19; 17 All 97; Ref: 9 All 253.

(77) Order directing suit to be re-admitted and registered.

938—Order re-admitting and registering the suit.—An appeal does not lie from an order made by a lower Court, directing a suit to be re-admitted and registered on the file of the Court.

Hirdhamun Jha v. Jinghoor Jha, 5 Cal 711.

(78) Order of Civil Court on conviction of escape from custody.

939—Civil Procedure Code, 1877, s. 651.—

Quære—Whether a person convicted under section 651 of the Civil Procedure Code, of escaping from lawful custody, who is sentenced to one month's imprisonment only, can under section 588 (29) of that Code appeal. **Empress v. Amar Nath. 5 All 318.**

(79) Order of collector in execution of decree.

940—Order passed by a Collector in the exercise of the powers conferred on him under s. 320 and the following sections of the Code of Civil

Appeal-*Contd.*

18 Orders-*Contd.*

Procedure relating to the execution of a decree of a Civil Court after transfer of the decree to him under s.320,are not appealable to the High Court. *Held*, therefore that the order of a Collector disallowing an application by the judgment-debtor that the amount of the decree might be satisfied by temporary transfer of his immoveable property, and ordering the sale of such property, and the order of a Collector confirming a sale, were not appealable to the High Court. **Madho Prasad v. Hansa Kuar, 5 All 314=3 W N 59.**

Kishun Ram v. Sarju Prasad,6 W N 168.

Notes:—Not Fol: 11 Bom 478 Disap: 7 All 407. Fol: 11 All 94 F B; 18 All 437. Dist: 9 All 602; 12 All 564. Ref: 8 Bom 301; 9 All 43.

(80) Order disallowing claim.

941—Order disallowing claim — S. 322B of Civil Procedure Code, Act X of 1877—Miscellaneous appeal.—An appeal from the decision by which a disputed claim is settled under s. 322B of the Code of Civil Procedure, Act X of 1877, is cognizable as a miscellaneous appeal *i. e.*, an appeal from a decree not passed in a *regular* suit.

Srinivasa Ayyangar v. Peria Tambi Nayakar, 4 Mad 420.

Notes.—Diss: 7 All 565. Ref: 10 Bom 248. Dist: 29 Mad 172.

(81) Order directing penalty to be enforced under Stamp Act.

942—Order for the enforcement of penalty under Stamp Act—Order not appealable as a decree—Civil Procedure Code (1859), S. 365—Civil Procedure Code (1877), S. 588 —

A decision of Judge which directs the enforcement of penalty under the Stamp Act, the case being afterwards proceeded with, is not appealable as a decree, as it cannot be said to be decree affecting the merits of the case or the jurisdiction of the Court. Nor can it be said that such a decision is an "order as to a fine" within the meaning of S. 365 (Civil Procedure Code 1859) which corresponds to S.588 cl.29, (Civil Procedure Code, 1877). **Sonaka Chowdrain v. Bhoobunjoy Shaha, 5 Cal 311.**

Notes:—Ref: 13 Bom 449 F B.

Appeal-*Contd.*

18 Orders-*Contd.*

(82) Order dismissing suit on failure to serve summons.

943—Civil Procedure Code Act, XIV of 1882, Sections 97 and 588. Appeal—" Decree ". Semble; An order dismissing a suit under Section 97 of the Civil Procedure Code is not a decree and is not appealable. **Lucky Churn Chowdhry v Budurrunnissa. 9 Cal 627=12 C L R 484.**

(83) Order dismissing suit on failure to give security for costs.

944—s. 381 C P C—An order passed under s. 381 Code of Civil Procedure dismissing a suit for failure by the plaintiff to give security for costs is a decree and appealable as such.

Williams v Brown 8 All 108 F B.

Notes:—Dist. 18 All 101 F B. Ref. 19 Bom 307.

945—C P C O 41 r 10 (1882 S. 549)—Security for costs, non-compliance with order to furnish:—No appeal for re-admission of rejected appeal on account of. No appeal will lie from an order refusing to re admit an appeal which had been rejected under S. 549 C P C on account of non-compliance with an order to furnish security for costs. 18 All 101 foll. 13 I A 57 dist.

Ferozi Begam v Abdul Latif. 1908 A W N 53=30 All 143=5 A L J 109 =3 M L T 221.

946—Civil Procedure Code, 1882, Section 136—" Decree "—Appeal—An order under Section 136 of the Civil Procedure Code, dismissing a suit, is a decree from which an appeal lies.

Khushali Mal v Pala Mal. 43 P R 1898.

(84) Order of single Judge to High Court,

947—Civil Procedure Code, 1877, s. 588—

S. 588, Act X of 1877, restricting appeals against orders, does not apply to prevent an appeal to the High Court from the order of a Judge of that Court. **Hurrish Chunder Chowdhry v Kalisundari Debi. 9 Calc 482=12 C L R 511.**

Notes:—10 I A 4=12 C L R 448; 511 Appl. 18 Cal 182; 13 M L J 497; 11 Mad 296. Fol. 23 Cal 580; 22 Mad 68 F B; 23 Mad 517; 8 M L J 231 F B; 28 Mad 127= 14 M L J 437; 33 Cal 306=10 C W N

Appeal-*Contd.*

18 Orders-*Contd.*

297=2 C L J 112; 10 C W N 986=33 Cal 1323. Dist. 17 Cal 455; 11 All 275 Con. 26 Cal 361: 14 All 226 F B; 10 Cal 252:Appr. 7 C L J 384;Ref 5 C W N 781; 20 Mad 407; 8 M L J 231 F B; 11 M L J 346; 17 All 438; 28 Mad 557; 25 Mad 437 F B; 555; 4 Bom L R 342.

948—An order of a Single Judge—Appeal.

An appeal lies against an order of a Judge sitting on the original side if that order decides a question of some right between the parties.

Sir Jehangir C. Jehangir v Hope Mills, Ltd. 10 Bom L R 488=33 Bom 216 =2 Ind Cas 294.

Notes—Referred to 10 Bom L R 1057.

(85) Order setting aside sale in execution of decree for rent.

949—Order seting aside sale in execution of a decree in rent suit—Bengal Tenancy Act (VIII of 1885) S. 173—An order Setting aside a sale under S. 173 of the Bengal Tenancy Act is not appealable. **Roghu Singh v Misri Singh. 21 Calc 825.**

Harabandhu Adhikari v Harish Chandra Deypal. 3 C W N 184.

Notes:—Ap. 3 C W N 184.

950—Bengal Tenancy Act S. 173—Non appealable—decree—Sale in execution—Order setling aside or confirming sale—Appeal—Held by the majority of the full Bench (Rampini. J dissenting)—

An order passed on an application under secs. 244 and 311 C P C to set aside a sale held in execution of a decree for rent when the decree-holder is the auction purchaser is an order which decides a question relating to title to land or to some interest in land as between parties having conflicting claims thereto. An appeal therefore lies from such order although no appeal lies from the decree in the suit on account of the prohibition contained in S. 153 of the Bengal Tenancy Act. 28 Cal 116 overruled. I C L J 255; Misc. App. No 438 of 1901 since reported I C L J 454 aute. Ref. and fol. **Kali Mamdal v Ramsarbasya Chakravarti. I C L J 476= 9 C W N 721=32 Cal 957 F B.**

Appeal-*Contd.*

18 Orders-*Contd.*

(86) Order on further directions varying report of commissioner's under decree for account in partnership.

951—C P C S. 591—Letters Patent, S. 15—Decree for account—Order appealable.

An order varying the report of a Commissioner, appointed to take partnership accounts, is not one of those orders indicated in S. 588, Civil Procedure Code. It falls within the concluding provision of S. 591 of the Code, and consequently any error in it, may be set forth as a ground of objection in the memorandum of appeal against a decree based upon it. **Jamsetji v Dadabhoy. 2 Bom L R 649.**

952—Partition decree—Application for appointment of Commissioner—Rejection as barred—C P C Ss. 2, 244—

Where the lower Court treated an application to appoint a Commissioner in a partition suit as one in execution and rejected it as barred, *Held*, that an appeal lay from the order, even though in law the application was not one in execution. Such appeal is not taken away by the fact that the Court rejecting the application wrongly assumed the existence of a decree to be executed.

Latchmanan Chetty v Ramanathan Chetty. 14 M L J 436=28 Mad 127.

(87) Order made in the Course of execution proceeding and not appealed against.

953—Order passed in execution—One of many questions raised, determination of—Final order.

Where the question of mesne profits having been reserved for determination in the course of execution, an issue as to the joint or several liability of the various defendants was left undecided along with it and an order in execution appointing commissioner for the determination of mesne profits also directed that the defendants should be jointly and severally liable for the amount—

Held, that the declaration need not be appealed against immediately, but might be objected to in the appeal against the final order passed in execution. *Quere*, whether the portion of the order declaring joint and several liability was at

Appeal-*Contd.*

18 Orders-*Contd.*

all an order relating to execution within the meaning of S. 244, C P C so as to be appealable by itself apart from the final order. **Godavari Samulo v Gajapati Narayan Deo. 23 Mad 494=23 Mad 260=10 M L J 206.**

954—Execution proceedings - Interlocutory order—

An appeal need not be preferred against every order in an execution proceeding. It is open to the party aggrieved to challenge, on appeal against the final order which determines the rights of the parties, the propriety of the interlocutory orders made in the course of the proceedings. **Chandanbala Debi v Probodh Chandra Roy Chowdhury 36 Cal 422=9 C L J 251=2 Ind Cas 338**

(88) Order confirming appointment of head of muths.

955—Nomination by a pandaram under a decree—Revocation of such nomination by the pandaram's successor.—

The pandaram of a muth, being empowered under a decree to nominate a person to be the head of a subordinate muth subject to the approval of the subordinate Court, made a nomination, and died before the subordinate Court had come to a determination as to the fitness of his nominee. His successor in office was brought on to the record, and revoked his nomination and made a fresh nomination. The subordinate Court treated the fresh nomination as a nullity, and made an order confirming the first. The pandaram appealed against this order. *Held* (1) that an appeal lay against the order complained of: (2) that the person whose nomination had been confirmed was a necessary party to the appeal. **Gnanasamba nda v Visvalinga 13 Mad 338**

956—*C P C O 26, R. 13 14* (Ss. 396, 588, 244) —Application for appointment of a Commissioner —Order—Appeal—

An application under S. 396, C. P. C. for the appointment of a Commissioner is not a matter coming within the scope of S. 244 C. P. C., and no appeal lies from an order made upon such application-28 Mad 127 dist. C M S A 14 of 1906 followed—**Mullayya v Subbaraydu 17 M L J 144=1907 A W N 64=4 A L J 135**

Appeal-*Contd.*

18 Orders-*Contd.*

(89) Order in execution of decree of privy council.

957—Ss. 318, 611:—Orders setting aside sale —Appeal to Privy Council — Surety for mesne profits—Execution-Appeal—Mesne profits including interest.

The High Court on appeal set aside an execution sale of immoveable properties by the Subordinate Court. The auction purchaser appealed to the Privy Council. The High Court took security from the judgment-debtors who were placed in possession pending the appeal to the Privy Council for re-delivery of the properties and mesne profits. The Privy Council reversed the Order of the High Court setting aside the sale and restored that of the Subordinate Judge confirming it. On an application by the purchaser for the recovery of the mesne profits from the judgment-debtors and his sureties, the Subordinate Judge refused execution against sureties, and awarded cretain amount against the Judgment-debtors after deducting some charges of a receiver who was in management of the properties under an order of Court for satisfaction of the decrees of some creditors of the judgment-debtors.

On appeal to the High Court against this order *held* (1) that although the order of the Privy Council merely confirmed the sale, it was competent for the Subordinate Court to order the judgment debtor to pay mesne profits to the auction purchaser by way of restitution, as the delivery of the property under S. 318 C. P. C. is a relief which follows peremptorily the confirmation of the sale. (2) That as the order of the Subordinate Judge was made in enforcement of the order of the Privy Council S. 611, C. P. C. confers a right of appeal to the High Court so far as the original debtors are concerned (3) That the sureties cannot be proceeded against in execution for the recovery of the mesne profits; that the purchaser is entitled to interest on the profits of each year up to the date of payment; that the salary of the receiver and his establishment who were not appointed for the appellant's benefit or at his request cannot be deducted in calculating mesne profits.

Arunachellam Chetti v Arunachallam Chetti 15 Mad 203

Appeal-*Contd.*

18 Orders-*Contd.*

Notes—Ref: 23 Cal 212; 25 Bom 409; 2 Bom L R 203; 31 Mad 330.

(90) Order for Pre-emption.

958—Pre emption decree.

A plaintiff may, after the period fixed for payment of the pre-emptive price, and without paying it, appeal both as to the correctness of the price and as to the reasonableness of the time allowed for payment. **Kodai Singh v Jaisri Singh 13 All 189, 376.**

959—Compliance with decree—Purchase-money not paid within time—Appeal.

Held that plaintiffs in a pre-emption suit who had obtained a decree conditioned on payment by them of the pre-emptive price within a certain fixed period could, after the expiration of such period, appeal against such decree on the ground that a condition of the contract out of which their right to pre-empt arose had not been embodied in the decree. Kodai Singh v Jaisri Singh (13 All 376) referred to. **Wazir Khan v Kale Khan 14 W N 3; 16 All 126**

Notes—Ref 18 All 223.

960—Decree for pre-emption—Time for payment—Omission of consequence of default—Appeal—Expiration of period without payment—Appeal struck off—Civ. Pro. Code, s. 214—

A decree for pre-emption was passed giving time for payment of the puchase-money, but omitting to state that in default of payment within time, the suit will stand dismissed. Plaintiff in appealing against the decree allowed the period to expire without payment and the appeal was hence struck off. *Held*, on appeal to the High Court, that the appeal to the lower Court was rightly struck off, that no appeal lay from such order and that no extension of time for payment of the purchase money could be granted by the Court. (Foll, 18 All 223) **Mulu Singh v Rahim Kuar A W N 1888. 22**

(91) Order of Collector confirming sale for arrears of dak cess under Public Demands Recovery Act (Bengal Tenancy Act VII of 1880)

961—Order of Collector Confirming sale for arrears of dak cess-Public Demands Recovery Act (Bengal Act VII of 1880)—

Appeal-*Contd.*

18 Orders-*Contd.*

A revenue-paying talukh was sold for the recovery of arrears of dak cess under bengal Act VII 1880. An application made to the Collector for setting aside the sale was refused. Held, following the ruling in 14 Calc 1 that an appeal lay to the Revenue Commissioner against the Collector's order affirming the Sale. **Lala Pryag Lal v Jai Narayan Singh 22 Cal 419.**

Notes—Ref 30 Cal 619; 2 C L J 306: 806; 34 Cal 677; Appr 11 C W N 803; Fol 6 C L J 84

962—S. 323 Appeal-Held that no appeal would lie from an order of the Collector under s, 323 of the Code of Civil Procedure. 5 All 314 W N 1883 p 164 followed. **Kishun Ram v Sarju Prasad. 6 W N 168.**

(92) Order Setting aside exparte decree.

963—Order setting aside exparte decree—Civil Procedure Code (1882) ss. 108, 591—

The words "affecting the decision of the case" in S. 591 mean "affecting the decision of the case with reference to the merits of it" where an exparte decree was set aside by an order under s. 108 and the suit was dismissed after being heard on merits. *Held* that such order was not appealable under s. 591 as it is not an order affecting that decision of the case under that section.

Chintamony v Raghoonath Sahoo. 22 Calc 981.

Notes—Dist 26 Bom 201; Fol 24 All 464; 25 All 280; 9 C W N 584; 8 C L J 308; Ref 3 Bom L R 734.

(93) Order refusing to accept deposit on account of sale in execution of decree.

964—Appeal

No appeal will lie from an order passed under s. 310 (a) of the Code of Civil Procedure, refusing to accept a deposit tendered under that section on the ground that it was too late. **Bashirud-din v Jhori Singh. 19 All 140= 17 W N 7.**

Notes—Fol. 25 Bom 418: 30 All 379=(1908) W N 157=5 A L J 557. Ref. 27 All 263; 5 C L J 204; 17 M L J 291; Not Fol. 29 All 275; W N (1907) 64; 4 A L J 135; 30 Mad 507.

Appeal-*Contd.*

18 Orders *Contd.*

965.—C.P.C.O 21 r 89 (1882 S 310 A)—Order under-Refusing to accept a deposit—Appeal:-An order under s 310 A of the C P C., refusing to accept a deposit,is an order in execution of the decree, within the meaning of S 244 (c) of the Code, and an appeal lies from such an order: 19 All 140. notfol 26 All 447 and 28 Cal 73 Ref. **Imtiaz Begam v Dhuman Begam 4 A L J 135= A W N (1907) 64=29 All 275.**

(94) Order striking off application for execution but maintaining attachment

966.—Order striking off application for execution, but maintaining attachment—Order not disposing of or affecting execution of decree.

A decree-holder, in execution of his decree, attached certain immoveable property of his judgment-debtor; but on his taking no other steps to complete the execution of the decree, the Court struck off the execution-proceedings maintaining the attachment. Against this order the decree-holder appealed. *Held* that, inasmuch as the order in question was not a judicial disposal of the application for sale, and would not preclude the decree holder from continuing the execution of his decree, an appeal from such order was superfluous, and must be dismissed. **Rattanji v Hari Har Das Dube 17 All 243.**

967.—Same order on two misls—Appeal against one only.

An application by a decree-holder for execution of his decree, and objections by the judgment-debtor being before the Court of a Subordinate Judge were registered separately and put up in separate misls The Subordinate Judge recorded separate orders on each misl, in the one case allowing the Judgment-debtor's objection, and in the other rejecting the decree-holder's application for execution. The decree-holder appealed against the order rejecting his application for execution, but not against the other order. *Held* that the appeal as instituted was not barred and could be heard.W N 1893 p 221 and W N 1883 p 190 distinguished. **Kamta Prasad v Zabardast Khan 14 W N 88.**

(95) Order amending sale certificate.

968.—Order amending sale certificate.—Order granting a review of order—Civil Procedure Code (1882), s. 244——An order granting an application for the amendment of a sale certificate is not appealable. 1 C W N 568 approved.

Bujha Roy v Ram Kumar Pershad 26 Calc 529=3 C W N 374.

Notes.—Fol: 23 All 476 Ref: 6 C L J 749; 7 C L J 436.

(96) Order rejecting claim of alleged representative of deceasad plaintiff and for abatement of suit.

969.—Ss 2, 3o6, 367—Death of sole plaintiff—Son adopted by plaintiff's widow—Legal representative.

The word 'dispute' in S 3o7, Civil Procedure Code, does not necessarily mean a dispute between several persons all claiming to represent the deceased. If the defendant in the case deny the claimant's title to represent the plaintiff, there is a 'dispute' within the meaning of the section.

An order by a Court dismissing a suit under the first clause of S, 366, Civil Procedure Code, is a 'decree.'

10 Bom 220 approved.

In a joint Hindu family consisting of two brothers, one sued the other for partition of property and died pending the suit leaving behind him no issue, but only his widow and his surviving brother, the defendant. His widow subsequently adopted a boy in pursuance of an authority left by him; and the boy applied, within the time allowed by law to the Court in which the suit was pending, to have his name entered on the record in the place of the deceased plaintiff, his adoptive father.

Held: that the right to sue survived to him as the legal representative of the deceased plaintiff and that he had a right therefore to be placed on the record.

Subbiah v Saminadaier 18 Mad 496.

Notes.—Ap 26 Mad 224; 226; 228; Ref: 27 Bom 162; 5 Bom L R 1041. Fol; 30 All 348=1908 W N 139=5 A L J 363; 12 M L J 380.

970.—C P C O 16 r 12 (1882 S 170)—Order—Appeal-Auction sale when complete-Confirmation.

Appeal-*Contd.*

18 Orders-*Contd.*

An order under S 170 of the Code of 1882 is not appealable

An auction sale does not become complete until it is confirmed by the Court. **Badri Prasad v Tej Singh 7 Ind Cas 100**

971.—Guardians and Wards Act S 41, (c):—There is no appeal from an order allowing a guardian to spend the minor's property for the marriage of his sister after the minor had attained majority, but the order may be revised under S 622 C P C. **Seetharama v Balarama 17 M L J 199.**

972.—Order directing appeal to abate-Act X of S 588 (18)—Appealable order.

Held, that an order directing an appeal to abate in influence of the death of one of the plaintiffn defedants, on the ground that no application has been made within the time allowed by law to substitute the legal representative of the deceased, is an appealable order under S 588, Cl (18) of the Civil Procedure Code. 154 P R 1879; 30 P R 1880 cited. **Gopal Singh v Naurang Singh P R 165 of 1882.**

Notes:—Ref. 133 P R 1884.

(96—a) Order rejecting application for suit to abate.

973.—C P C (1882) S 366—*Held*, that an order rejecting an application that a suit might be declared to have abated by reason of the death of the plaintiff and the invalidity of an application to the Court to bring his legal representative on to the record was not one of the orders contemplated by s 366 of the Code of Civil Procedure and that no appeal would lie therefrom.

Bhagwant Das v The Maharaja of Bharatpur 15 W N 78 = 17 All 286.

973A.—S, 47 O XXI r 50—Civ Pro Code (Act XIV of 1882), Ss 244, 258—Judgment-debtor, objection by, how to be treated—Objection on the ground that judgment-debtor was holdidg property as trustee for religious purposes—Appeal against an order dismissing judgment-debtor's objection.

Where a judgment-debtor sets up a claim to the effect that certain property attached in the execution of a decree is in his possession, not on his own account, but on account of or in trust for some other person, and in particular where he claims that the property in question has been set apart for religious charitable purposes and is hel l by him as a trustee, his objection must be treated as falling under O XXI r 58 of the Code of 1908 (corresponding to S 278 of the Code of 1882) and not under S 47 of the Code of 1908) (corresponding to S 244 of the Code of 1882).

Consequently, no appeal lies from snch an order. 15 Cal 437: 23 Bom 237; 23 Mad 195: 10 M L J 64; 7 All 36; A W N (1884) 218; 28 All 644; A W N (1906) 158; 3 A L J 565 Fol; 17 Cal 711, Dist; 8 C W N 353 not followed.

Sajid Ali v Ali Mohammad Khan 12 Ind Cas 411.

(96—b) Instructions issued by District Judge as to the mode of taking an account.

974.—No appeal lies against instructions issued under the provisions of s S 395 of the Civil Procedure Code by a District Judge to a Commissioner as to the mode in which he should take an account. No appeal is provided by s 588 of the Code from orders passed under s 395. If the instructions are wrong and result in a party being charged with more than he is legally liable for, the remedy is by appeal from the decree.

Appaji Chintaman Dev v Dhondo Ganesh P J (1898)

(96—c) Order refusing to allow a change of attorney.

975.—Appeal from an order-Change--Appeal, heading of.

An appeal lies from an order refusing to allow a change of attorney. **Dinendra Nath v T H Wilson & Co. 5 C W N 434 = 28 Cal 264.**

(96—d) Order appointing guardian *ad litem*.

976.—Certificated guardian—Appeal.

An order made by a Subordinate Judge appointing a guardian *ad litem* to a minor, where the litigation affects the property of the minor and there exists a duly constituted guardian of the property, is an appealable order; but a guardian *ad litem*, where the litigation concerns property of the minor, cannot be appointed so

Appeal-*Contd.*

18 Orders-*Contd.*

long as there exists a certificated guardian in respect of the property who is capable of acting in that behalf. **Har Bilas v Lachman Das. 11 W N 42.**

(96—e) Order assessing value of property directed to be sold under decree.

977.—Appeal—Under—statement in valuation—Valuation according to decree-holder's statement—Sale proclamation—C P C (Act V of 1908), Sections 2, 47, O 21, Rule 66, Sub-rule (2), (cle)—Order, when decree.

An order, by which the value of the property, directed to be sold under the decree, has been assessed at a certain figure according to the statement of the decree-holder, after rejecting the application of the judgment-debtor for time to prove higher value, is not appealable

Whether an order is a decree within the meaning of Section 2 of the Code of Civil Procedure, depends upon its nature and contents.

An order to be a decree must conclusively determine the rights of the parties. 27 Mad 259, (F B), appr.

Deoki Nanden Singh v Bansi Singh. 14 C L J 35.

(96—f) Order deciding claims of rival claimants for possession of properties.

978.—Order under Regulation, if a decree—appeal, if lies against order—Administration of estates of persons dying intestate—Order deciding claims of rival claimants for possession of properties—Order for security—Regular suit, if necessary to be brought—Jurisdiction of Judge to make order, when arises

The proceeding for the administration of the estate of a person dying intestate under Regulation V of 1799 is not a suit, and the order by the District Judge selecting one of several persons as the claimant, into whose possession the properties should go, and calling upon him to furnish security, is not a decree, as it does not adjudicate or conclusively determine the rights of the parties with regard to all or any of the matters in controversy, and is not appealable as a decree.

It is not appealable as an order, as it does not fall within the description of appealable order under the Civil Procedure Code, nor is any provision made for appeal in the Regulation itself.

But the memorandum of appeal may be treated as an application for revision.

A District Judge has no jurisdiction to make any order under Sec 4 of Reg. V of 1799, unless a claimant has taken possession and a regular suit has been preferred by the party out of possession. It is only during the pendency of such regular suit for adjudication of the dispute between the rival claimants, one of whom is in possession, that the Judge is authorised to take security from one of the parties and to place him in possession of the disputed property. 25 Cal 757 ; 13 C L J 467, Ref.

Setara Begum v Syed Faiz Ali Khan. 13 C L J 677.

(96—g) Appeal from a lower appellate Court's decision.

979.—Suits Valuation Act S. 11:—

No appeal lies from a lower appallate Court's decision to deal with case.

Ramasamy Aiyangar v Obai Goundan. 15 M L J 487.

(96—h) Order re-admitting appeal dismissed for default.

980.—C. P. C. O. 41, rr 17 19, Section 105 (1882) Sections 556, 558, 591. Appeal

Order for re-admission of appeal dismissed for default not capable of being used by the appellant as a ground of objection to the decree. An order under Section 558 of the Code of Civil Procedure re-admitting an appeal which had been dismissed for default under Section 556 is not appealable ; neither is it "an order affecting the decision of the case, which may be set fourth as ground of objection in the memoradum of appeal" from the decree in the suit within the meaning of Section 591 of the Code. 22 Cal 981 foll.

Gulab Kunwar v Thakur Das. 1902 A W N 136= 24 All 464.

Notes:—Foll 26 All 280; 9 C W N 584,

Appeal-*Contd.*

18 Orders—*Contd.*

(96—i) Order forbidding decree-holder to bid at execution sale

981.—Sections 2, 244, 294, 588 (16) Leave to bid, refusal of, to decree-holder—Appeal.

No appeal lies against an order forbidding a decree-holder to bid at a sale held in execution of a decree, the matter being one of administration. Reference :—(a) 13 Cal 174 Ref:

Ko Tha Hnyin v Ma Hnin I. 15 C W N 862 (P C)

(96—j) Appeal from order passed under Section 491 C P C (1882)

982.—Section 95 ; Section 104 ; O 43 r 1 (1882) Sections 491, 497 588). Improper attachment before judgment—Award of compensation —Appeal.

No appeal lies under section 588 from an order passed under section 491 of the Code of Civil Procedure.

The words " no other such orders " in the opening of section 588 and the omission of orders under section 491 therefrom lead to the infer ence that the legislature expressly excludes a right of appeal in respect of such orders, (24 Mad 62 ref to). The mere fact that an order under section 491 is embodied in the decree does not make it form part of the decree so as to render section 540 applicable.

Lok Nath v Amir Singh 2 A L J 602=1905 A W N 197 =28 All 81

(96-k) Order dismissing application for compensation.

983—S. 11 No. 11 Sch. *1* No. 1—Court fee payable on memorandum of appeal—Order not having the force of a decree—C. P. C, S. 2. In a reference under S. 18 of the Land Acquisition Act, the District Judge valued the compensation to be given at a certain figure and the amount was placed in deposit with the Collector. One H then applied to the District Judge for payment of the amount to him and the application was opposed by other persons who claimed a title to the property, some claiming the whole and others portions of it. The District Judge's order on the application was " This suit be dismissed. The parties may seek redress in the Civil Court. " H appealed to the High Court. *Held*, (*Maclean* C. J. and *Banerjee J.*) on a reference by the Registrar under S. 5, Court Fees Act.—That the order of the District Judge was not a decree within the meaning of S. 2. C.P. C., and Court fee was payable in the appeal under No. II of Sch. II of the Court Fees Act (two Rupees) and not as computed on the amount in deposit with the Collector (and claimed by the appellant) under No 1 of Sch. 1 of the Court Fees Act. **Harrish Chandra Chatterji v Bhoba Tarini Debi 8 C W N 321.**

Appeal-*Contd.*

18 Orders—*Contd.*

(96 l) Order rejecting appeal for failure to furnish security for costs.

984—C.P.C. O. 41, r. 10 (2)—Order rejecting appeal for failure to furnish security for costs—Appeal.

Held that an order rejecting an appeal under O. 41 r. 10 (2), C. P. C., is not appealable.

18 All 101; 13 O C 59. Ref. **Fateh Singh v Ramma Singh. 14 O C 40=9 Ind Cas 748.**

(97) Order allowing an objection that appeal is barred

985—Order of dismissal—Limitation.

An appeal will lie to the Chief Court from an order by the lower appellate Court allowing an objection that the appeal is barred by limitation.

Bahadur Singh v. Basawa Singh 158 P R 1882.

(97-a & b) Order improperly passed in execution.

986—S. *47*—Execution Court if may investigate validity of decree—An order improperly passed under S 47 if appealable.

Where a jurisdiction is usurped by a Court in passing an order against which an appeal would lie, appeal against the order cannot be defeated by showing that the order was without jurisdiction.

So where a Court purporting to act under S. 47 C P C directed execution to proceed against a minor, and an appeal was preferred on the ground that the decree sought to be executed did not bind the minor, *held*—that the fact that, on the appellant's own showing, the minor would not be a party to the decree within the meaning of S. 47 and thus the order would not be an order under S 47, would not make the appeal incompetent.

Appeal-*Contd.*

18 Orders—*Contd.*

An execution Court must proceed on the assumption that there is a valid decree capable of execution and it is not open to it to investigate validity of the decree or its binding character. **Moharaj Kumar Bindeswari Charan Singh v Thakur Lakpat Nath Singh 15 C W N 725.**

(97-c) Order of abatement by Court.

987——*C. P. C. O 22 r 4; S. 104; O 43 r. 1 (1882 Ss. 368, 588 cl. 18.)*—Penultimate clause—Order of abatement—Appeal—Death of one of several defendants—Election to proceed against survivors. Though the penultimate clause in S. 368 does not in words require an order of abatement by Court, an order is necessary declaring that the suit has abated: and an appeal lies from such order under cl 18 of S. 588.

A mortgagee is entitled to waive his right to proceed against a surety and restrict himself to his right against the mortgagor and consequently when the surety dies after being impleaded in the suit alone with the mortgagor, the mortgagee need not bring in the legal representatives of the deceased surety on record, but may proceed against the rest. **Mehdi Hussain v Sughra Begam 1903 A W N 15=25 All 206.**

(97-d) Order restoring a suit dismissed for want of payment of process fee.

988—C. P. C. O IX, r. 2—Suit dismissed for want of process-fee—Order of Appellate Court restoring suit—Appeal.

There is no appeal from the order of an Appellate Court restoring a suit dismissed for want of payment of process fee. **Abdur Rahman v. Sughra Begam 9 Ind Cas 484.**

(97 e) Order rejecting application to transfer suit.

989—Civ Pro Code, 1882 s. 25—Application to transfer suit—Rejection with Costs—Appeal.

There is no appeal given by law from an order under s. 25 of the Code. **Ajodha Prasad v. Ramsarup A W N 1883, 88.**

(97-f) Order refusing to re-admit appeal.

990—Appeal Order rejecting application for reahearing of appeal dismissed under S 549 C P C:-No appeal lies against an order refussing to readmit an appeal rejected on the ground of the failure of the appellant to furnish security for the costs of the respondent under S. 549 of the Code of C P—(18 All 315 Ref.) **Firoz Begam v. Abdul Latif 5 A L J 109=A W N (1908) 53 =3 M L T 221=30 All 143.**

Notes.—Fol 19 M L J 304.

(97-g) Order returning memorandum of appeal to be presented to proper court.

991—Order returning a memo of appeal-Appeal.

An order returning a memorandum of appeal to be presented to the proper Court is not appealable. 31 Cal 344 Foll: 14 Mad 462, Dist. **Govind Rao v. Narayan Rao, 17 C P L R 129.**

(97 h) Order appointing guardian of the property of a lunatic,

992—993—S. 22—Appeal against order appointing guardian of the property of a lunatic.

Held, that an order appointing guardian of the property of a lunatic is appealable—32 P R 1887 (F B); 94 P R 1905 Ref. **Mussammat Alem Khatun v Mubarak Khan 28 P L R 1911 =9 Ind Cas 548.**

(97-i) Order refusing mutation of name.

994—Order refusing mutation of names—No appeal.

The Financial Commissoiner cannot hear an appeal from an order refusing mutation of names. **Ram Ditta v Kaim Din 6 P R 1881 Rev.**

(97-j) Order refusing to execute award.

995--996—Order of District Judge refusing to execute an award under the Land Acquisition Act, appealability of, as a decree Chief Court, the sole Court for such appeal.

An order of a District Judge refusing to execute an award under Act 1 of 1894 (Land Acquisition) is one made under s. 244 Civ. Pro Code and, in consequence, appealable as a decree. The Chief Court being the sole Court for appeal under s. 54 of the said Act, the above order is appealable only to the Chief Court and to no other Court, the value of the claim involved being immaterial. **Zamindars of Dhar v. Rana 53 P R 1906= 103 P L R 1906**

Appeal-*Contd.*

18 Orders—*Contd.*

(97-k) Order refusing to recognise transfer of decree

997—Order refusing to recognise transfer of decree—Appeal.

An appeal, lies against an order refusing to recognise the transfer of a decree; for the purposes of appeal, the order must be regarded as one made under s. 244 Civ Pro Code. **Virasami Rawth v. Bodi Naikan 25 Mad 384 Note.**

(98) ORDER ON APPLICATION FOR ORDER ABSOLUTE.

998.—Mortgage, decree *nisi*—Application for order absolute—Receiver, appointment of plaintiff as—Accounts, examination of, of receiver—Order absolute, if can be made before examination of accounts—Jurisdiction of Court which made the decree *nisi*, which was varied on appeal to the High Court—Order absolute, if a decree and appealable as such-Transfer of Property Act (IV of 1882), S. 89—Order for the examination of accounts, interlocutory, if decree—C. P. C. (Act V of 1908), O. 34, r. 5, sub-rule 2—Practice-Decree, form of.

An order granting or refusing an application for order absolute is a decree within the meaning of the C. P. C. and is appealable as such.

An interlocutory order for the examination of the accounts of a receiver cannot be treated as an adjudication of any right, claim or defence set up and is not a decree.

An application for order absolute is to be presented to the Court which made the decree *nisi* sought to be made absolute, and even if the preliminary decree has been made in modification of the order of the Court of first instance by a Court of appeal, the application for order absolute may, both according to the practice of this Court and in law, be made to the Court of first instance which made the decree *nisi*: there is nothidg in the law which requires that the application should be made to the Court of appeal.

In a mortgage suit in which a receiver of rents and profits has been appointed, the judgment ought to direct that in taking the account, the plaintiff should be charged with the amount (if anything) paid into Court by receiver, and with such a sum as should be in the receiver's hands, at the date of the certificate, and with such a sum (if any) as the plaintiff should submit to be charged with in respect of rents and profits to come into the receiver's hands prior to the order absolute.

The receiver appointed in the case of a mortgage suit should ordinarily be an indifferent person between the parties to the suit, one who has no pecuniary interest of his own which might conflict with the duties of his office.

The propriety of appointing the mortgagee himself, as receiver, is extremely doubtful, and it would be prudent on the part of a plaintiff mortgagee if he does not accept the office of receiver.

If, however, a plaintiff mortgagee accepts the office of receiver, he is liable to account, and the sums, if any, received by him must be applied towards the discharge of the judgment-debt, before he can obtain an order absolute for sale. If the mortgagee is himself the receiver, the sums actually realised or which with due diligence might have been realised by him, should be set off against the judgment debt. 29 Cal 651; 10 C L J 91, Ref. 23 All 88; 31 All 328; 23 Mad 521; 25 Cal 133; 12 C W N 1028, Ref. and Fol. 11 C L J 81; 11 C L J 155, Exp. and Dis. 1 Ch. 19, Ref. 11 Hare 241, Ref. 13 L J Ch. 304, Ref. 54 Barb. 215, Ref. **Shamuldhun Dutt v. Lakimani Debi 13 C L J 459.**

(98-1) Order directing substitution of parties.

999.—S. 588, C. P. C. 1882—Appeal—Order of substitution.

An appeal lies against an order directing substitution of parties under s. 372. Such an order is practically the same as an order disallowing objections to substitution. **Sourindra Mohun Tagore v Siromoni Debi. 28 Cal 171= 5 C W N 307.**

(98-2) Order under s. 335 C P C (1882)

1000.—S. 335, Civ. Pro. Code, 1882 (=O. XXI, rr. 100, 101, 103, new Code)—Appeal.

Appeal-*Contd.*

18 Orders—*Contd.*

An appeal does not lie from an order under s. 335, Civ. Pro. Code. **Ram Narain Sahoo v Bandi Pershad. 31 Cal 737.**

(98-3) Order refusing to set aside exparte dismissal of application to set aside sale.

1001-1002.—C. P. C. O. 9 r. 9; O. 21 rr. 90, 92; S. 104; O. 43 r. 1—(1882 Ss. 103, 311, 312, 588).

Order refusing to set aside ex-parte dismissal of application to set aside sale—Appeal.

If an application to set aside a sale is dismissed for default and the sale is confirmed, the order of confirmation is appealable under cl. (16) of s. 588, C. P. C. But there is no appeal from an order refusing to set aside the *ex parte* order of dismissal of an application to set aside a sale under s. 311 of the Code. 27 Cal 414; 31 Cal 207; 19 All 596; A W N (1907), 186, Fol.

Mrinalini Chowdhurani v. Benode Chandra Mitra 6 Ind Cas 148.

(98-4) Order dismissing an application under s. 108 C P C (1882).

1003-1004.—C. P.C. O. 9 r. 13; S. 104; O. 43 r. 1— (1882, ss. 103. 588).

Applicability of s.108 to execution proceedings—Appeal from order—Inherent power of Court to set aside its own order.

An appeal would lie, under s. 588, cl. (9). C. P. C. from an order, dismissing an application under s. 108 of the Code on the ground that s. 108 of the Code did not apply to execution proceeding, if the application could be entertained under that section.

The Court has an inherent power to prevent an abuse of its processes and is competent to revise an order made in the absence of the opposite party and without service of notice upon him, which the law directs should be served.

Krishna Chandra Pal v Protab Chandra Pal. 3 C L J 276

(98 (5)) Order refusing to restore suit dismissed for default.

1005-C.P.C.O. 9. r.9; s.99; s.105 (1882 ss. 103 578, 591.)

Appeal-*Contd.*

18 Orders—*Contd.*

Assistant Collector refusing to restore suit dismissed for default—Appeal—Order of remand in a case in which no appeal lies—Ultra vires.

No appeal lies from an order of Assistant Collector refusing to restore a suit dismissed in default. If an appeal is preferred and order of remand is passed, the remand is *ultra vires*, and proceedings taken thereafter are without jurisdiction.

S. 578, clearly indicates that the High Court can in second appeal enter into a question which goes direct to the jurisdiction of the Court. S. 591 of the Code deals with the order which the Court had jurisdiction to make, but in the making of which the Court had committed an error or irregularity. (12 All. 510 Ref.) **Babu Baij Nath v Gajraj Singh 6 Ind Cas 464=7 A L J 675.**

(98 (6) Order refusing to determine dispute between judgment-debtors.

1006.—C.P.C.S.47; O.21, r.95 (1882 Ss.244 and 318) Dispute between judgment-debtors—Application for possession.

A dispute between the judgment debtors does not relate to the execution, discharge or satisfaction of the decree and cannot be gone into by a Court executing the decree. Where, therefore certain property was sold in execution of a decree and the sale was confirmed, but the purchaser applied under section 318, Civ. Pro Code that possession be made over to one of the two judgment-debtors, to which the other judgment-debtor objected, on the ground that the property was purchased with her money, which she had given to the other judgment-debtor, who had misappropriated it, but she did not apply to set aside the sale; *held* that the dispute did not relate to the execution of the decree, but should be settled in a separate suit brought for the purpose and no appeal lay to the High Court from the order refusing to determine the dispute between the judgment-debtors. **Kastura Kunwar v. Gya Prasad. 4 A L J 47=A W N (1907) 29 =29 All 207.**

(98 (7)) Order rejecting application for reviving an application under s. 311 C. P. C. (1882).

1007.—C. P. C. O. 9 r. 9: O. 21 r. 90: S. 104,

Appeal-*Contd.*

18 Orders—*Contd.*

O. 43 r. 1: S. 141—(1882 Ss. 103, 311, 588 & 647).

No appeal lies against an order rejecting an application under S. 103, of the Civ. Pro. Code, for reviving an application, under S. 311, of the Code dismissed for default. 10 Bom 433, 27 Cal 414, 31 Cal 207, & 11 Mad 319, Ref.

Musammat Sobaran Kuar v. Ude Sah. 10 O C 353.

(98(8)) Order rejecting application for removal of obstruction to execution of decree.

1008.—C.P.C.O.21,r.97 (1882 S.328)—Decree-Execution—Obstruction to execution of decree—Application by decree-holder for removal of obstruction—Rejection of application-Appeal-High Court—Revisional jurisdiction.

A decree holder made a complaint under S. 328 of the Civil Procedure Code, to the Judge who, holding that the matter came under S. 331 of the Code, without registering the claim as a suit and without making any inquiry, rejected the complaint.

Held, that the order was not appealable; but it was one which cou d be dealt with by the High Court under the powers conferred upon it by S. 622 of the Code. **Vishnu v. Ramchandra 9 Bom L R 936.**

(98-9-10) Order dismissing application for setting aside sale.

1009.—C.P.C. O. 21, r. 90; S. 104, O. 43. r. 1 (1882 Ss. 311 and 588),

Appeal from an order dismissing the application in default. *Held*, that no appeal lies from an order dismissing for default an application to set aside a sale under S. 311. Ref: 5 O C 294, Fol. 10 Mad 270 Ref. **Sripal Singh v. Pandit Raten Lal. 10 O C 171.**

1010.-C.P.C.O 21, r 90 (1882 S.311)-Application to set aside sale—Dismissal for default—Appeal Adjournment—Illness.

An order dismissing an application under s. 311, C.P.C., on ground of the non-appearance of the applicant, is appealable.

Where the parties were ready with the witnesses, but the case was adjourned for want of time, and, on the date fixed for hearing the applicant wanted time on the ground of illness supported by a medical certificate from a Civil Hospital Assistant, but the Court refused the application.

Held—That. in the circumstances of the case, the order was bad, and the case was remanded.

Broja Sundar Roy Chowdhury v. Moti Lal Mozumdar. 14 C W N 573= 5 Ind Cas 493.

(99) ORDER OF COLLECTOR REFUSING TO INTERVENE AFTER ATTACHMENT OF LAND.

1012.—S. 72—Agricultural land—Order of Collector refusing to intervene after attachment of land—No appeal.

Where a Civil Court by its order, after attachment of agricultural land, sent the record to the Collector, it amounts to an enquiry whether he wished to intervene,and where the Collector, by an order of his, refused to intervene, no appeal lies against the Collector's order. **Raja Ram v. Durga Dut. 5 P R 1910 (Rev). =8 Ind Cas 391.**

(99 (1)) Order directing party to appear in person.

1013-1016.—C.P.C.O.3, r. 1 O.7. r.15 O.10 r 4 (1882 Ss. 36, 60, 120)—Order appealable—S. 588—Omission to mention—Order directing party to appear in person.

The Subordinate Judge ordered some of the defendants to appear in person in his Court without mentioning the section under which, the order was made. *Held*, that the order was an order under S, 120 C.P.C. (1882).

Appeal-*Contd.*

18 Orders—*Contd.*

Where a Court purporting to act under the Civ. Pro. Code passes an order for the personal appearance of a party, but omits to quote the section under which the order is passed, held, that such an order is open to appeal.

Abdul Jalil v. Humera Bibi, 6 A L J 340= 2 Ind Cas 463.

(99 (2)) Order that no warrant of attachment should issue.

1017.—C.P.C. (Act V of 1908)—Execution proceedings—Order of Court that no warrant of attachment should issue by a certain date not appealable.

Where, in execution proceedings, the judgment-debtors, after the rejection of their objections, stated before the Court that they would deposit the decretal amount in Court by a certain date, and thereupon the Court directed that no warrant for attachment should issue before that date.

Held that the Court took no step in execution of the decree against the judgment-debtors, and that no appeal, therefore, lay from that order.

Hazoora Singh v Mussammat Maya Devi. 101 P L R 1911=9 Ind Cas 823.

(99(3)) Order rejecting an application to be brought on the record.

1018.—C.P.C.S. 2: O 22 r. 7; S. 104. O 43 r. 1 (1882 Ss. 2. 372, 588) (20)—Assignee of deceased appellant.

No appeal would lie from an order rejecting the application to be brought on to the record by an assignee of the deceased appellant. 4 C W N 403 foll; 22 All 384 overruled; 19 All 142 dist.

Jamna Bibi v Sheikh Jhan 1902 A W N 112 =24 All 532 F B.

(99 (4)) Order refusing to recognise assignment of decree.

1019.—Assignment of decree—Order refusing recognition of Appeal.

An appeal lies against an order refusing to recognise an assignment of a decree. (25 Mad 383 fol:) Madpanor

Unnamali Ammal v Kandasawmy 6 Ind Cas 199=8 M L T 56.

Appeal-*Contd.*

18 Orders—*Contd.*

(99 (5)) Order of imprisonment in execution of decree.

1020.—Execution of decree—Appeal.

An appeal does not lie from an order of imprisonment in execution of a decree.

Gooldad Khan v Kureem Khan. P R 22 of 1871.

(99(6)) Order directing Nazir to take possession of the property in an administration case.

1020 A.—Ss. 34, 30, 53—Administrator *pendente lite*—Civil Procedure Code, S. 499—Claim to property in hands of administrator—Appeal.

On an application for grant of letters of administration with the will annexed, the District Judge ordered the Nazir to prepare an inventory of the property and to take it into his possession; and the Nazir took possession of some of the moveable property belonging to the estate. Subsequently, the District Judge appointed the Nazir administrator *pendente lite*. Certain persons laying claim to some of the property in the possession of the administrator applied to the District Judge for an order directing its delivery to them. This being refused, they appealed:—*Held* that the applicants might have appealed or applied for revision of the District Judge's order directing the Nazir to take possession of the property belonging to the estate to be administered; but the present order, even if appealable, which is doubtful, was not one which should be interfered with. The appellants, if the Nazir was wrongfully in possession of their property, had their proper remedy by suit.

Kashi Nath Singh v Sheoshankar Pande. 1905 A W N 127.

(99(7)) Order absolute for foreclosure or sale.

1020B.—Appeal—Order absolute—foreclosure—Sale—Court Fees Act schedule II Art 1—Decree—Code of Civil Procedure s. 244 (c).

An appeal against an order absolute for foreclosure or sale should be treated as an application under Schedule II Art 1 of the Court Fees Act. 22 Mad 256. 16 Bom 408; 17 All 238; 23 Cal 723, 8 Cal 720; 10 Bom 238. 7 All 565 ref to.

Balmakund v Haji Husan Ali Bohra. 14 C P L R 100.

Appeal-*Contd.*

18 Orders—*Contd.*

(99(8)) Order of Assistant Collector determining whether a usufructuary mortgagee was in possession or not of the property mortgaged.

1020C.—Ss. 107, 110 (1) 111, 112—Partition proceedings—Time fixed for objection can be extended—Objection fixed beyond time-Extension of time—Fresh notice—Mortgagee in possession —Proprietary title—Appeal.

The issue of a fresh notice in respect of an application, filed under S. 110 (2) of the Land Revenue Act, is not expressly provided for in the Act itself, but an Assistant Collector is competent to issue a fresh notice, or to extend the period within which objections may be filed, if he sees fit to do so. If an Assistant Collector does in fact entertain an objection filed by a recorded co-sharer after the period for the presentation of such objection has expired, this will not of itself render proceedings taken by him under S. 111 of the Act void or without jurisdiction.

A finding by an Assistant Collector that a person, claiming to be usufructuary mortgagee of a particular share, either is or is not in possession of the same, is one which does not determine a question of "Proprietary title" within the meaning of S. 111 of the Act and is not appealable to the District Judge as such. (18 All 210, Fol.)

Jagdish Prashad v Chimman Lal. 5 Ind Cas 107.

(99(9)) Order of a Disirict Judge sanctioning prosecution of the guardian of a minor.

1020D.—Guardian—Power of District Judge to order prosecution of—Appeal.

Upon an appeal against an order passed by the District Judge, directing prosecution of a person who was appointed guardian of a minor and required to furnish security.

Held, that the order was not appealable.

Held, further, that the District Judge had no jurisdiction to pass the order, which must be reversed and set aside as *ultra vires*. **Sital Das v Jesi Bai. 88 P L R 1910**

(99—10) Order of a District Judge sanctioning a mortgage.

1020E—Ss. 29, 47—*Held*, that no appeal lies against an order of a District Judge sanctioning a mortgage in favour of a particular person in preference to another person. Such an order cannot be treated as an order refusing sanction to mortgage. **Musammat Shiam Kunwar v Shiam Lal 11 O C 29.**

(99—11) Order refusing application for Order absolute under Sec. 89 Of T. P. Act Court- fee.

1020F—S. 89—Refusal to make order absolute—Appeal—Court-fee.

Ad valorem Court-fee on the value of the appeal should be paid on the memorandum of appeal from an order refusing an application for an order absolute under sec. 89 of the Transfer of Property Act. **Charu Chandra Mitter v Bhagirath Persad 12 C W N 1028.**

(99-12) Decision of District Court accepting security as sufficient.

1020G—Practice—Appeal to Her Majesty in Council —Security for costs of respondent accepted by District Court—No appeal from decision of District Court.

Where the High Court admits an appeal to Her Majesty in Council, and directs the District Court to consider the sufficiency of the security tendered by the appellant for the costs of the respondent, no appeal lies to the High Court from the decision of the District Court accepting the security as sufficient. **Ramkuar v Har Narain Singh A W N 1890, 75.**

(99-13) Order made in the course of proceedings under T, P. A, Ss. 86 &87.

1020H-Ss. 86 and 87—Nature of proceedings under section.

Whether suit is to be regarded as pending until decree is made absolute-Appeal-proceedings under S 87 of the Transfer of property Act, are regarded by the Legislature as a continuation of the suit referred to in S 86 of that Act. Therefore a mortgage suit must be held to be pending, at any rate until the decree conditional, referred to in S 86, has been made absolute or until the payment made by that decree has been validly made, as the case may be, where the point in issue is, whether an appeal lies from an order made in the course of such proceedings.

S. 87 of the Transfer of Property Act does not contemplate the framing of a separate decree in the event of payment being made, as ordered in the decree conditional. 2 N L R 178 Fol; 1 N L R

Appeal-*Contd.*

18 Orders—*Contd.*

143; 3 C W N 756 Ref; and 3 N L R 55 not Fol **Ganpati v Daji. 4 N L R 153.**

(100) Other Cases.

1020 I—S. 591, C. P C, 1882 - " Any such order" Meaning of.

"Any such order" in s. 591, C. P. C., (1882) means any order passed by any Court in the exercise of its original or appellate jurisdiction and not simply orders from which no appeal is provided. **Mussammat Jatam v Hira Nand, 156 P R 1883.**

Notes.—Ref: 83 P R 1894.

1020J—C.P.C. O 6,r.17;O.7 r.11: O 6 r.18, s.104 O. 43 r. 1 s. 106 (1882) Ss. 53, 54, 588 and 589,

Held, that an appellate order, confirming an order returning a plaint for amendment, is not open to revision under S.70 of Act XVIII of 1884, as amended by Act XXV of 1899; but its legality can be questioned in appeal from the final order rejecting the plaint. **Malang v Mohammad 15 P W R 1908.**

1020K—Appeal part-heard by District Judge and then transferred to Sub-Court—Sub-Judge continuing and disposing of appeal—Irregular procedure—Remand by High Court.

Where an appeal to the District Court was part-heard by the District Judge and was then transferred to the Court of the Sub-Judge, and the Sub-Judge continued the hearing and reversed the decree of the District Munsif, the High Court on second appeal held that the procedure could not be justified, and remanded the appeal to the District Judge for hearing and disposal according to law. **Kotaiya v Lakshmaiya 9 M L J 297.**

1020L—XVIII of 1884, S. 3—Appeal—Land Suit—Suit for declaration that the plaintiff is the sole owner of an orchard on a partition of the village shamilat—Act. XVII of 1887, Ss. 116 & 158—Question relating to enforcement of entry in wajibularz Question of title or mode of making the partition.

A suit for a declaration that a certain orchard on a portion of the village *shamilat* is planted by the plaintiff alone at his own expense, and that he is in sole possession thereof, without making any claim regarding the land occupied by the orchard or the *shamilat* as a whole, is not a *land suit* within the meaning of S. 3 of the Punjab Courts Act

Appeal-*Contd.*

18 Orders—*Concld.*

1884 and hence no appeal lies of right. **Devi Dial v Ahmad Khan. 4 P R 1908=14 P W R 1908=91 P L R 1908.**

Order directing party in person.

1020 M.—O. 3 r. 1 O. 7. r. 15 O. 10. r 4 (1882 Ss. 36, 60, 120)—Order appealable—S.588—Omission to mention—Order directing party to appear in person.

The Subordinate Judge ordered some of the defendants to appear in person in his Court without mentioning the section under which the order was made. *Held*, that the order was an order under S. 120 C P C. (1882).

Where a Court purporting to act under the Civ. Pro. Code passed an order for the personal appearance of a party, but omits to quote the section under which the order is passed, held, that such an order is open to appeal **Abdul Jalil v Humera Bibi 6 A L J 340= 2 Ind Cas 463.**

Appeal-orders. See Claim to attached property **(1903) 23 W N 206.**

Appeal—orders. See Claim to attached property **8 C P L R 67.**

Appeal—orders. See C P C S 47 **5 A L J 553.**

Appeal—orders. See C P C S 47 **30 Mad 402.**

Appeal orders See C P C S 47 **63 P R 1901.**

Appeal—orders. See C P C S 47 **25 Mad 529.**

Appeal—orders. See Claim to attached property **2 Bom L R 241.**

19. Probate.

(a) Order to suspend Probate.

1021—Succession Act, s. 265-Civil Procedure Code, 1859, s. 363.

Where an application for probate has been granted, and, an objection being made, a subsequent order is passed directing that the case be reopened, that probate be suspended for a certain time and that the executor bring in his evidence to prove his right to obtain probate,—*Held*, that no appeal lies from such an order. Act X of 1865, 263, and Act VIII of 1859, s. 363, discussed. **Brojo Nath Pal v Dasmony Dassee 2 C L R 589.**

Notes—Ref: 17 Cal 48.

(b) Order of District Judge admitting person as caveator

1022.—Order of District Judge admission of person as caveator—Probate and Administra-

Appeal-*Contd.*

19. Probate—*Contd.*

tion Act (V of 1891), S. 86—Civil Procedure Code (1882), S. 588 cl. 2.

S. 86 of the Act V of 1891 makes the Civil Procedure Code applicable to orders passed under that Act. An appeal therefore would lie to the High Court from the order of a District Judge admitting a person as a caveator under s. 69 of the Act: Such an order is appealable under s. 588, cl 2, of the Code. **Abhiram Dass v Gopal Dass. 17 Calc 48.**

Notes.—Fol: 4 C W N 602; 26 Bom 792. Ref: 14 C W N 119; 10 C L J 263.

(c) Order refusing to make person party defendant to an application for probate.

1023.—Order refusing to make a person party to an application for probate.—Probate and Administration Act (V of 1881), Ss. 53 and 86

S. 86 and S. 53 of Act V of 1881 read together only allow an appeal to the High Court in cases where an appeal is allowed by the Code of Civil Procedure. Therefore, an order refusing to make a person a party defendant to an application for probate is not appealable. 13 Cal 100, & 2 All. 904 followed. **Khettramani Dasi v Shyama Churn Kundu. 21 Calc 539.**

Notes—Fol: 27 Cal 5; 6 C W N 912 Reversed; 27 Cal 527 P C; Ref: 10 C L J 263.

(d) Order refusing to amend Probate.

1024.—Order refusing amendment of a probate—Probate and Administration Act (V of 1881), S. 86—Succession Act (X of 1865), S. 263.

An Order refusing to amend a clerical error in a grant of probate either under S. 86 of Act V of 1881 or S. 263 of Act X of 1865 is not appealable. 21 Calc 539, referred to. **Gerindra Kumar Dass Gupta v Rajeswari Roy. 27 Calc 5.**

1025.—Lower Court refusing to grant probate of will to executor, but granting letters of administration without the will annexed to testator's representative—No appeal by executor—*Locus standi* of party interested in will to appeal against grant of letters of administration.

One A. K. propounded a will and applied, as executor, for probate to the District Judge, and the appellant, who was the representative of one of the legatees under the will, the legatee himself being dead, supported the application for probate The application was opposed by the widow of the testator's deceased son, who also applied for letters of administration without the will annexed.

C. C. 68

Appeal-*Contd.*

19. Probate—*Contd.*

The lower Court disposed of both applications, and, after drawing up issues, *inter alia* as to the effect of the will if proved, as to how far it was valid, and as to what property it might or might not affect,-held the will not proved, and granted administration to the said widow. The deceased legatee's representative appealed to the Chief Court,

Held, that it is competent to a person, who is a party to the proceedings in the lower Court and interested in having a will propounded and maintained as a will, to appeal against the grant of letters of administration without the will annexed, even if the executor does not appeal and abandons his application for probate. **Mussammat Bali v Mussammat Hussain Bibi. 55 P R 1894.**

(e) Compromise in appellate stage after revocation of probate, unlawful.

1025A.—Probate proceeding — Proceeding for revocation of probate, if suit—Civil Procedure Code (Act V of 1908), S. 107, sub-section, 2, O. I, r. 10, O 21, rr 1 and 3—Revocation of probate by first Court—Compromise in appellate stage after revocation of probate, unlawful—Petitioner for revocation, if can withdraw entire proceeding pending appeal by the objector—Power of Court in cases not falling within letter of law—Appellate Court's power to add as party respondent person not party to the suit—Party cognisant of probate proceeding, if bound by the result—*Stranger* promoting *litigation*.

A proceeding for revocation of a probate is not a suit within the meaning of Rules 1 and 3 of Order 23 of the Code of Civil Procedure (Act V of 1908).

When probate has actually been revoked by a Court of first instance on the ground that the will propounded is a forgery, the parties are not entitled to bring the matter on appeal, and then by compromise to obtain a reversal of the decision and a revival of the probate without any adjudication on the merits. Such a compromise cannot be regarded as lawful within the meaning of Order 23, Rule 3 of the Code of Civil Procedure.

The action of a Probate Court of competent jurisdiction, when it admits a will to probate or rejects it as not duly attested and executed, is in the nature of a proceeding *in rem*, and, so long as the order remains in force, it is conclusive as to

Appeal-*Contd.*

19. Probate—*Contd.*

the due execution and the validity of the will, not only upon all the parties who may be before the Court, but also upon all other persons whatever, in all proceedings arising out of the will or claims under or connected therewith. There is no difference in principle whether the compromise is attempted for the grant of the probate in the original Court during the pendency of the proceeding there, or whether it is attempted in a Court of appeal during the pendeucy of an appeal against a judgment by which the will has been pronounced to be a forgery. The essence of the matter is that the question in controversy affects not merely the parties before the Court but also others who are bound by the decree, though not represented before the Court.

The effect of S. 107, sub-section (2) of the Code of 1908 is to entitle the appellant to withdraw his appeal, just as the plaintiff might have withdrawn his suit in the Court of first instance.

After a petitioner has instituted proceedings in the Court of first instance, for revocation of a probate on the ground that the will was a forgery and such proceedings have terminated in his favour, it is not competent to him in an appeal preferrrd by the executor or any other party who has appeared in support of the will, to withdraw the entire proceedings and thus compel the Court to revive the grant of probate of a will which has been pronounced by a Court of competent jurisdiction to be a forgery. Order 23, Rule, 1 Sub-Rule (1), is not applicable to cases of this character.

The action of the Court in cases not falling within the strict letter of the law is to be regulated upon sound general principles, one of which is that litigation should be shortened as far as is practicable. The Court is bound to take care that the order which it makes in the exercise of its inherent power, does not unfairly prejudice the position of any of the parties.

As an ordinary rule, a person, who was not a party to the suit in the Court of first instance, ought not to be allowed to intervene at the appellate stage;but the power is vested in the Contrt to add him as a party respondent. Such power should be exercised with caution.

A person who is not a party to proceedings in the probate Court, in which the validity of a will is questioned, is bound by the result, if he was aware of the proceedings and had a right to intervene.

Quaere—Whether the doctrine that the mere circumstance that a stranger has promoted litigation or assisted in a suit, does not make him bound by the judgment, applies to probate proceedings. (4 C W N 600 Ref.) **Saroda Kanto Dass v Gobindo Mohan Das.**
12 C L J 91=6 Ind Cas 912.

(f) Order refusing to stay the issue of probate

1026.—Cl. 15—'Judgment'—Stay of issue of probate—Order refusing.

An order made by a Judge of the High Court refusing to stay the issue of probate and the discharge of the Receiver appointed in a probate action is a 'judgment' within the meaning at Cl. 15 of the Letters Patent and is appealable, 8 B L R 433 commented on and foll; 6 Cal 594 ref. to 24 Mad 358 dissented from. **Mussamat Brij Coomaree v Ramrich Dass. 5 C W N 781.**

Notes.—Ref: 29 Cal 286; 6 C L J 298 F B; 11 C W N 1030 F B; 8 C W N 572; 31 Cal 722 F B, 9 C W N 123; 3 C L J 29; 34 Cal 1037 F B; Dist: 31 Cal 1081; 9 C W N 123; 33 Cal 1323= 10 C W N 986. Fol: 33 Cal 927= 3 C L J 67.

20. Receivers.

(1) Order refusing to remove a receiver.

1027 Civil Procedure Code (Act X of 1877), Ss. 2, 244, 503, 540, 588—Act XXIII of 1861, s. 11.—By a decree in an administration-suit, *A* was appointed receiver "to manage the estate". *A* died, and by a subsequent order B was appointed receiver. One of the defendants in the suit applied to have B removed from the office of receiver on the ground of his alleged mismanagement of the estate. The application was refused. *Held*, that the order of refusal was appealable, whether the former Code or the present Code of Civil Procedure was deemed to be applicable, being an order made in respect of a question arising between the parties to a suit relating to the execution of the decree, **Mithibai v. Limji Nowroji Banaji, 5 Bom 45.**

Appeal-*Contd.*

20. Receivers—*Contd.*

1028—C. P. C. S. 503—Appointment of Receiver—Appeal.

Held, that when a subordinate Court proceeds to make an appointment of a Receiver under s. 503 of Civil Procedure Code, an appeal lies from that order. **Raja Mohammad Sardar Husain Khan v. Nowroji & Co., 1 O C 168.**

1029—Civil Procedure Code, 1882. Sections 503, 588 (24)—Order refusing to direct receiver to pay out moneys—Appeal.—

Held, that the appeal allowed by Section 588 (24), Civil Procedure Code, against an order, under Section 503, appointing or refusing to appoint a receiver does not extend to "directions" given by the Court to such receiver subsequently to his appointment.— **Kapur Chand v. Narinjan Lal, 107 P R 1895.**

1030—C P.C. O. 40, rr.1 to 3 S 104:O. 43, r. 1 (1882 Ss 503, 505, 588)—Receiver, appointment of—Recommendation by Subordinate Judge to District Judge—Refusal by the latter to appoint—Appeal. A Subordinate Judge recommended to the District Judge,the appointment of a Receiver under S 505 of the Code. The latter refused to make any appointment. On appeal to the High Court, *held*, that no appeal lay against the order, which was passed under S 505 of the Code, and respecting which no appeal was provided for by S. 588 of the Code. 7 Cal 719, Fol. **Bai Mani v. Khimchand Gokaldas. 10 Bom L R 1037 =33 Bom 104=1 Ind Cas 657**

Notes:—The new section authorises the Sub-Judge himself to appoint a receiver.

1031—C. P. *C.* O. 40, r. 1, cl. (1) (d) and O. 43, r. 1—Directions to receiver, if appealable.

Where both the parties have agreed to the appointment of a receiver of the properties in dispute, and the Court has, in appointing the receiver, given him certain directions as to the disposal of the income

Held,that an appeal lies from those directions by virtue of O. 43, r. 1 (s) of the Code.

Mohunt Anant Das v. Ram Parkash Das, 14 C W N 183=5 Ind Cas 69.

2) Order submitting person for and confirming nomination as receiver.

032—Civil Procedure Code, Act X of 1877,

Appeal-*Contd.*

20. Receivers—*Contd.*

Sections 503 and 505—Receiver. Appointment of, by Subordinate Court—Appeal—Sanction of District Court to appointment of Receiver.

There is no appeal from an order by a Court Subordinate to a District Court appointing a receiver under Section 505 of the Code of Civil Procedure, subject to the sanction of the District Judge under Section 505 of the *Code*. Nor is there an appeal from the order of the District Judge granting his sanction under the latter section. On a reference made to him under Section 505 by a Subordinate *Court*, the District Judge is not merely bound to approve or disapprove of the person nominated as receiver by the Subordinate *Court*, but has full control over the matter of the appointment to determine whether or not the appointment of a receiver ought under the circumstances to be made. **Birajan Kooer v. Ram Churn Lall Mahata, 7 Cal 719= 9 C L R 203.**

Notes: –Appr: 21 Bom 328; Ref: 10 Mad 179 F B; 24 Bom 38; 31 *Cal* 495; 34 *Cal* 305; 5 *C* L J 270.Fol: 10 Bom L R 1037; 33 Bom 104.

1033—C.P.*C.* Ss. 503, 505 and 588—Order refusing to sanction appointment of receiver,passed by District Judge—Execution of Decree—Appeal.

Held, that the order of the District Judge, refusing to sanction the appointment of a receiver on the nomination of the Subordinate Judge in proceedings in execution of a decree, was passed under s. 505 and not under s. 503, *Civil* Procedure *Code*, and as such was not appealable under s 588, *Civil* Procedure *Code*. **Sankatadin v. Shankar Bakhsh, 1 O. C. 21.**

1033*A*—(1882 S. 505)—Report recommending appointment of a receiver—Order refusing to make the appointment—Appeal.

Where a Subordinate Judge recommended a person to the District Judge for receivership, and the District Judge declined to appoint a receiver and the petition was then dismissed, *held*, no appeal lies against the District Judge's order under S. 505 refusing to authorize the appointment of a receiver 10 Mad 179 (180) (F B) (foot note), Fol **Kayarunnisa Begum v. Sakina Bibi, 20 M L J 78=5 Ind Cas 991.**

Appeal-*Contd.*

20. Receivers—*Contd.*

(3) Order refusing to appoint receiver.

1034—Civil Procedure Code, *1882*, Ss. 503, 588 (*24*).—An order refusing to appoint a receiver under s. 503 of the Code of Civil Procedure is not appealable. **Subramanya v. Appasami, 6 Mad 355.**

Notes:—Over:10 Mad 179 F B.Ref:24 Bom 38

1035—Civil Procedure Code, 1859, s. 92.—

An appeal did not lie against an order refusing to appoint a receiver under Act VIII of 1859, s. 92. **Imbichi Patama,1 M H C 129.**

1036—C.P.C. Ss. 503, 505-Receiver, appointment of—Subordinate Judge—Order refusing to appoint a receiver—Appeal.

A Subordinate Judge, when considering the expediency of the appointment of a receiver, is really acting under S. 503, as limited and explained by S. 505 of the Civil Procedure Code; and an appeal lies against his order refusing to recommend to the District Judge the appointment of a receiver. **Sangappa v. Shivabasawa, 1 Bom L R 502=24 Bom 38.**

1037—Ss. 503, 588 cl. 24.—An order refusing to continue the appointment of a receiver must be taken to be an order under S 503, and is therefore appealable. **Gnyanoba v. Radhabai, 90 P J 127.**

1038—C. P. C. O 40, rr. 1 to 3, S. 104: O. 43, r. 1 Ss. 22, 23 (3) (*1882* S. 503, 505, 588, (24))—Appeal. Refusal by District Judge to appoint receiver upon recommendation from Subordinate Court.—

Where upon a report from a Subordinate Court recommending the appointment of a receiver, a District Judge refuses to make the appointment, his order must be taken as an order under S. 503 and not under S. 505, C.P.C. As such the order is appealable under Cl 24 S. 588, C.P.C.

Khagendra Narain v. Shoshadhar Jha, 8 C W N 608=31 Cal 495.

(4) Order dismissing application for appointment of receiver.

1039—Civil Procedure Code, 1877, S. 503.—An order made by a Subordinate Judge, dismissing an application under S. 503 for the appointment of a receiver in a suit pending before him, or declining to nominate a receiver, is an order under that section and not under S. 505, and is, therefore, appealable under s. 588 of the Civil Procedure Code as amended by Act XII of 1879. **Gossain Dulmir Puri v. Tekait Hetnarain, 6 C L R 467.**

Notes:—Fol: 17 Cal 680; 10 Mad 179 F B. Ref: 24 Bom 38; 31 Cal 495.

1040—Civil Procedure Code, Ss. 503, 505, 588—Order rejecting petition for appointing a receiver—Appealable.

An order rejecting an application for appointing a receiver comes under S. 503 and therefore an appeal can lie on it in accordance with S. 588 Cl. 24 of the Civil Procedure Code. 6 Mad 355 overruled. **Venkatasami v Stridavamma, 10 Mad 179.**

See Anonymous Case, 10 Mad 180, note.

Notes—Fol: 17 Cal 680; Dist: 24 Bom 38; 31 Cal 495.

1041—Order rejecting an application for the appointment of a receiver—Civil Procedure Code (1882) ss. 503, 505, 588 (24) and 589—Bengal, North-Western Provinces and Assam Civil Courts Act (XII of 1887) S. 21.

An order rejecting an application for a receiver under S. 503 of the Code of Civil Procedure (1882) is appealable. The order in appeal is final under s. 588. 6 C L R 467 followed. The appeal from the order of the Subordinate Judge, lies to the High Court under s, 21 of Act XII of 1887 where the value of the suit is above Rs. 5000, and in other cases to the District Judge.

Boidya Nath Adya v Makhan Lal Adya. 17 Calc 680.

Notes:—Dist. 17 Bom 56 ; 32 Cal 734= 9 C W N 690 ; 10 C W N 565 (Ft N)=3 C L J 197. Appl: 10 C W N 564=3 C L J 257 ; 11 C W N 705. Ref: 6 C L J 38; 31 Bom 73 ; 1 C W N 136 ; 22 Bom 315 ; 31 Cal 495 ; 8 Bom L R 885 ; 6 C L J 427.

(5) Order directing discharge of receiver appointed.

1042—C.P.C. S 104, O. 43 r 1 (1882 S.588)—Appeal—Order of discharge of receiver and for rendition of accounts.

Appeal-*Contd.*

20. Receivers—*Contd.*

No appeal lies from an order directing discharge of receiver appointed during the pendency of a suit subsequently compromised and also directing the rendition of accounts in terms of the compromise. **Sant Saran Das v Gulab Das. 1903 A W N 67.**

(6) Direction given by court in passing a receiver's accounts.

1043—*C.* P. C. O. 40, rr 1 to *3* ; S. 104 ; O 43, r. 1 Ss. 92. 23 (3)—(1892 Ss. 503 and 588,—Receiver's accounts, order in passing—Appeal.

The directions which a Court gives in passing a receiver's accounts are not appealable under cl. of S. 588 of the Civ. Pro. Code. **Rani Keshabati Kumari v W O Mac Gregor. 12 C W N 648=35 Cal 568.**

(7) Order that receiver should be appointed.

1044—Not appealable.

An order that a receiver should be appointed which is not an order appointing a receiver is not appealable. **Srimati Mathuria Debi v Shib Dyal Singh Hazari. 3 Ind Cas 430**

(8) Order accepting the correctness of the account rendered by receiver.

1045—Civ. Pro. Code (Act XIV of 1882), ss 503, and 588 (24)—Appeal—Receiver.

Held, that the order of the Court accepting the account stated by the Receiver to have been realized by him and referring the decree-holder to a suit for the decision of his claim against the Receiver was not appealable under s 588 (24) of the Civ Pro. Code. The orders appealable under the section are those specified in paragraphs (a),(b), (c) and (d) of s. 503 only. **Wali Ram v Ishar Chand. 65 P L R 1904=26 P R 1904.**

(9) Receiver's account.

1045A—No appeal lies from directions given by the Court in passing a Receiver's account. (1789-90) 3 Bro C C 41, (1826) 2 Russ 549, Ref. (1789) 1 Ves Jun 85, Ref (1887) 19 L R I R 423; (1892) 21 L R I R 242, Ref 35 Cal 568, Fol. **Mohini Mohan Patra v Ram Narain Patra and Baroda Kanta Sircar, 14 C L J 445**

Appeal-*Contd.*

20. Receivers—*Concld.*

(10) Office of Receiver appointed pending appeal continuing till he is finally discharged.

1045B—Pending appeal—Appeal decided and remanded—Receiver not finally discharged —How far 'functus officio' as soon as appeal is decided :

Where a Receiver is appointed pending an appeal, his office does not come to an end as soon as the appeal is decided, but continues till he is finally discharged. **Grey v Woogra Mohun Thakur. 28 Cal 790**

21. Regulations.

(1) Beng. Reg. XV of 1793.

1046—Order refusing application by mortgagee for return of excess payment under Reg. XV of 1793.

No appeal lies from an order refusing an application by a mortgagor for the return of excess payment alleged to have been made by him in proceedings under Regulation XV of 1793 by which he redeemed his mortgage. **Sreeman Chunder Banerjee v Modhoo Soodun Roy. 24 W R 17**

(2) Beng. Reg. I of 1798.

1047—Order of District Judge–Act XXIII of 1881, s. 38.

No appeal was provided from a summary order made by a District Judge under Regulation I of 1898 ; but such order was open to question in a regular suit. Act XXIII of 1861, s. 38 gave no right of appeal in such cases, but provided merely that the mode of trial and the procedure incidental and ancillary thereto, laid down in the *Civil* Procedure *Code*, should be applied throughout in miscellaneous cases and proceedings. **Hureenath Koondoo v Modhoo Soodun Saha. 19 W R 122.**

Notes:—Ap: 11 Mad 319 ; 24 Mad 95. Ref: 10 Bom 433 ; 1 All 178 F B; 8 *C* W N 160. Fol: *31 C*al 207.

(2 a) Regulation V of 1799.

1047A—Ss.5, 7—Regulation of application to be put in possession of the estate of the deceased —Appeal.

Appeal-*Contd.*

21 Regulations—*Contd.*

During the course of a proceeding under Regulation V of 1799, the appellant applied under Ss. 6 and 7 of the Regulation that the property of the deceased intestate might be handed over to him on the ground that he was the heir. The Court dismissed the application ;

Held, that the order rejecting the application was not appealable. **Bhure Lal Brahman v The Secretary of State for India in Council 10 Ind Cas 414**

(3) Beng. Reg. V of 1812.

1048—S. 26 and V of 1827, s. 3—Order of attachment and manager.

No appeal lay to the High Court from an order passed by a District Judge, issuing a precept to the Collector to hold an estate in attachment, and to appoint a manager under s. 26, Regulation V of 1812, and s. 3, Regulation V of 1827.

The Collector of Furreedpore. 12 B L R F B 366

Gooroo Dass Roy v Collector of Furreedpore. 19 W R 170, and 20 W R 262.

1049—Order of Collector refusing to make distribution among shareholders.

An appeal did not lie to the High Court from the order of a Collector refusing to distribute amongst the shareholders the amount of their shares of the surplus proceeds of a joint undivided estate attached and administered under Regulation V of 1812. **Jogo Moyee Chowdhrain v The Government. 3 W R Mis 17,**

(4) Beng. Reg. VIII of 1819.

1050—S. 6—Order of Civil Court.:

There is no appeal from an order made by the Civil Court under s 6 of Regulation VIII of 1819. **Soorja Kant Acharj Chowdhry. 1 Cal 383; 25 W R 222.**

(5) Beng. Reg. III of 1872

1051—Suit referred to Civil Court in Sonthal Pergunnahs. Order in.

A decision on an issue or in a suit properly referred to a Civil Court in the Sonthal Pergannahs, under s. 5, Regulation III of 1872, was appealable to the High Court under Act VIII of 1859, which was applicable to the Sonthal Pergunnahs. **Tarini Prosad Misser v Mahammad Chowdhry. 6 C L R 555.**

Notes—Fol: 18 Cal 133; Ref 8 C L R 548.

(6) Madras Regulation III of 1802.

1051A—S. 16—*Cl.* 7—Claim for property of an intestate—Order dismissing petition—Appeal.

No appeal lies against an order of a District Judge passed under S 16 *Cl.* (7), of Madras Regulation III of 1802. **Narasayya v The Collector of Anantapur. 24 Mad 95.**

Notes: Rel. 12 M L J 390; Dist: 26 Bom 379. Fol. 28 All 593=3 A L J 435; 439=(1906) W N 150 ; (1904) W N 74 ; 26 All 407 F B ; 27 Mad 428. Ref: 18 M L J 238.

22. Sale in execution of decree.

(1) Order refusing interest in execution of decree.

1052—When a sale in execution was set aside, and the order directing the return of the purchase-money did not also direct the payment of interest thereupon,—*Held*, that there was no appeal from the order of the lower Court refusing to give interest **Bishonath Doss v Ahmed Ali, W R 1864 Mis 19.**

1053—C.P.C.O. 21 rr.66, 70, s. 47 (1882 ss, 287, 244)—Appeal—Proceedings under s, 287—Ministerial not Judicial—No order—Proceedings of a Court under s. 287, C P C and the rules framed thereunder in relation to the proclamation to sale are not 'orders,' and are therefore not applicable as "decrees." **Sivagami Achi v Subramania Aiyar. 14 M L J 57=27 Mad 259 F B**

Notes:—Ref: 18 M L J 568.

(2) Order absolving purchaser from liability for damages on re-sale.

1054 -Civil Procedure Code, 1859, s. 254.

A purchaser at a sale in execution of a decree is liable for damages caused by re-sale consequent on his not making the required deposit. An appeal lay from the order of the lower Courts absolving the purchaser from liability.

Sree Narain Mitter v Mahatab Chand 3 W R 3

Sooruj Buksh Singh v Sree Kishen Doss 6 W R Mis 126

Appeal-*Contd.*

22. Sale in execution of decree—*Contd.*

Notes:—*Ap: 4* M H C R *359*; 5 B H C R 176; Ref: 33 Cal 613=10 C W N 551=*3* C L J 576.

(3) Order making defaulting purchaser liable for difference on re-sale.

1055—An appeal lay from an order holding the first defaulting purchaser liable for the difference arising from re-sale in execution of decree under S. *254*, Act VIII of 1859. **Joobraj Singh v. Gour Buksh Lall, 7 W R 110.**

Notes:—Diss: 2 Bom 562. Ap: 16 *Cal 535*; 1 All 181 F B, 25 *Cal 99*: *21* W R 149.

1056—Order in execution—Defaulting Purchaser—*Civ*, Pro. Code 1859, s. 254—

An appeal lies from an order passed on an application under this section, to make a defaulting purchaser liable for the loss occasioned by a re-sale. **Ramdial v Ram Das. 1 All 181.**

Notes—Dist. 12 All 397; 14 All 201 F B (1892) W N *74*; Ap. 17 M L J 10 F B; Fol. 16 *Cal 535*; Dist. 23 Mad 73; Ref. 18 Mad 439.

(4) Order under S. 254 C P C (1859).

1057—No appeal lay to the Judge from an order passed by a subordinate Court under s. 254, Act VIII of *1859*. **Binda Dabee Dossee v Gopee Soonderee Dossia. 6 W R Mis 82.**

(5) Order refusing refund of price to purchaser.

1058,—No appeal lies from an order refusing a refund of price to a purchaser, the sale to whom has been set aside, under s 315 of the Code of Civil Procedure. (ante p 85), (ante, p 89) and 1 All 181) referred to. 16 Calc 535 dissented from. **Rahim Bakhsh v Dhuri 12 All 397=10 W N 135.**

Notes:—Ap; *14* All 201 F B, Ref; *18* Mad 439

(6) Order on defaulting purchaser to make good such deficiency.

1059.—Appeal.

No appeal lies from an order under s 293 of the Code of Civil Procedure directing purchaser at a sale in execution of a decree to make good the loss happening on a re-sale occasioned by this default. 1 All 181 and *16* Calc 535 dissented from; W. N. 1890 p 85; *12* All 397; S. C. W. N. 1890 p 135 followed.

Deoki Nandan Rai v Tapesri Lal 14 All 201=12 W N 74.

Ilahi Buksh v Baij Nath 13 All 569= 11 W N 156.

Notes:—Con: 25 Cal 99. Ref 18 Mad 439.

1060.—Order under Civil Procedure Code (1882) s 293. Defaulting purchaser to make good the deficiency on resale–Second appeal-Execution of Decree–Sale-Civil Procedure Code 1882 Ss 244. 313—Misdescription of property in proclamation of sale.

Both an appeal and a second appeal lie from an order under s 293 of the Code of Civil Procedure (1882), directing a defaulting purchaser at an execution—sale to make good the deficiency of price happening on a re-sale owing to his own default, 3 W R 3, 6 W R Mis 126, 7 W R 110, 16 Calc 535, 18 Mad 439, followed 14; All 201, referred to and discussed. In this case it was held on appeal, reversing the decision of the lower courts, that under the circumstances the purchaser was not liable for the deficiency. **Kali Kishore Deb Sarkar v Guru Prosad Sukul 25 Cal 99= 2 C W N 408.**

Rajendra Nath Roy v Ram Charan Sinha 2 C W N 411.

Notes:—Ref: 2 C W N 411.

1061.—Civil Pro Code 1882 s 311-sale in execution of Decree—Rejection of an application to take back on file petition for setting aside sale which is dismissed on account of default.

An application under s 311 of Civil Procedure Code was made to set aside a sale in execution. It was dismissed for default. The applicant petitioned the court to take it back on file. The court rejected it and the petitioner appealed against this order. *Held* that the order is non-appealable. 10 Bom 433, followed. **Raja v Srinivasa 11 Mad 319,**

Notes:—Dissl; U B L R 1897–1901, 254; Fol; 27 Cal 414; 29 All 596; 31 207; W N (1907) 186; 10 O. C. 353; Ref 9 C W N 160; 27 Mad 504, 18 C L J 276.

Appeal-*Contd.*

22. Sale in execution of decree—*Contd.*

(7) Order rejecting an application for restoring to the file an application to set aside sale in execution of a decree.

1062.—Order rejecting an application to restoring to the file an application dismissed for default—Application to set aside sale in execution-Civil Procedure Code (1882) Ss 311, 588 (8).—

An order rejecting an application to restore to the file an application to set aside a sale under s 311 of the Code of Civil Procedure, which has been dismissed for default is not appealable.

Suja Uddin v Reazuddin 27 Cal 414.

(8) Order refusing to admit petition to set aside sale.

1063—Civil Procedure Code 1859 s 256.

Under s 256 of Act VIII of 1859, the order of a Civil Court refusing to admit a petition against a sale was final. **Lall Gobindyal v Burzin 2 Hay 111.**

(9) Order affirming rejection of petition for reversal at sale in execution of decree.

1064.—Civil Procedure Code 1859 s 257.—

Under s 257, Act VIII of 1859, no appeal lay from the order of a lower Appellate Court, affirming the order of the lower Court, rejecting a petition for the reversal of a sale in execution on the ground of irregularity. **Raj Narain Koer v Inder Chunder Babu W R 1864 Mis 39. Muddun Mohun Roy Chowdhry v Ram Chunder Goopto 2 W R Mis 41.**

(10) Order setting aside sale for irregularity.

1065.—Under S 257 Act VIII of 1859, the order of a Judge on appeal setting aside a sale of immoveable property on the ground of irregularity was final, unless, under s 35, Act XXIII of 1861, the Judge was shown to have acted without jurisdiction. **Kooldeb Singh v Juggunath Singh 2 W R Mis 19. Bhujun Ram Tewaree v Lalla Ajoodhya Persad 2 W R Mis 29. Muddun Mohun Roy Chowdhry v Ram Chunder Goopto 2 W R Mis 41.**

Appeal-*Contd.*

22. Sale in execution of decree—*Contd.*

Mahomed Hossein v Afzul Ali B L R Sup Vol Ap 1 W R F B 83; Marsh 296. Abdool Kureem v Ooghan Lal 6 W R Mis 119.

1065A.—S 310A—Order refusing to set aside a sale—Appeal, whether lies against—Agreement of discharge, effect of.

An appeal lies against an order refusing to set aside a sale under S 310-A of the Civ Pro Code, 1882, even though the purchaser is not the decree-holder but a stranger.

An agreement between the decree-holder and the judgment-debtor, whereby the former agrees to treat a portion of the decree debt as discharged, in consideration of certain services rendered by the judgment-debtor, is tantamount to a receipt of the amount. 9 M L J 258; 23 Mad 37, Fol. **Lakshminarasimhacharyulu v Lakshmamma 12 Ind Cas 169.**

1066.—Order of Court executng decree setting aside sale for irregularity-Civ. Pro. Code 1859, s 256

When a Court executing a decree passes an order postponing a sale and the sale takes place notwithstanding, in consequence of the order arriving too late, the Court is justified in setting aside the sale, on the ground of irregularity, and its order doing so is not appealable.

Maijah Singh v Jhou Lal 6 N W P 354.

Notes:—Dist: 1 C W N 226.

1067.—Civil Procedure Code 1859 s 257.

Where the lower Court allowed an objection and makes an order setting aside the sale, such order, according to s 257, Act VIII of 1859, was final. **Oodiut Zuman 8 W R 109.**

(11) Order setting aside sale.

1068—Civil Procedure Code, 1877, s 588 (m) -Execution of decree——Application to set aside sale of immoveable property—Auction-purchaser,

Held that, although the auction-purchaser may not apply under s 311 of Act X of 1877 to have a sale set aside, he yet may be a party to the proceedings after an application has been made under that section, and then, if an order is made against him, he can appeal from such order under s 588 (m) of Act X of 1877. **Kanthi Ram v Bankey Lal 2 All 396.**

Appeal-*Contd.*

22 Sale in Execution of decree—*Contd.*

1069.—*C. P. C.* O 21 r 89 (*1882* S 310A)—Appeal—No appeal from an order setting aside a sale under s 310A. *Held*, that no appeal lies from an order under S 310A, C P C setting aside a sale whether the auction-purchaser is the decree-holder or an outsider. 1895 A W N 140 ref to. **Kuber Singh v Shib Lal 1904 A W N 237 = 27 All 263.**

1070.—Order setting aside Execution Sale—Civ Pro 1877, s 311.

Where after a judgment-debtor has applied under this section to have a sale set aside, the auction purchaser is made a party to the proceedings and the sale is set aside, the auction purchaser can appeal against the order setting aside the sale. **Gopal Singh v Dular Kuar 2 All 352.**

1071.—Order setting aside Execution Sale—Civ Pro 1877 s 311.

An application under this section to set aside a sale in execution of decree having been made by the judgment-debtor, the Court executing the decree (Subordinate Judge) disallowed the objection, and passed an order confirming such sale. The judgment-debtor subsequently applied to the Subordinate Judge for a review of judgment. The Subordinate Judge, without recording his reasons for granting such application, and without recording an order granting such application, irregularly proceeded at once to pass an order setting aside such sale, without cancelling the previous order confirming it. The auction-purchaser appealed to the District Judge. That officer, treating the appeal as one from an order granting an application for review of judgment, entertained it, and set aside the Subordinate Judge's second order. *Held* that the District Judge was not justified in entertaining such appeal, such order not being one granting an application for review, but one setting aside a sale, and as such not appealable.

Before a review of judgment is granted an order granting the application for review and the reasons for granting the same should be recorded.

Bhairon Din Singh v. Ram Sahai, 3 All 316.

1072-Order setting aside a sale, Appeal from -Civil Procedure Code, 1882, ss. 312. & 588, cl. 16.

Appeal-*Contd.*

22 Sale in Execution of decree—*Contd.*

An appeal does not lie from an order setting aside a sale passed under s. 312 para 2. of the Civil Procedure Code (Act XIV of 1882).

Sakharam Vithal v Bhiku Dayram 11 Bom.. 603

1073—Civil Procedure Code (Act X of 1877) Sections 312, 588 (*16*), 589—Appeal from order rejecting application to set aside sale—Omission to implead auction-purchaser as respondent-Effect of such omission.—

Where in an appeal from an order passed under Section 312 of the Civil Procedure Code, rejecting an applicatien to set aside an execution sale, it appeared that the judgmest-debtor, the appellant, had not made the auction-purchaser a party to the proceedings, *held*, that the appeal must be dismissed, as the said auction-purchaser was a necessary party in order to enable the Court to effectually adjudicate upon all the questions involved in the application, and as the appellant by his own laches had omitted to serve him with notice under the appeal and as the period for appeal long since expired, there was no valid reason as against the auction-purchaser for extending the prescribed period, and permitting an amendment of the appeal. **Mela Ram v Narain Das (P R 188 of 1882.).**

(12) Order confirming sale.

1074—s. 310 C. P. C.—A share of undivided immoveable property was put up for sale in execusion of a decree, and was knocked down to M. *Before* it is was knocked down to him, the decree holder, who had obtained permission to bid for and purchase such share, and who was a co-sharer of such share, bid the same sum as that for which it was knocked down to M, claiming a right of pre-emption. The Court subsequently confirmed the sale in favor of the decree-holder. *Held*, that N could not appeal. **Munir Khan v Abdul Rahim Khan. 3 All 674.**

Ramautar v Sheodutt.
6 N. W. P. 243.

Tasaduk Ali v Maksud Ali.
6 N. W. P. 272, 1 All 272

Narain Singh v Muhammed Faruk.
1 All 277.

Appeal-*Contd.*

22 Sale in Execution of decree—*Contd.*

1074A-C P C O. 34, rr 4, 5 (T.P.A. Ss 88. 89)-Application for order absolute—Order thereon—Applicability-Civil Procedure Code (XIV of 1882) Ss. 310 A, 311—Applicability of these sections to sales of mortgaged property in execution of mortgage decrees:—

Ss. 310 A and 317 of the Civil Procedure Code apply to sales of mortgaged property in execution of mortgage decrees-(a) Per Sir Arnold White, C J:—It was not intended by the Legislature that the code of rules contemplated by S. 104 should be an exhaustive and self-contained code. It was intended that the special rules should be supplementary to the existing general rules of procedure which were applicable to the subject-matter dealt with in Ch. IV (b) Also S. 310-A is not a procedure section at all, but confers a substantive right, (c) The test to apply is, are the general provisions of S. 310 A consistent, and can they be read together with the special provisions of the enactment which deals with the special subject-matter of the law on the matter; (d) After the order absolute for sale the relationship between the parties is that of judgment creditor and judgment debtors, and their rights are governed by the provisions of the code which relate to parties in that position; (e) S. 291 of the Civil Procedure Code also applies to sales in execution of mortgage decrees. (f)The sale is 'under' the Transfer of Property Act, as well as under Ch XIX of the Civil Procedure Code. Per. *Davies* J:—(a) There can be no doubt that the provisions of the Code of Civil Procedure are applicable to cases tried under Special Acts, if the trials are in a Court of Civil judicature. And if there are not rules in the Special Acts inconsistent with, or substituted for the general rules of the Code of Civil Procedure. (b) When property is sold in execution of a mortgage decree, it is not sold as mortgaged property, but as the absolution property of the *quondam*, mortgagor treated as a judgment debtor It has been restored to his full ownership by operation of law. So there is no reason to treat it differently from any other immoveable property belonging to the judgment-debtor. Per *Bhashyam Ayyangar* J.—(a) The rules contemplated by S. 104 cannot affect the question now under consideration, and indeed so far as the courts subject to the superintendence of the High Court are concerned, no rule could be framed under that section inconsistent with Ss. 310 A and 311 Civil Procedure Code, or any other enactment for the time being in force (b) S.104 does not primarily contemplate the making of rules for the execution of the decrees passed under Ch IV of the Act, such rules being already provided for by Ch XIX of the Civil Procedure Code, supplemented by Ss. 87, 89 93 of the Transfer of Property Act. What the section contemplates is the making of rules for 'carrying out the provisions' in the Chapter; 25 Cal 793 commented on, 22 Mad.230;19 All 205,25 Bom 104 approved.(c) An appeal lies from an order passed upon an application made under S. 89 of the Transfer of Property Act. Per Arnold White, C.J. and Moore, J. Such an order made in a proceeding in execution and is not appealable as such. It however, has the effect of a final decree, and an appeal lies from it, under S. 54 of the Code of Civil Procedure. So, there is no limitaion as to the time within which an application for an order absolute under S. 89 can be made. Per Davies, *B*enson, Bhashyam Ayyangar, J J —An application made under S. 89 of the Transfer of Property Act is in effect an application for execution of the decree passed under S. 88 and an order made thereon is appealable under S. 244 of the Code, there can be only one decree in a suit. Forms and much less the heading of forms, cannot control the construction of an Act 21 Cal 818 and 22 Cal 931 discussed.—**Malli-karjunadu Setti v Lingamurti Pantura 12 M L J 279=25 Mad. 244**

13 Order Confirming sale before time for filing objections has expired

1075—In execution of a decree against B (a minor) his property was put up to sale, and sold on the 20th September, 1885. Objections under s.311 were filed on behalf of the minor through his mother as guardian but the application was rejected on the ground that she did not legally represent the minor. The order was made on 11th January, 1886. On the 12th January, 1886, objections were filed on behalf of the minor by one B. On the 2nd of August 1886, this application was also rejected on the ground that the sale having been confirmed on the 11th January 1086, the Court was precluded from entertaining the application. *Held* that an appeal lay to the High Court under s. 312 Code of Civil Procedure.

Baldeo Singh v Kishen Lal 9 All 411=7 W N 58

Appeal-*Contd*

22 Sale in Execution of decree—*Contd.*

(14) Order disallowing objections to sale.

1076.—Appeal.

Per Petheram, C. J., and Oldfield, Brodhurst, and Duthoit, JJ., an order passed under the first clause of s. 312 of the Code of Civil Procedure after an objection made under the provisions of s. 311 has been disallowed, is appealable under Art. (16) of s. 588.

Per Mahmood, J., an application made under s. 311 can be disposed of only under s. 312, and if the Court rejects the objection to the sale, the order must be regarded as an order "refusing to set aside a sale of immoveable property" under the first paragraph of s. 312 and therefore appealable as falling under the purview of Art. (16) of s.588. (W N 1882 p. 117) (W N 1883, p. 178) dissented from. **Mahmood J. Totaram v Baldeo Prasad** **7 All 253=5 W N 17.**

Notes:—Ref: 10 All 506

1076A.—Appeal—Sale in execution—Objection by judgment-debtor—Disallowance.

No appeal lies from an order disallowing the judgment-debtor's objection to the validity of the sale in execution of the decree against him. (A W N 1882, 117, Fol) **Rajan Kuar v. Lalta Prasad.** **A W N 1883, 178.**

Notes:—Diss: 7 All 253, F.B.

1076B—Notification of sale—Objections by judgment-debtor—Order disallowing objection—Ministerial Act—Appeal—C P C 1882, s. 244.

Prior to the sale in execution of a hypothecation decree against an eight annas share of immoveable property belonging to two persons, one of the judgment-debtors made an application to the execution Court, stating that the decree-holder was seeking to put up for sale an eight-annas share which was exempted from attachment and sale by the decree. The decree-holder contended that he was not attempting to sell the eight-annas share mentioned in the application, but another eight-annas share, four-annas of which belonged to one judgment-debtor (the applicant) and the other four-annas to the other judgment-debtor, and that this eight-annas share was liable to be sold in execution of the decree. The Court passed an order saying that the objection be disallowed, and that a copy of this rubkari be sent to the officer conducting the sale in order that it be notified at the time of the sale that the eight annas exempted right is not being sold. The judgment-debtor appealed from this order. *Held* that, that was a purely ministerial order and did not fall within the purview of s. 244, Civ Pro. Code, that it simply amounted to a direction to the officer conducting the sale as to what should be done in connection with that sale and that no appeal lay from the order.

Sitla Kunwar v Markande.
A W N 1887, 134.

(15) Order refusing to set aside sale.

1077—Order—Refusal to set aside sale—Civil Procedure Code (1882) ss. 294, 312 and 313—An order refusing to set a side a sale, unless it is made under s. 294, 312 or 313 of the Code, is not appealable to the High Court. **Durga Sundari Devi v Govinda Chandra Addy.**
10 Calc 368.

1078—Decree—Execution—Application by another decree-holder under S 295 for rateable distribution—Execution proceedings transferred to the Collector-sale of property by Collector-judgment-debtor applying to set aside the sale-Deposit in Court of purchase-money-Refusal to set aside the sale——Appeal——Confirmed sale can be set aside—Collector's power to set aside the sale.

C, a decree-holder, in execution of his decree attached certain properties belonging to his judgment-debtor. H, another decree-holder against the same judgment-debtor, applied to execute his decree and prayed for rateable distribution under S. 295 of the Civil Procedure Code, 1882. The execution proceedings were transferred to the Collector under S 320 of the Civil Procedure Code. The properties were sold by the Collector in execution of C's decree. Within thirty days of the sale, the judgment-debtor, applied under S. 310-A of the Civil Procedure Code to set aside the sale, and deposited in Court five per cent of the purchase money as well as the decretal amount specified in the proclamation of sale. The Subordinate Judge declined to set aside the sale, inasmuch as the judgment-debtor had not deposited also the amount due under H's decree. The judgment-debtor appealed, but the District Judge dismissed

Appeal-*Contd.*

22 Sale in Execution of decree—*Contd.*

the appeal on the ground that no appeal lay.

On appeal to the High Court, it was contended, (1) that no appeal lay; (2) that inasmuch as the execution proceedings had been referred to the Collector, S. 310-A of the Civil Procedure Code, had no application; (3) and that the judgment-debtor could not apply under S. 310-A because the sale had already been confirmed by the Collector.

Held, (1) that an appeal would lie from an order under S. 310-A of the Civil Procedure Code where the case fell under S. 244 (c) of the Code;

(2) that the Code of Civil Procedure conferred no power on the Collector to set aside a sale under S. 310-A, nor was there any rule vesting that power in the Collector. The power to act under S. 310-A continued in the Court notwithstanding the transfer of execution to the Collector;

(3) that there was nothing in S. 310-A which precluded the Court from setting aside the sale merely because it had been confirmed.

(4) that it was erroneous on the part of the Subordinate Judge to hold that it was incumbent upon the judgment-debtor to deposit in Court anything except that for which S, 310-A has made provision.

Pita Moti v Chunilal. 9 Bom L R 15.

1079—C P Ss. 47, 104, cl. (i) O. XXI, rr. 89, 92 O. XLIII, r. (1) (i)—Second appeal—Auction Sale.

A deposit by the judgment-debtor to set aside a sale can only be made under s. 89 of O. XXI. It does not come under s. 47 of the Code.

An order refusing to receive it and to set aside the sale, or an order setting aside the sale, is made under R. 92 of O. XXI, and an appeal lies to the District Judge under O. XLIII, R. 1 (i), and no second appeal lies to the High Court.

Sita Nath Roy v Hare Krishna Sahu. 6 Ind Cas 573.

1080—Notification 1225 of 1866—Refusal of Commissioner to sanction sale—Appeal from order—Power of superintendence of Chief Court—

Appeal-*Contd.*

22 Sale in Execution of decree—*Contd.*

An appeal does not lie (Lindsay, J dissenting) from an order of the Commissioner refusing his sanction to a sale of immoveable property in execution of a decree; Sec 11 of Act XXIII of 1861 does not apply to such an order,

Per Boulnois, J—The Chief Court, under Sec. 44 of Act IV of 1866, has superintendence over subordinate Courts; but its powers are limited to (1) directing the exercise of the power or jurisdiction disclaimed by a subordinate Court, and (2) setting aside an order made without jurisdiction; the Chief Court cannot interfere on the ground that an order made by a Court having jurisdiction is erroneous.

Karam Chand v Karam Din. P R 122 of 1876.

1081—C P C Ss, 144 *(1)*;1882 Ss.115,(583.622) Restitution—Appeal—Order refusing restoration of property sold—Property sold and proceeds rateably distributed—Amount paid in rateable distribution held in appeal to be in excess of amount due— Petition to restore property sold—

The District Judge ordered rateable distribution of the proceeds of an execution sale between petitioners and counter-petitioners and distribution took place. The High Court found on appeal that the counter-petitioners were entitled to a less amount than they received. The counter-petitioners themselves were purchasers of certain items and the sale proceeds of those items were in excess of the sum found due to them. Petitioners applied for cancellation of the sale of these items purchased by counter-petitioners in restitution. The District Judge held that the sale was valid and that petitioners were entitled only to the excess amount. *Held*, the order of the District Judge was not a decree, nor was there an appeal in any sense from his order. Nor could the High Court interfere in revision under s. 622 with the District Judge's order though illegal, there being no want of jurisdiction or material irregularity in its exercise. *25* Bom 337 ref to 11 I A 237 and 11 Mad 220; 16 I A 104 ref to *Semble*—That the sale being for a sum in excess of the sum due is illegal. There can be no doubt that the sale was illegal in so far as it was unnecessary. The court in making restitution is bound to restore the parties so far as they can be restored to the same position they were in at the time when the Cou by its

Appeal-*Contd.*

22 Sale in Execution of decree—*Contd.*

erroneous action had displaced them from it. 10 All 166 referred to. **Parasurama Aiyar v Seshaier. 27 Mad 504**

(16) Order refusing Permission to bid.

1082—Order refusing permission to bid—Civil Procedure Code (1882) s. 294—An order under s.294 refusing permission to a decree-holder to bid at a sale in execution of his own decree is not appealable. **Jodoonath Mumdul v Brojo Mohun Ghose. 13 Calc 174.**

1083—Appeal—

Held that an order allowing a decree-holder to bid at a sale held in execution of his decree was not appealable. The order under s. 294 of the Code of Civil Procedure which is made appealable by s. 588 (16) is the order setting aside the sale. **Bachni Kuar v Charu Chander. 3 W N 104.**

Appeal—Objections by respondent.
See Withdrawal of suit. **19 W N 26**

(17) Order refusing to set aside dismissal of application to set aside sale.

1084—Sections 588 (8) and 647 of the Civil Procedure Code do not give a right of appeal against an order under sec. 103 in a proceeding, under sec. 311 sec 647 is not intended to confer any rights of appeal not expressly given elsewhere by the Code. **Ningappa v Gangawa P J (1885) 220=10 Bom 433.**

Notes.—Fol. 27 Cal 414; 11 Mad 319; 31 Cal 207; 29 All 596; Ref. 9 All 36; 8 C W N 160; W N (1907) 186.

1085—C P C. S. 310A–Order dismissing application to set aside sale—Appeal.

An application under S. 310-A C P C (1882) to set aside a sale raises a question relating to the satisfaction of the decree within the meaning of S. 244, and an order dismissing such an application is appealable. **Nallamuthu Pillay v. Subba Pilli 8 Ind Cas 855=9 M L T 165.**

(18) Order refusing to amend certificate of sale.

1086—Appeal—Purchase by decree-holder—Application for amendment of sale certificate.

A decree-holder applying for execution of his decree asked for a 2 annas 8 pies share belonging to his judgment-debtor to be put up to sale. This share was advertised for sale, and ultimately the decree-holder him-self bought at the sale; but a sale certificate was granted to him in respect of a 2 annas 8 pies share only. The decree-holder applied for amendment of the sale-certificate, which was refused him. He then appealed against the order of the Court refusing to amend. *Held*, that no appeal lay from such order either under S 588 or by virtue of S. 244 of the Code of Civil Procedure (26 Cal 529 and 18 All 36 Ref.)

Saddo Kunwar v. Bansi Dhar (1901) A W N 156=23 All 476

(19) Order adjourning a sale in execution of decree.

1087—An order under s. 291 of the Code of of Civil Procedure adjorning a sale in execution of a decree is not appealable either as a "decree" within the meaning of ss. 2 and 244 of the Code, or otherwise. **Rahiman v. Muhammed Husain 8 W N 71**

(20) Decision as to the value of incumbrances entered in the sale proclamation.

1088–1089—Appeal.

This appeal relates to a question arising under s. 287 of the Code of Civil Procedure. In course of execution of respondent's decree against the appellants, it became necessary for the Court to ascertain the incumbrances to which the property of the judgment-debtor ordered to be sold was liable. The Court held those to amount to Rs. 4, 600 and entered that in the sale proclamation. The judgment-debtor appealed to the Judge on this question. *Held* that the appeal was maintainable. **Mohan Lal v. Ibn Hasan 6 W N 167.**

(21) Order allowing the Collector to proceed with the sale

1090–1091—s 284 C P C—Ex-parte order for sale—Res Judicata.

Held that an ex-parte order for sale of mortgaged property in execution of a simple money decree held by the mortgagees against the mortgagor, no suit for sale upon the mortgage having been brought, could not be taken as barring an appeal by the judgment-debtor from an order of the Court which passed the decree ordering the

Appeal-*Contd.*

22 Sale in Execution of decree—*Concld*

Collector (who had allowed the judgment-debtor's objection to execution) to proceed with the sale.

Hyder Sher Khan v. Har Kishen **14 W N 16.**

(22) Order accepting the value set aside by the decree-holder.

1093—1094—Civ Pro Code 1908 ss. 2,47 O. XXI r 66 (2) (e)—Appeal—Under statement in valuation according to decree-holder's statement —Sale proclamation—Order when decree.

An order by which the value of the property directed to be sold under the decree has been assessed at a certain figure according to the statement of the decree-holder, after rejecting the application of the judgment-debtor for time to prove higher value is not appealable. (27 Mad 259 F B *Appr*). Whether an order is a decree within the meaning of s. 2 of Code of Civil Procedure, depends upon its nature and contents. An order to be a decree must conclusively determine the rights of the parties. **Deoki Nanden Singh v. Bansi Singh** **14 C L J 35.**

(23) OBJECTIONS BY RESPONDENT.

(1) Objection meaning of.

1095—Civil Procedure Code, 1859 s. 348; 1877 1882, s. 561.

The word objection used in s. 348 of Act VIII of 1859 was not limited to written objections simply, but comprehended also verbal objection.

Ramnarain Bhuttacharjee v. Moheschunder Roy **2 Hay 79**

1096—C P C O 41 r 22 (1882 S. 561)—Objections allowed to be urged.

The objections allowed to be urged under S. 561 of the Code of Civil Procedure are limited to the person who has appealed against him and the respondent's right are not enlarged by the new addition to the list of such persons or other persons who should not have been put on the list at all. (S D B N W P. (1863) Vol. 11 360) referred to. (7 Mad 215) distinguished. **Kallu v. Manni** **23 All 93=20 W N 212.**

Notes.—Dist: 28 All 95 =2 A L J 667=(1905) W N 200.

1097—C P C O 41 s.23 (1882 S. 561)-Procedure

Appeal-*Contd.*

23 Objections by Respondent—*Contd*

by way of objections not open to a party who has in fact appealed.

Held, that objections under S. 561 C P C can only be filed by a party who might have appealed from decree of the Court below, but has not done so. It is not open to a party who has appealed and whose appeal has been dismissed, subsequently to such dismissal, to prefer objections under S. 561 to the decree of the Court below. **Ramji Das v. Ajudhia Prasad.** **1903 A W N 160.**

(2) Applicability of S. 348

1098—Special appeal.

S. 348, Act VIII of 1859, was as applicable to special as to regular appeals. **Narayan Ayyar v. Lakshun Ammal** **3 M H C 216**

Notes—Ref 3 M H C R 289.

(3) Time for objection

1099—Objections under s. 348, Act VIII of 1859, might be urged at any time in the course of hearing of an appeal. **Thakur Dass Goshamee v. Gopee Kisto Goshamee** **15 W R 18**

1100.—Hearing of appeal.

It was too late to take an objection under section 348, Act VIII of 1859, when the Appellate Court has given its decision.

Abdul Gunnee v Gour Monee Debia. **9 W R, 375.**

1101.—Objections not urged at hearing-Subsequent application for hearing same—Act X of 1877.

When this appeal was filed,, the respondents, under s. 561. Act X of 1877, filed an objection to the decree of the lower Court on the ground that it improperly ordered them to pay their own costs. At the hearing of the appeal which was dismissed on the 23rd January, 1882, the respondents did not urge their objection. On the 26th January, 1882, they asked the Court to make an order allowing their objection. *Held* that it was too late. **Asghar Ali v Riayat Husain.** **2 W N 29.**

(4) Time for filing objection.

1102—Application to file cross-appeal, requisites of.

Appeal-*Contd.*

23 Objections by Respondent—*Contd*

An application to file a cross-appeal orally was rejected, firstly, because a written memorandum of its grounds had not been filed previously; secondly, because the objection, when taken, was not filed on the regulated stamp; and lastly, because the ground now urged had not been advanced as an objection in a regular appeal previously filed. **Hoolas Kooeree v Sufeehun Sufeehun v Mahomed Hubbebeoollah Khan. 8 W R 379.**

Notes:—Ref : 4 Cal 72.

1103.—C P C O. 41 r 22 (1882 S 561—

Cross-objections, right of respondent to file, within one month from service of summons and hearing of appeal. *Held*, that the object of S 561 Civil Procedure Code, is to allow a respondent to an appeal one month between the service of sommons on the respondent and the date of hearing the appeal. *Held*, further, that the defendant having by his appeal brought the whole case before the Court, it could be dealt with as if he had put forward objections under S. 561, Civil Pro. Code, and they had been dismissed by the lower Appellate Court. **Kidar Nath v Hira Lal 5 O C 235**

1104.—Practice.—

A respondent might under s. 348 file a notice with the Register, specifying therein the objections which he intends to take on the hearing of the appeal. **Madhobee Doss B L R Sup Vol. 587 : 6 W R Mis 102.**

1105.—Limitation—Act X of 1877.

The notice of objections referred to in s. 561 of the Code of Civil Procedure must be filed not less than seven days before the date fixed for the hearing in the summonses issued to the parties.

Deo Kishen v Maheshur Shai. 4 All, 248=2 W N 82.

Dhani Ram v Punnia. 3 W N 229.

Dori Lal v Narain Das. 6 All 164, 3 W N 237.

Notes :—Not Fol: 11 Bom 698.

1106.—Right of respondent to support decree upon ground decided against him in lower Court——Written notice of objection, when necessary.—

Section 561 of the Code of Civil Procedure draws a clear distinction between a respondent supporting a decree upon grounds decided against him in the Court below, and his taking an objection to the decree, which he might have taken by way of appeal. In the former case the respondent may support the decree in the manner indicated at the hearing although he may not have filed any written notice of his intention to do so. But where the respondent means to object to the decree itself, in that case the section requires that a notice of such an objection in the form of a memorandum, complying with the provisions of Section 561 shall be filed not less than seven days before the date fixed for the hearing of the appeal. (59 P R 1886) cited. **Gauri Mal v Nidha Lal. 127 P R 1888.**

1107.—Notice of objection-Respondent raising plea of res judicata decided against him in lower Court.—

A preliminary question having been raised for the defendant-respondents at the hearing of an appeal, that the plaintiff's suit was barred as a *res judicata*, which objection had been overruled in the Court below, it was objected on behalf of the appellants that no notice of objection had been given under Section 561. Civil Procedure Code.

Held, that no notice was necessary, as the defendants were not objecting to the decree which was in their favour, but desired to support the decree on a ground decided against them in the Court below. **Dharam Singh v Attar Singh P R 59 of 1886.**

1108.—A cross-appeal—Notice of objection.

A notice of objection under Section 561 of the Civil Procedure Code (1882) must be filed not less than 7 days before the day (if any) fixed for hearing the appeal in the notice served upon the respondent. Section 5 of the Act XV of 1877 has no applicability to an objection under Sec 561 of the Code, **Kally Prosunno Biswas v Mungala Dassee 9 Cal 631.**

Notes—Not Fol 11 Bom 698.

Appeal-*Contd.*

22 Sale in Execution of decree—*Concld*

Collector (who had allowed the judgment-debtor's objection to execution) to proceed with the sale.

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An order by which the value of the property directed to be sold under the decree has been assessed at a certain figure according to the statement of the decree-holder, after rejecting the application of the judgment-debtor for time to prove higher value is not appealable. (27 Mad 259 F B *Appr*). Whether an order is a decree within the meaning of s. 2 of Code of Civil Procedure, depends upon its nature and contents. An order to be a decree must conclusively determine the rights of the parties. **Deoki Nanden Singh v. Bansi Singh** **14 C L J 35.**

(23) OBJECTIONS BY RESPONDENT.

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1096—C P C O 41 r 22 (1882 S. 561)—Objections allowed to be urged.

The objections allowed to be urged under S. 561 of the Code of Civil Procedure are limited to the person who has appealed against him and the respondent's right are not enlarged by the new addition to the list of such persons or other persons who should not have been put on the list at all. (S D B N W P. (1863) Vol. 11 360) referred to. (7 Mad 215) distinguished. **Kallu v. Manni** **23 All 93=20 W N 212.**

Notes.—Dist: 28 All 95 =2 A L J 667=(1905) W N 200.

1097—C P C O 41 s.23 (1882 S. 561)-Procedure

Appeal-*Contd.*

23 Objections by Respondent—*Contd*

by way of objections not open to a party who has in fact appealed.

Held, that objections under S. 561 C P C can only be filed by a party who might have appealed from decree of the Court below, but has not done so. It is not open to a party who has appealed and whose appeal has been dismissed, subsequently to such dismissal, to prefer objections under S. 561 to the decree of the Court below. **Ramji Das v. Ajudhia Prasad.** **1903 A W N 160.**

(2) Applicability of S. 348

1098—Special appeal.

S. 348, Act VIII of 1859, was as applicable to special as to regular appeals. **Narayan Ayyar v. Lakshun Ammal** **3 M H C 216**

Notes—Ref 3 M H C R 289.

(3) Time for objection

1099—Objections under s. 348. Act VIII of 1859, might be urged at any time in the course of hearing of an appeal. **Thakur Dass Goshamee v. Gopee Kisto Goshamee** **15 W R 18**

1100.—Hearing of appeal.

It was too late to take an objection under section 348, Act VIII of 1859, when the Appellate Court has given its decision.

Abdul Gunnee v Gour Monee Debia.
9 W R. 375.

1101.—Objections not urged at hearing-Subsequent application for hearing same—Act X of 1877.

When this appeal was filed,, the respondents, under s. 561. Act X of 1877, filed an objection to the decree of the lower Court on the ground that it improperly ordered them to pay their own costs. At the hearing of the appeal which was dismissed on the 23rd January, 1882, the respondents did not urge their objection. On the 26th January, 1882, they asked the Court to make an order allowing their objection. *Held* that it was too late. **Asghar Ali v Riayat Husain.**
2 W N 29.

(4) Time for filing objection.

1102—Application to file cross-appeal, requisites of.

Appeal-*Contd.*

23 Objections by Respondent—*Contd*

An application to file a cross appeal orally was rejected, firstly, because a written memorandum of its grounds had not been filed previously; secondly, because the objection, when taken, was not filed on the regulated stamp; and lastly, because the ground now urged had not been advanced as an objection in a regular appeal previously filed. **Hoolas Kooeree v Sufeehun Sufeehun v Mahomed Hubbebo-ollah Khan. 8 W R 379.**

Notes:—Ref : 4 Cal 72.

1103.—C P C O. 41 r 22 (1882 S 561—

Cross-objections, right of respondent to file, within one month from service of summons and hearing of appeal. *Held*, that the object of S 561 Civil Procedure Code, is to allow a respondent to an appeal one month between the service of sommons on the respondent and the date of hearing the appeal. *Held*, further, that the defendant having by his appeal brought the whole case before the Court, it could be dealt with as if he had put forward objections under S. 561, Civil Pro. Code, and they had been dismissed by the lower Appellate Court. **Kidar Nath v Hira Lal 5 O C 235**

1104.—Practice.—

A respondent might under s. 348 file a notice with the Register, specifying therein the objections which he intends to take on the hearing of the appeal. **Madhobee Doss B L R Sup Vol. 587 : 6 W R Mis 102.**

1105.—Limitation—Act X of 1877.

The notice of objections referred to in s. 561 of the Code of Civil Procedure must be filed not less than seven days before the date fixed for the hearing in the summonses issued to the parties.

Deo Kishen v Maheshur Shai. 4 All, 248=2 W N 82.

Dhani Ram v Punnia. 3 W N 229.

Dori Lal v Narain Das. 6 All 164. 3 W N 237.

Notes :—Not Fol: 11 Bom 698.

1106.—Right of respondent to support

Appeal-*Contd.*

23 Objections by Respondent—*Contd*

decree upon ground decided against him in lower Court——Written notice of objection, when necessary.—

Section 561 of the Code of Civil Procedure draws a clear distinction between a respondent supporting a decree upon grounds decided against him in the Court below, and his taking an objection to the decree, which he might have taken by way of appeal. In the former case the respondent may support the decree in the manner indicated at the hearing although he may not have filed any written notice of his intention to do so. But where the respondent means to object to the decree itself, in that case the section requires that a notice of such an objection in the form of a memorandum, complying with the provisions of Section 561 shall be filed not less than seven days before the date fixed for the hearing of the appeal. (59 P R 1886) cited. **Gauri Mal v Nidha Lal. 127 P R 1888.**

1107.—Notice of objection-Respondent raising plea of res judicata decided against him in lower Court.—

A preliminary question having been raised for the defendant-respondents at the hearing of an appeal, that the plaintiff's suit was barred as a *res judicata*, which objection had been overruled in the Court below, it was objected on behalf of the appellants that no notice of objection had been given under Section 561, Civil Procedure Code.

Held, that no notice was necessary, as the defendants were not objecting to the decree which was in their favour, but desired to support the decree on a ground decided against them in the Court below. **Dharam Singh v Attar Singh P R 59 of 1886.**

1108.—A cross-appeal—Notice of objection.

A notice of objection under Section 561 of the Civil Procedure Code (1882) must be filed not less than 7 days before the day (if any) fixed for hearing the appeal in the notice served upon the respondent. Section 5 of the Act XV of 1877 has no applicability to an objection under Sec 561 of the Code, **Kally Prosunno Biswas v Mungala Dassee 9 Cal 631.**

Notes—Not Fol 11 Bom 698.

Appeal-*Contd.*

23 Objections by Respondent—*Contd*

1109.—Objections to a decree under Section 561 of the Civil Procedure Code (XIV of 1882) need not necessarily be filed seven days before the day originally fixed for hearing the appeal. When the hearing is postponed, it is sufficient if the objections are filed seven days before the day fixed for the postponed hearing, the object of Section 561 being merely to give the appellant timely intimation of proposed objection.

Rangildas Narbheram v Bai Girji. P J (1884) 171=8 Bom 559.

Notes:—Fol: 11 Bom 698 : Ref : 14 Cal 610 ; Dist : 7 C P L R 85.

1110.—An appeal having been held on the 10th April 1879 and the date for hearing fixed for May 1879, a memorandum of objections under s. 561 of the Civil Procedure Code was filed by the respondent on the 18th September 1879, before the actual hearing, which took place in July 1880. *Held*, that the memorandum of objections, under sec. 561 of the Code of Civil Procedure as amended by sec. 86 of Act XII of 1879, ought to have been filed not less than seven days before the date fixed for hearing, and was therefore inadmissible. **Ram Gobind Jugodeb v Deno Bundhu Sri Nundun Mohapattee 9 C L R 281.**

1111—Civil Procedure Code (1882). s. 561-Practice—Objections to decree—Time for filing Date of hearing—

Quere-Whether under S. 561 of the Code, objections to the decree by the respondents must necessarily be filed seven days before the date originally fixed for hearing appeal or whether it is not sufficient if they are filed seven days before the day on which the appeal is actually heard, and whether the decision in 8 Bom. 599, to that effect is not correct, and the decisions of the Calcutta High Court to the contrary are not erroneous. **TulsiPershad v. Raja Misser, 14 Cal 610.**

1112—The expression "the day fixed for hearing" in Sec. 561 of the Civil Procedure Code means the day on which the hearing begins,including both the days fixed in the notice under Sec. 552 and the day to which the hearing may be adjourned. **Dinkar Parsharam Ranade v Vinayak Moreshwar. P J (1836) 100= 11 Bom. 698.**

Appeal-*Contd.*

23 Objections by Respondent—*Contd*

1113—Civil Procednre Code 1882, s. 561—Civil Procedure Code, Amedment Act (Act VII of 1888), s. 48—Time allowed for memorandum of objections,

An appeal cannot definitely be posted until the Court has ascertained that notice of the appeal has been served on the respondent, and a date must then be fixed not less than one month from the date of service, as the respondent is entitled, by s. 561 of the Code,to that period within which he may file any objection he may have. **Sundaram v. Annangar. 13 Mad 492.**

1114—Civil Procedure Code, 1882, s. 561—Time for filing objections—Delay in filing them—Practice.

Where a respondent, in order to save the costs of copying the judgment of the Court below, the decree, and other documents in the case, delayed sending instructions to counsel to draw objections to the decree until the paper books had been received from the appellant, at which date the period allowed for filing objections had expired, the Court refused to extend the time or permit the objections to be filed. **Sulleman Ebrahimji v. Joosub Jan Mahomed. 14 Bom 111.**

1115—C P C O. 41. r. 22 (1882 S. 561)—Limitation—Objections filed after time—Discretion of Court It being within the discretion of a court of appeal to extend the time for filing objections under S. 561 of the Code of Civil Procedure, it was held not to be a good objection to the decree of the lower appellate court that the court had knowingly entertained objections which were filed by the respondent after the prescribed time. It was to be presumed that the court had properly exercised its discretion in the matter. **Hardeo Prasad v. Ali Hasan. 1902 A W N 74**

1116—C P C O. 41, r. 22 (1882 S. 561)-Memo of objections between co-respondents—Delay in filing—Excusing of, Per Around White C. J. Semble. S, 571 C. P. C. only applies where a party has a right of appeal, but who until forced or invited into court does not think fit to exercise it. Per *Subrahmanya Aiyar*. J.—A memorandum of objections may be filed under S.561, C P C by one respondent against another although the question arises between the co-respondents only. It would be a legitimate ground to excuse delay in the presentation of a memo of objections if the admission of the same is required to do complete justice. **Kulaikada Pillai v Visvanatha Pillai. 15 M L J 212=28 Mad 229.**

Appeal-*Contd.*

23 Objections by respondent—*Contd.*

(5) Hearing of appeal.

1117—Calling on of case.—

The mere calling on of a case to be heard does not mean the same thing as the hearing of the case in the sense of s. 348, Act VIII of 1859.

Ram Pershad Ojha v Bhurosa Koonwar. 9 W R 328.

Notes:—Fol:23 W R 229. Ref: 17 All 518.

(5-a) Hearing of cross objections.

1117A—Appeal—Cross—objection—Civ. Pro Code (Act XIV of 1882), S. 561.

Although an appeal fails on the ground of appellant's having no right of appeal, the respondent is still entitled to have his cross-objections heard and determined on the merits. 100 P R 1889, Dist. 8 Bom 365, Fol **Nanak Bakhsh v Wazir Singh. 4 Ind Cas 625—67 P W R 1909.**

1117B.—Dismissal of appeal on preliminary ground—Cross objection—Act X of 1877, s. 561.

Where the defendant's appeal was dismissed as barred by limitation, sufficient cause not being shown for its not being filed within the 90 days prescribed by law, *held*, that a cross objection filed by the plaintiff (a portion of whose claim only had been decreed by the Lower Court) could not be entertained, as her preliminary objection to the hearing of the appeal having prevailed, the appeal had not been " heard " within the meaning of s. 561 of Act X of 1877.

The Secretary of State v Nonis. P R 38 of 1880

(6) Withdrawal of appeal.

1118—If the case is withdrawn, objections under s. 348 cannot be heard. **Ram Pershad Ojha v Bhurosa Koonwar. 9 W R 328**
Puresh Narain Roy v Watson. 23 W R 229

Notes:—Fol. 23 W R 229. Ref: 17 All 518.

1119.—Where, in the course of the hearing of an appeal, the appellant desired to withdraw, in order to avoid the decision of a question raised by the respondent at the hearing.—*Held* that, under s. 348 of the Civil Procedure Code, the respondent was entitled to have the case heard and determined. **Venkataramanaiya v Kuppi 3 M H C 302**

Appeal-*Contd.*

23 Objections by respondent—*Contd.*

Notes.—Ap: 9 Bom 28. Dist: 23 W R 229; 10 All 587; 23 All 130, Ref: 3 M H C R 368; 24 P L R 1906.

1120.—Delay caused by converting cross-objections into appeal.

Where one party appeals and the other party who was also to appeal merely files cross-objections, and the former withdraws the appeal, the latter can apply to convert his cross-objections into an appeal. **Hargovandas v Jadav Vahoo 1 Bom L R 768.**

1121.—Appeal and cross-objections—Power of appellant to defeat cross-objections by withdrawing from appeal—Case remanded to lower Appellate Court under S. 562 Civil Procedure Code—Default of appellant—Proper order for lower appellate Court to pass.

The first Court having decreed plaintiffs' suit for pre-emption at Rs. 492, plaintiff appealed to the Divisional Court as to the price, and defendant cross-objected that plaintiffs' suit had not been filed by a duly qualified agent. The Divisional Court dismissed the suit on the latter ground, whereupon plaintiffs appealed to the Chief Court, which remanded the case to the Lower Appellate Court under s. 562 of the Civil Procedure Code, for decision as to whether plaintiffs' alleged agent had been duly authorized to institute the suit, and for disposal of the appeal if the suit were found to be within limitation. At the date fixed for hearing on the remand, plaintiff failed to appear, whereupon the lower Appellate Court passed an order to the effect that the appeal must be dismissed for plaintiff's default, and that, therefore, defendant's cross-objection failed, and could not be entertained.

Held, that inasmuch as the case had been remanded by the Chief Court merely in order to give plaintiff an opportunity of proving that his alleged agent was duly authorized to institute the suit, the lower Appellate Court should have held, on plaintiff's default, that the previous order of the Divisional Court stood.

Held, further, that when once an appeal has come to a hearing, the Court is seized of the appeal, and an appellant cannot in such a case defeat a cross-objection by withdrawing from the

Appeal *Contd.*

23 Objections by respondent—*Contd.*

appeal. **Muhammad Hussain v Abdul Rahman. 86 P R 1898**

1122.—Held that objections under s. 348, Act VIII of 1859, can only be heard when the opposite party, being appellant, prosecutes his appeal, and not when he withdraws from it.

Bahadur Singh v. Bhugwan Doss. 1 Agra 23.
Shama Churn Ghose v. Radha Kristo Chaklanuvis. 14 W R 210.

Notes.—Ref: 10 All 587: 17 All 518.

1123.—C P C O.41 r. 22 (1882 S.561)—Appeal withdrawn—Memo of objections under s. 561 of Act XIV of 1882—Rule 113, Rules of practice.

If an appeal is withdrawn without any hearing Rule 113 of the Rules of Practice does not apply and any memo of objections that may have been filed must be dismissed without costs as the respondents are not entitled to take any objection to the decree under section 561 of Act XIV of 1882. **Raman Nair v. Narantha. 6 M L T 346.**

1124.—S. 373 of the Code of Civil Procedure, which gives the right to plaintiff to withdraw his plaint, ought not to be deemed applicable to the case of an appellant where objections have been filed under sec. 561 by the respondent and the hearing has commenced. Sec. 373 is therefore not extended to an appeal under such circumstances by sec. 582 **Dhondi Jagannath shet Kusheh v. The Collector of Salt Revenue. P J (1884) 199=9 Bom 28.**

Notes.—Fol: 8 All 551; Dist: 10 All 587, 23 All 130. Ref: 17 All 518, 1888 A W N 258, A W N (1895) 115

1125.—C.P.C. O. 41 r. 22 (1882 S. 561)-Cross objections—Withdrawal of appeal after hearing not allowed. When cross—objections are filed by respondent, an appeal cannot be withdrawn after commencement of hearing of appeal. 10 All 587; 53 P R 1896; 3 M H C R 702; 23 W R 229, 9 Bom 28 Fol. **Gokal Chand v. Pala Mal. 24 P L R 1906.**

1126.—Withdrawal of—Objection by Respondent—Civ. Pro. 1882, S. 561.

Where an appeal was dismissed upon the application of the appellant himself made before the hearing. *Held* that the respondents, who had filed objections to the decree of the Court of first instance under this section, had no claim to have their objections heard, notwithstanding the dismissal of the appeal. **Maktab Beg v. Hasan Ali. 8 All 551.**

Notes.—Ref: 10 All 587; 17 All 518.

1127—S. 561—Withdrawal of appeal—Effect on objection.

If an appeal in which objections have been filed under s. 561 of the Code of Civil Procedure is whithdrawn the objections cannot be heard. 1 Agra 23; 9 W R 328, 14 W R 210; 23 W R 229; 10 Bom H C R 397; 9 Bom 28; 8 All 551.

Jafar Husain v Ranjit Singh 17 All 518=15 W N 115.
Ramjiwan Mal v Chand Mal. 10 All 587

Notes.—Ref 23 Bom 692; 23 All 130; 29 Cal 43.

1127A-C.P.C O. 23 r.1; O.41; r.22(1882 Ss.373, 561)—Appeal—Right of appellant to withdraw his appeal at any time before judgment. Where no objections under s. 561 of the Code of C. P. have been filed by the respondent, an appellant has an absolute right to withdraw his appeal at any time before judgment; but where such objections have been filed, the appellant, if he wishes to withdraw his appeal, must do so before the hearing of the appeal has commenced. 1892 A W N 58 and 7 All 518 ref to. 3 M H C 802 ref to. and 9 Bom 28 dist. **Kalyan Singh v Rahmu 1904 A W N 26=23 All 130**

(7) Dismissal of appeal for default.

1128—Civil Procedure Code 1859, s. 348—Where an appeal is dismissed for default, the hearing of objections under Act VIII of 1859, s. 348, cannot be allowed to proceed. **Baroda Kant Bhuttacharjee v Pearee Mohun Mookerjee. 23 W R 57.**

Notes—Ref: 10 All 587.

1128 A—C.P.C.O. XLI r. 22 (4)—Appeal dismissed for default—Memorandum of objections-Power of Court to deal with.

Where an appeal is dismissed with costs for default, the Appellate Court may under O. XLI, r. 22, sub-r. 4 deal with the memorandum of ob-

Appeal-*Contd.*

23 Objections by respondent—*Contd.*

jections. **Raman alias Kuttan's daughter Karthyayini v Theyyan's son Ram. 9 M L T 217=9 Ind Cas 572**

1129-C.P.C.O. XLI r.22, cls (1) and (4)-Appeal filed out of time—Dismissal of appeal—Memorandum of objections is also liable to be dismissed.

Kanirkamanna v Maosad Kanirkamanna. 8 Ind Cas 140.

(7 (a) Dismissal of appeal for want of necessary Parties.

1130—Dismissal of Appeal on account of the absence of necessary parties. Civ. Pro. Code (Act XIV of 1882) s. 561 Respondents' right of having memorandum of objections heard.

A suit was filed to recover possession of lands demised on Kanom in Malabar. The defendants represented the mortgagee and one (defendant No 20) who claimed part of the property sought to be recovered As to the latter, a decree for a portion of it only was made in favor of the plaintiffs who preferredan appeal bringing defendent No.20 only on the record. Def. No. 20 submitted memorandum of objection. The appeal was dismissed as the mortgagee's representatives were not brought on record. *Held*, that the appeal comes under s. 561 of Civ. Pro. Code & accordingly memorandum of objections should be heard.

Kombi Achren v Kochunni 21 Mad 352.

1130A.-C.P.C.O. XLI, r. 22 (4)-Appeal dismissed for non-payment of proper Court-fee Cross-objections whether can be entertained after such dismissal of appeal—General rule— Exceptions—Court-fee—Appellant not able to pay Court-fee on the whole amount claimed—Abandonment of part of claim, whether permissible.

An appellate Court has no power to reject cross-objections on the merits without hearing the respondent.

The general rule that cross-objections cannot be entertained unless the appeal is decided on the merits is subject to only two exceptions, *viz.*, when the appeal is withdrawn or it is dismissed in default.

Therefore, where an appeal is dismissed,without a hearing, upon the ground that the appellant has not paid the Court-fee, the Court has no

Appeal-*Contd.*

23 Objections by respondent—*Contd.*

jurisdiction to hear and determine the cross-objections.

An appellant, who has claimed a large amount in an insufficiently stamped memorandum of appeal, is at liberty, on being required by the Court to pay Court-fee for the full amount claimed, to abandon part of his claim and to restrict it to such an amount on which he can afford to pay the Court-fee. (27 All 151, App.)

Duni Chand v. Azim Khan. 131 P L R 1911.

(8) What objections may be taken.

1131.—Civil Procedure Code, 1859, s. 348.

S. 348 in no way restricted respondents as to the points on which they may by way of cross appeal, object to the decision appealed against.

Hunooman Singh v. Suddolall. W R 1864, 232.

Mudhoo Mokee Dabee v. Gunga Gobind Mundle. W R 1864, 299.

1132.-C.P.C.S. 561-Decree for sale of mortgaged property—Rights of prior mortgagees—Mortgagors—Cross objections—Lien Costs—Appeal.

The plaintiff obtained a decree for sale of certain mortgaged property subject to the right of prior mortgagees who were made co-defendants. On an appeal by the mortgagors regarding costs the plaintiff filed cross objections against the prior mortgagees urging that the property should be sold free of any lien. *Held*, that such cross objections ought not to have been entitled.

26 Cal 114 & 109 referred to 9 C P L R 62 approved. **Ramratan v. Hira Lal. 14 C P L R 46.**

1133.—C.P.C.O. 41, r.22 (1882 S. 561)-Memo of objections.

It is not necessary to entitle a respondent to support a decree upon a particular ground under S. 561, C. P. C., that the ground should have been in express terms decided against him.

Shrish Chandra Roy v. Mungri Bewa. 9 C W N 14.

1134.—C.P.C.O. 41, r. 22; S. 100 (1882–Ss. 561 and 584)—Objection filed in second appeal.

Appeal-*Contd.*

23 Objections by respondent—*Contd.*

In an objection under S. 561 of the Code of *C.* P. filed in a case in second appeal the ground taken was "that the learned District Judge is wrong in holding that the *muafi Chak Gudar Shah* was *wakf* property and that the plaintiff was not entitled to her legal share in it." *Held*, that the ground taken in an objection under S 561, *C.* P. C., when filed in a case in second appeal must comply with the provisions of S. 584 of the Code, and that the ground in question as drafted did not comply with the provisions of that section as it did not allege that the decision was contrary to any specified law or usage having the force of law. **Sheikh Mobarak Ali v. Musammat Ruqaya Bibi. 7 O C 49.**

1135.—Where plaintiff relied on a rent note as well as other evidence tending to prove the relationship of landlord and tenant between him and the defendant, and the Court of First Instance held the rent note not proved, but the tenancy established by other evidence and on appeal by the defendant the Appellate Judge refused to allow the plaintiff to support the decree by showing that the rent note was proved on the ground that he was bound by the decision of the Court of First Instance as to the rent note *Held*, that the plaintiff could support the decree as well on the rent note as on the rest of the evidence, and that the note was a piece of evidence on which, like the rest of the evidence, he was bound to form his own opinion in deciding the defendant's appeal. **Ramacharya v. Ganuji, 87 P J 210.**

1136.—C.P.C. O 41. r. 22 (1882 s.561). Cross objections are maintainable only with respect to the principal appeal.

There should be separate appeal with respect to separate orders passed on separate appeals. Provisions as to the payment of interest in the share of Deorha is not of the nature of penalty and so it is enforceable. S C. A. No. 409 of 1905 & L. R. 2 Ch. App. 542 Fol. **Miran Baksh v. Bajrang Bahadur Singh. 10 O C 214.**

Appeal-*Contd.*

23 Objections by respondent—*Contd.*

(9) Objection on ground.

1137.—Civil Procedure Code, 1859, s. *348*.

The first Court held that the plaintiff's suit was barred by the law of limitation, but the decision was reversed on appeal, and the case was remanded by the lower Appellate Court for trial on the merits. The first Court then gave a decree for the plaintiff, but on appeal the lower Appellate Court dismissed the suit on the merits. The plaintiff preferred a special appeal to the High Court. *Held* it was competent to the defendant on such appeal, under s. 348 of the Civil Procedure Code, to raise the objection that the suit was barred by the law of limitation.

Himmat Bahadur. B L R Sup Vol 429 = 5 W R 91.

See Rayekishoree Dossee v. Bonomallee Churn Mytee. 10 W R 209.

Kishen Chunder Gaen v. Sreeshtee Dhur Khattah. 8 W R 208.

Notes:—See 5 W R 91.

1138.—Civil Procedure Code, s. 561—Dismissal of appeal as barred by limitation—Objections not entertainable.

The entertainment of objections under s. 561 of the Civil Procedure Code is contingent and dependent upon the hearing of the appeal in which such objections are taken, and when that appeal itself fails, is rejected, or dismissed without being disposed of upon the merits, the objections cannot be entertained either. 23 W R 57 229 N W P 1866 p. 23, 9 Bom 28, 8 All 551 Ref.

Ramjiwan Mal v. Chand Mal. 10 All 587 = A W N (1888), 258.

Notes:—Ap: 11 All 408. Con: 19 All 346 F B. Ref: 21 Mad 352; 21 Bom 552; 23 Bom 692. 12 All 461 F B; 28 Bom 235; 5 C L J 380; 34 Cal 216.

1139.—S. 584—A respondent in second appeal cannot be allowed to support the judgment of the Lower Appellate Court on a ground which itself can only be substantiated by ascertaining questions of facts, on which the finding of the Court of first instance being against him, the Lower Appellate Court was not asked to come to any finding and upon which, therefore, no finding was recorded by that Court. **Ganesh v. Bhau. 1890 P J 101.**

Appeal-*Contd.*

23 Objections by respondent—*Contd.*

1140.—C.P.C.O. 41, r. 22 (1882-S. 561)-Costs -Memorandum of objections not moved-Jurisdiction to dismiss the memorandum with costs.

General damages are recoverable in a suit for compensation for wrongful attachment. before judgment. Courts have jurisdiction to dismiss a memorandum of objections not stamped and therefore not moved and to dismiss it with costs also.

Kumaraswami Pillai v. Udayarnadan. 18 M L J 490.

1141.—Specific performance of contract—Specific Relief Act, 1877, Sections 12. 20, 22—Discretion of Court—Decree of lower Court reversed on respondent's cross-objections——Civil Procedure Code, Section 561—Appeal from part only of decree.

One D. D. having alienated his right in a certain shop to one T. R., defendant was about to sue the latter for pre-emption when it was agreed between them that T. R. should sell his rights to defendants for Rs. 2,000. Thereupon defendant entered into an agreement with plaintiffs to the following effect:—That defendant should pay Rs. 350, and plaintiffs the balance of the said Rs. 2,000 through defendant, to T. R.; that plaintiffs should bear all incidental expenses, that thereafter plaintiffs should be put into possession of three-fourth of the shop, one-fourth remaining with defendant, and that in the event of any breach of the said agreement, the party in default should pay the other party Rs 500. A question having arisen subsequently as to what sum should be entered in the sale-deed as consideration for the three-fourths part of the shop, the deed of sale was not executed, and the parties separated. Plaintiff thereupon instituted the present suit, and alleged that defendant had given him possession of three fourths of the shop, and had subsequently dispossessed them. They prayed that they might be restored to possession and that defendant might be orded to execute a conveyance in their favour, the latter portion of the prayer being inserted in the heading of the plaint, and not (presumably by an oversight) at the end of it. The first Court gave plaintiffs a decree in the term of their prayer, but the Divisional Judge, on appeal, though finding all the facts in plaintiff's favour, modified the decree of the first Court by granting them a decree merely for the Rs.500, on the ground that there had been no

Appeal-*Contd.*

23 Objections by respondent—*Contd.*

complete constructive possession of the shop by plaintiffs, and because the suit was not one for specific performance. From this decree defendant appealed to the Chief Court and plaintiff filed cross objections under Section 561, Civil Procedure Code. For defendant it was contended that the said cross-objections were not maintainable on the ground that defendant had appealed only against a portion of the decree of the lower Appellate Court.

Held, overruling the objection, that the cross-objections were maintainable under Section 561 of the Code.

Held further. without considering defendant's appeal that the plaintiff's cross-objections must be allowed on the ground that the suit as laid was for specific performance of a contract which, under the circumstances, was a proper contract to be specifically enforced, and none the less so, because a sum was named in it as the amount to be paid in case of its breach by the party in default, the fact that in this case the party in default was not willing to pay such sum being an additional reason for specifically enforcing the said contract.

According to section 22 of the Specific Relief Act, jurisdiction to decree specific performance is discretionary, but the discretion of Court is not arbitrary, but sound and reasonable, guided by judicial principles and capable of correction by a Court of Appeal. **Haji Ghulam Muhammad v. Kaka Ram. 31 P R 1897.**

(10) Objection on ground of jurisdiction.

1142—Civil Procedure Code, 1959. s. 348.

An appeal from an order dismissing a suit for want of jurisdiction was not such an appeal as is contemplated by s. 348, Act VIII of 1859, and on such an appeal the respondent was not entitled to go into the merits. **Kameekhapershad Mookerjee v Larmour W R F B 86.**

(11) Objections against party not appealing.

1143—A respondent, in taking advantage of the provisions of s. 348 of the Civil Procedure Code. can only take such objections as have reference to the party appealing. If he wishes to raise objections aganist parties who do not appeal. he

Appeal-*Contd.*

23 Objections by respondent—*Contd.*

must do so by independent appeal. **Ganesh Pandurang Agte** v **Gangadhur Ramkrishna 6 B H C 244.**

Notes—Dist: 3 Bom L *R* 172. Ref. 14 M L J 310. F B.

1144—Objection against person no party to appeal.

A brought a suit against B C and D for the possession of certain land. The suit was dismissed by the first Court. A appealed and the appellate Court gave him a decree against C and D but dismissed his suit as against B C, and D appealed to the High Court and A preferred objections under s. 561, Code of Civil Procedure. *Held* that as B was no party to the appeal the objections against him could not be entetained. **Bisheshar Rai** v **Tapeshuri Lal 6 W N 88.**

1144A—Objections by respondent against a party not appellant in the appeal and having distinct interest—Rectification of sale-deed upon which plaintiff's title rests:

A respondent has no right to file objections against a party who is not an appellant in the case and whose interest is entirely distinct from those of the appellant.

In a suit for possession, the plaintiff's title to the plots in suit rested upon a sale-deed. Those plots did not appear in the deed, but it was said that, by mistake, other numbers were inserted. Another sale-deed was subsequently executed by the defendant in favour of the plaintiff with the object of rectifying the mistake in the first deed, but the numbers in suit did not appear in the second deed.

Held, that the deed, upon which the plaintaff's claim rested, not having been rectified in accordance with the provisions of S.3 of the Specific Relief Act, the plaintiff's suit was not maintainable. 23 All 93, 30 Cal 655, Fol. **Sajjad Husain** v **Bakar Ali. 11 O C 93.**

1145—Appeal only partly in respondent's favour—Civil Procedure Code, s. 348.

If a decree is passed partly in favour of and partly against a plaintiff, and one of the defendants alone appeals as against the decree in favour of the plaintiff, making a co-defendant a respondent, there is no reason why the latter should appear or interest himself in the result, nor why the plaintiff should be allowed at the hearing to raise objections to his suit having been dismissed against the other defendant. **Goonomonee Dossia** v **Parbutty Dossia 10 W R 326.**

Notes—Ref 26 Cal 114; 7 Mad 215.

1146—Respondent may support the appeal on any ground.

If a respondent desires to have a decree in his favour modified still more in his favour he is bound to file objections under s. 561 of the Code of Civil Procedure, but it is open to a respondent, if he accepts the decree, without filing objections under s. 561, to challenge the finding of the Court below on any point decided against him. **Ram Prasad** v **Gokul Das. 18 W N 109.**

1147—Civil Procedure Code, 1859, s. 348.

In a suit to recover possession of certain land against A, who claimed to be its proprietor, in which J B, who claimed to be a raiyat, was made co-defendant, plaintiff obtained a decree against the former, but his suit as against the latter was dismissed. A appealed from the decree, and during the course of the appeal the plaintiff was allowed to take a cross-appeal with regard to the dismissal of his suit against J B. *Held* that the cross-appeal sould not have been admitted. **Anwar Jan Bibee** v **Azmut Ali 15 W R 26.**

Notes—Ap: 24 W R 179. Fol: 26 Cal 114; 30 Cal 655.

1148—Civil Procedure Code, 1859, s. 348.—S. 348, Act VIII of 1859, was wide enough to empower an Appellate Court on cross-appeal to re-open the whole case, and assess damages on defendants who had been acquitted in the original suit, and who were not parties to the appeal. **Anund Chunder Goopto** v **Mohesh Chunder Mozoomdar. 1 W R 229.**

Notes.—Appeal: 11 Bom 596. Dist: 24 W R 179. Ref: 26 Cal 114.

(12) Altering decree on appeal where respondent makes no objection.

1149—Where, in the lower Appellate Court, no objection to the decree of the Court of first

Appeal-*Contd.*

23 Objections by respondent—*Contd.*

instance was urged by the plaintiff (respondent), it is not competent to such Court to disturb the decree, by giving him a larger sum than that awarded by the Court of first instance. **Apee v Heera Nund.** **2 N W 44.**

1150—Point not taken in cross-objections. Decree of Lower Court based on a point not taken by respondent in his cross-objections reversed. **Padmakar v Mahadev. 1888 P J 335.**

1151—C.P.C.O. 41.rr 22, 32; (1882 Ss.561 and 577) Prayer for possession or return of purchase money--Decree for possession--Appeal--No memo of objections—Order for return of money by Appellate Court--Legality thereof.

Where the plaintiff sued for possession of a house from the defendant or for return of the purchase money and the Munsiff gave a decree for possession but on appeal the District Judge granted the alternative relief reversing the judgment of the Munsiff, it was contended in second appeal that the District Judge should not have granted the alternative relief, as no memo of objections was filed against the judgment of the Munsif.

Held, that no memo of objections was necessary. (28 Mad 229 Dist.). **Kuppusawmi Chetty v Samudra Vijia Nainar 4 M L T 266.**

(13) Altering Decree on appeal where respondent takes no objection.

1152—Altering decree on appeal where respondent takes no objection-Civil Procedure Code 1859 s. 348.

In a suit to establish title to three annas and fraction of an estate, plaintiffs, having obtained a decree for two annas, appealed, but the lower Appellate Court reduced the share allotted to the plaintiff. *Held* that, as no question of the share to be awarded was raised before the lower Appellate Court by the defendant under s. 348, Code of Civil Procedure, that Court should not have interfered with the decision in the way it did.

Ritooraj v. Oojagur Singh **15 W R 227**

(14) Questions by opposite parties in same interest

1153—Appeal by defendant from dismissal of suit—Cross-objection by plaintiff.

Appeal-*Contd.*

23 Objections by respondent—*Contd.*

Where a plaintiff's suit is dismissed, and a defendant appeals, seeking no relief whatever, but acting in the same interest with the plaintiff, the latter is not entitled, by way of cross-appeal under s. 348, to agrue that his suit was wrongly dismissed. **Sabetoollah Meah v. Rohim Dewan 9 W R 273**

(15) Objections by opposite parties in separate appeals.

1154—Both parties appealed from the decree of the Court of first instance, and both the appeals were dismissed by the lower Appeallate Court. The plaintiff appealed to the High Court from the decree of the lower Appellate Court dismissing his appeal, whereupon the defendant took objections to the decree of the lower Appellate Court dismissing his appeal. *Held* that such objections could not be entertained. **Ganga Prasad v. Gajadhar Prasad.** **2 All 651.**

Notes.—Dist: 8 Bom 368.

(16) Finding in favour of respondent who had not appealed or objected.

1155—Order remanding Appeal—Finding in favour of Respondent who had not appealed—Civ. Pro. Code 1877 s. 561.

H sued *B* for arrears of rent, alleging that the annual rent payable by the latter was Rs. 212-1.0. The Court of first instance gave *H* a decree based on the finding that the annual rent payable by *B* was Rs. 94. H appealed, and the lower appellate Court gave him a decree based on the finding that the annual rent payable by *B* was Rs. 128-12-0. *B* appealed to the High Court from the lower appellate Court's decree. H did not appeal from that decree, neither did he take any objections thereto under this section. Stuart C. J. and Oldfield, J. before whom such appeal came for hearing, remanded the case to the lower appellate Court for a fresh determination of the question as to the amount to the annual rent payable by *B*. The lower appellate Court then found that the annual rent payable by *B* was Rs. 212-1-0. *Held* by Stuart C J (Oldfield J dissenting) that such second finding of the lower appellate Court should be accepted and the amount awarded by its decree be enlarged accordingly, notwithstanding H had not appealed from that decree or preferred object-

Appeal-*Contd.*

23 Objections by respondent—*Contd.*

ions thereto. **Bikrmajit Singh v. Husaini Begum. 3 All 643.**

Notes:—Dist: 34 Cal 996. Ref: 22 Mad 202.

1156—C.P.C.O. XLI r.22 (1)—No cross-appeal or objection-Right of respondent to support the decree on grounds decided against him by Court below.

A respondent, although he may not have appealed against any part of the decree, may support the decree on any of the grounds decided against him in the Court below. It is only when he takes exception to the decree that he is bound to prefer an appeal or take cross-objections. **Shankar Lal v. Madari Singh 7 Ind Cas 484**

1157—Objection—Decree entirely in favour.

In this case judgment was given in favour of the defendant but one of the several issues was decided against him by the Munsiff. In appeal to the Judge that issue was also decided in his favour. It was contended before the High Court that the defendant not having given any notice of objection under s. 561 the Court could not consider that issue. *Held* that s. 561 does not apply to the cases of a respondent in whose favor the whole decree is passed. He can support that decree by any contention with which he could have contested the case in the Court of first instance unless he has waived any particular point. **Bhagwant Rai v. Deo Dut Rai 7 W N 44.**

1158—C. P. C. O. 41 rr. 22, 25 (1882 Ss 561 & 566)-Suit for possession-Appeal from decree of Lower Appellate Court-Remand to the Lower Appellate Court—Fresh enquiry—Lower Appellate Court awarding more than the original decree when plaintiff not appealing—Validity. The plaintiff sued the defendant the proprietor of an adjoining estate, for recovery of possession of certain lands, after determination of the boundary between the two estates. The Munsiff partially decreed the suit. The defendant appealed, but plaintiff neither appealed nor filed any objection against the decree of the Munsiff. The decree of the Munsiff was modified by the Appellate Court in favour of the defendant, and, thereupon, the plaintiff appealed to the High Court which remanded the case and directed a fresh investigation to be made by the Civil Court Amin by comparison of the maps of both the parties. After a fresh enquiry the Lower Appellate

Appeal-*Contd.*

23 Objections by respondent—*Contd.*

Court passed a decree in favour of the plaintiff, giving him more lands than he recovered in the first Court.

Held on appeal to the High Court, that, as the plaintiff had not appealed from the judgment of the Munsiff, the Lower Appellate Court has no power to award him more than he recovered in the Munsiff's Court; 3 All 643 Dist. **Agilul Hosain v Dino Nath Dutt 34 Cal 996**

Notes:—But Contra see O 41 r 33 of the new Code.

(17) Objections which could not have been taken on appeal.

1159.—Incidental decision of issue.

The plaintiff sued the defendants for compensation for the wrongful taking of the fruit on a tree which he alleged belonged to him. The defendants set up as a defence that the fruit on such tree had not been removed, and that such tree belonged to them. The Court of first instance dismissed the suit on the ground that the fruit on such tree has not been removed, but found incidentally that such tree belonged to the plaintiff. The plaintiff appealed from the decree of the Court of first instance, and the defendants objected to the decree, contending that such tree belonged to him. *Held* that, inasmuch as the Court of first instance did not, in deciding that such tree belonged to the plaintiff, decide a question substantially in issue, it did not decide in this matter "against the defendants" within the meaning of s 561 of the Civil Procedure Code, and as the decree was limited to dismissing the suit, the defendants as respondents were not qualified to take an objection which they could not have taken by way of appeal, and therefore the Appellate Court was not warranted by law in entertaining the objection taken by the defendants, **Balak Tewari v Kausil Misr 4 All 491.**

Notes:—Ref: 7 Bom 464; 13 Bom 567.

1160.—Alienation by widow—Necessity-suit by collaterals dismissed on appeal without notice being issued to respondents—Further appeal—Right of respondents, who had filed no cross-objections, to support decree by objection, going to the root of decree—Civil Procedure Code 1882, Sections 551, 561.—

Appeal-*Contd.*

23 Objections by Respondent—*Contd.*

In a suit by plaintiffs, as collaterals of one M. B, to have it declared that a sale by his widow should not affect their reversionary rights, defendants pleaded that plaintiffs were not the collaterals of, or co-sharers with M B or residents of the village where the land in dispute was situate and further, that the sale was for necessary purposes. The first Court found that plaintiffs were the collaterals of M B but that necessity had been proved in respect of the whole of the consideration and gave a decree in favour of plaintiffs on payment of this amount. Plaintiffs alone appealed, and their appeal was dismissed by the Divisional Judge under Section 551, Civil Procedure Code. Plaintiffs having preferred a further appeal to the Chief Court, respondent, who had neither appealed from the finding of the first Court as to plaintiffs being the collaterals of M B., nor filed any cross-objections, endeavoured to support the decrees of the lower Courts on the ground that plaintiffs had no *locus standi*.

Held, that it was not open to respondents to seek to maintain so much of the decrees as found the whole consideration to be for necessity, by shewing that the suit should have been dismissed *in limine* on the ground that plaintiffs had no *locus standi*.

The first and second paragraphs of Section 561 Civil Procedure Code, are not on the same footing, and a decree cannot be supported by an objection going to the root of that decree.

Rulda Khan v Mussammat Kandi 25 P R 1897.

(18) Objections by party in property made respondent.

1161.—Extent of his right.

A decree was obtained by A for possession of land against B and for costs against B, C, D, and others, defendants in the suit. An appeal was filed by C & other defendants so far as costs were concerned making A and D respondents. D objected to that part of the decree which related to the possession,—*Held* that under s 561, D had a right though improperly made a party by C to challenge the rest of the decree.

Timmaya Mada v Lakshmana Bhakta 7 Mad 215.

Notes:—Dist: 23 All 93; 28 Mad 229=15 M L J 212. Ref: 26 Cal 1)

Appeal-*Contd.*

23 Objections by Respondent—*Contd.*

1162.-S. 567,-Reversing decree in favour of a person not a party to appeal.

When plaintiff sued the defendants for redemption and a decree was passed ordering redemption in payment by plaintiff of Rs. 88-5-5 to defendant No 2, and the defendant No 2 appealed making only the plaintiff a party and the plaintiff filed cross objection to the effect that the accounts taken by the Sub-Judge were wrong and the Appellate Court reversed the decree and awarded plaintiff Rs. 223 as against defendant No1, *held* that it was not competent to pass any decree against defendant No 1 who being not a party to the appeal could not be affected by the cross-objections. **Munshi Jandin v Mahamad 1893 P J 254.**

1163.—Cross-objection as to costs—Appeal dismissed.

A cross-objection as to costs is not entertainable when the appeal is dismissed for want of proper Court fee. **Shan Alam v Mahmud 2 P R 1889.**

(19) Objections on appeal as to costs.

1164.—Section 561 of the Code of Civil Procedure gives the respondent the power of taking any objection to the decree at the hearing of an appeal which he could have taken by way of appeal, provided he has filed a notice of objections not less than seven days before the date fixed for the hearing of the appeal: and this power is independent of whether an appeal lies on a mere question of costs.

Held, also, that a finding, accompanied by the reasons for it, as required by section 204 of the Code is not a conclusive finding of fact binding on a Court of second appeal.

Hari Ganesh Kamat v Vithal Ramchandra P J 1884, 81=8 Bom 368.

Notes:—Ap: 14 Bom 452; Fol: 19 Bom 328; Ref: 5 Bom L R 956.

(20) Unsuccessful intervenors.

1165.—Civil Procedure Code, 1859, 348.

Unsuccessful intervenors (defendants) who have not appealed cannot raise questions under s. 348, Act VIII of 1859. **Bipro Pershad Mytee v Kanye Deyee 1 W R 341.**

Notes:—Ref: 5 W R 82.

Appeal-*Contd.*

23 Objections by Respondent—*Contd.*

1166-1167.—Civil Procedure Code, 1859, s. 348. A respondent, making a cross-appeal, can take objection to any part of the judgment of the first Court adverse to him to which the appellant can answer, and which affects the appellant's interests only but the cross-appeal of a respondent does not open up any question between himself and his co-respondents, for they cannot be allowed to interplead. The law gives a respondent a right to raise objections at the hearing of the appeal; but under s 348, Civil Procedure Code reasonably construed, the contest is between two parties equally interested and not with third parties. **Mahboob Ali v Zur Banoo Bibee 9 W R 78.**

1168 —Civil Procedure Code, 1859 s 348.

Plaintiff sued two tenants and his co-sharer for joint rents. His suit was dismissed, and the dakhilas produced by the tenant defendants were declared to be false. The latter appealed, making the former and his co-sharer, respondents. Plaintiff then appeared and made a cross appeal under s 348, Act VIII of 1859. *Held* that plaintiff had no *locus standi* to entitle him to make a cross-appeal against his co-sharer upon the appeal of the tenant defendants. **Anunto Doss Sein v Ram Joy Sein 11 W R 435.**

Notes: -Ref 26 Cal 114.

1169.—Cross-objections between respondents-Civil Procedure Code (1882)—A plaintiff's suit for possession of land was decreed in part against the defendants by the Court of first instance. though some of the defendants appealed to the High Court, they did not make the other defendants party—respondents. The plaintiffs preferred cross objections under s 561 of the Civil Procedure Code. The High Court added the non-appealing defendants as respondents and made an order to the effect that they might be under parties without prejudice to any objection that might be urged on their behalf at the hearing of the appeal. When the appeal was heard the non-appealing defendants contended that the plaintiffs could not urge their cross-objections as against them:—*Held* that, as a general rule, it is only against the appellant that the right of the respondent of urging cross-objections should be limited and it is only an exception that one respondent can urge cross-objection against another, the exception being good, among other cases, in those in which the appeal of some

Appeal-*Contd.*

23 Objections by Respondent—*Contd.*

of the parties opens out questions which cannot be disposed of completely without matters being allowed to be opened as between co-respondents: but as there was nothing exceptional in this case, the plaintiffs were not allowed to urge their cross-objections against the non-appealing defendants. **Bishun Churn Roy Chowdhry v Jogendra Nath Roy 26 Cal 114.**

Notes:—Dist 28 Mad 229=15 M L J 212; Fol 30 Cal 655; 28 All 95=2 A L J 667=(1905) W N 200; Ref 35 Cal 538=12 C W N 720.

1170—C P C O. 41 r. 22 (1882-S.561)—Memo of objections lie between co-respondents General rule and exceptions.

The rule is that generally no memorandun. of objection can be urged by one respondent against a co-respondent. But where the appeal of the appellant opens out questions which cannot be disposed of completely without the matters decided against the plaintiff-respondent in the Court below being opend as between him and the other respondents, a memo of objections can be allowed. Where in a suit brought by a plaintiff against several persons a principal debtor and another as surety, and it was decided as against the surety but not as against the principal debtors, the claim against them being barred by limitation, the plaintiff respondent in an appeal by the surety cannot file a memo of objections as against the principal debtors. 26 Cal 114; 25 Cal 565 followed. 15 W R 26 Fol.

Shabuddin v Deomoorat Koer. 30 Cal 655

1171-C P C O.41 r.22 (1882 S.561)-Respondents (plaintiff and 2nd defendant) C P C (Act XIV of 1882) S. 561—Act V of 1908, O. 41, r. 22-Memo of objections against co-respondents—Maintainability. Cross objections.

Memo of objections as between co-respondents could be filed under S. 561 of the C P C (28 Mad 229; 17 Mad L J 62 and C R P 322 of 1905 followed). **Kadari Bhagavanlu v Kokanada Narayanasami. 6 M L T 324.**

1172—C P C O.41, r.22; S.141 (1882 Ss. 561, 647) – Memorandum of objections against co-respondent.—Small Cause revision—Power of High Court in revision cases.

Appeal-*Contd.*

23 Objections by Respondent—*Contd.*

It is open to the High Court in dealing with revision petitions under S. 25 of the Provincial Small Cause Act IX of 1887 to exonerate the defendant against whom the decree has been passed by the lower Court and pass a fresh decree against another when all the parties are before the Court. *Obiter*—S. 647, C P C makes applicable to revision petitions under S. 25 of the Provincial Small Cause Act, the procedure relating to appeals, and consequently a memorandum of objections will lie in such revision petitions. A memorandum of objection between co-respondents was allowed in the case. **Krishna Aiyangar v Appanaiyangar. 17 M L J 62**

1173—Right of one co-respondent to take an objection to the decree as against another co-respondent in the appeal—Separate appeal.

Held, that the language of Section 561 of the Civil Procedure Code is not wide enough to permit a plaintiff-respondent, on the appeal of one defendant, to take any objection which the plaintiff could have taken by way of appeal against another defendant who is respondent in the appeal. The true interpretation of the section is that which interprets respondent as limited to a respondent in relation to the appellant, and on this interpretation the section does not permit one co-respondent to take an objection to the decree as against another co-respondent in the appeal.

The proper mode of proceeding in order to raise a question as between the plaintiff and a defendant in an original suit who are co-respondentents in an appeal by another defendant is by a separate appeal by the plaintiff against the non-appealing defendant and when the objection as between such co-respondents is taken within the period of limitation for an appeal by the objector against the co-respondent, and is otherwise not open to exception, the defect is only one of form and might be overlooked, the objection being treated as an appeal which in substance it is. But where the objection is taken after the period for an appeal has expired, it cannot be entertained as an appeal until the delay has been satisfactorily accounted for. **Sher Singh v Kabula Singh. 7 P R 1887.**

1174—Cross-objections against person not party to appeal.

Appeal-*Contd.*

23 Objections by Respondent—*Contd.*

When respondent takes cross-objections against a party who has not joined in the appeal, the Court should allow the former an opportunity of making the latter a correspondent, to enable his cross-objections to be heard. **Ganesh v Bala 1888 P J 99.**

1175—C. P. C. O. 41 r. 22 (1882 Ss. 561, 544)—Cross Objections—Right to urge against co-respondent.

As a general rule, the right of the respondent to urge cross-objections should be limited to his urging them against the appellant, but where a suit had been decided, the suit upon a ground common to all the defendants, and one of the defendants appealed and the plaintiff filed cross-objections against the decree

Held, that inasmuch as under S. 544 of the Civil Procedure Code, the appellate Court could modify or set aside the decree in favour of all the defendants, the whole case was opened out in appeal, not only between the plaintiff and the defendant who had appealed, but also as between the plaintiff and other defendants who had been made respondents who in the present case were necessary parties. 26 Cal 114 ; 31 W R 338 Ref.

Abdul Ghani v Abdul Majid. 2 A L J 667 =1905 A W N 200=28 All 95.

1176—Civil Procedure Code, 1859, s. 348

A plaintiff (respondent) may take an objection under s. 348, against defendants who have not appealed, but who are *pro forma* brought in as co-respondents. **Ram Lall Mookerjee v Tarra Soonduree Debia. W R 1864. 3**

Contra Hossain Buksh Putooah v Baroo Beparee. 5 W R 49.

1177—Civil Procedure Code, 1859, s. 348.

One defendant cannot take an objection under s. 348 on the appeal of a co defendant.

Burroda Soonduree Dossee v Nobogopal Mullick. W R 1864, 294

Khermukuree Dossee v Nilambur Mundul 2 W R 227

Gudhadhur Banerjee v Monmohinee Dossee 7 W R 366

Kishen Chunder v Chundrabolly Dossee 2 Hay 180

Appeal-*Contd.*

23 Objections by Respondent—*Contd.*

1178—Absence of co-respondent—Civil Procedure Code, 1859, s. 348.

The lower Appellate Court was held to be justified in refusing to enter into an objection raised by the respondent under Act VIII of 1859, s. 348, in the absence as a party to the appeal of one of the parties interested in the decision of the first Court. **Moizzunnissa v Mooraree Dhur Dey. 22 W R 314**

1179—Absence of co-respondent—*Cross-appeal by only some of respondents.*

A question having arisen in the execution of a decree as to assessing wasilat, the first Court held that the decree-holders were entitled to wasilat of a 2 anna 13 gundah share. The Judge held on the appeal of some of the judgment-debtors that the decree-holders were entitled to 1 anna 10 gundah share, and rejected the objections raised by the decree-holders under s. 348, Civil Procedure Code. *Held* that the Judge was wrong in amending the Munsif's decree as to the share, as the objection was not taken in the Court of first instance, and that he was bound to dispose of the objections taken by the decree-holders under s. 348 : and if there was any difficulty arising from the absence of the judgment-debtors, he ought to have directed that they should be made respondents. **Pran Kishore Deb v Mahomed Ameer 21 W R 338**

Notes—Ref: 26 Cal 114.

1180—Objection against absent co-respondents.

An objection by way of cross-appeal cannot be taken against a co-respondent who is not present in Court, and so unable to answer the objection of the cross-appellant. **Lall Chand v Kudmoo Koonwar 7 W R 532.**

Notes—Ref: 26 Cal 114.

1181-C. P. C. O. 41 r. 22-Memo of cross-objections—Right to urge objections as against co-respondents who have not appealed.

Under R 22 O 41 of the new Code, a respondent may file a memorandum of cross-objections and urge objections against co-respondents who have not appealed against the decree. 23 All 93, 5 B H C R 244 ; 9 C P L R 62 ; 15 W R Cr 26 ;

Appeal-*Contd.*

23 Objections by Respondent—*Contd.*

26 Cal 114 : 25 Cal 565 ; 30 Cal 655 and 14 C P L R 46 Ref and Dist. **Ramchand v Rikhab Dass. 6 N L R 51.**

(21) Allowing objection not taken.

1182—Civil Procedure Code, 1859, s. 348—Court Fees Act, 1870. s. 16

The principle that an Appellate Court should not go beyond the subject-matter of the appeal applies to an objection, called a cross-appeal, under s. 348, which enables the respondent to take any objection to the decision of the lower Court which he might have taken if he had preferred a separate appeal. The joint effect of this section of Act VII of 1870, s. 16 is to place the respondent in the position of a cross-appellant in so far that he must, before the hearing, specify his matter of objection, and must pay into Court the Court-fee attaching thereto. An Appellate Court was held to have acted whithout authority and to have contravened the Court Fees Act, in having voluntarily suggested what it thought to be an error of the Court below, and allowed the respondent to take it as an objection giving effect to the objection subject to the payment of the Court-fee stamp.
SharodaSoonduree Debee v Gobindmonee Alias Brojo Sooduree Debee. 24 W R 179.

Notes.—26 Cal 114.

(22) Objection by pauper respondent.

1183.—Objections to a decree by a pauper respondent-Civil Procedure s. 561.

A respondent cannot file objections to a decree, under s. 561 of Civil Procedure Code in forma pauperis. 1 Bom 75 followed.
Narayana v. Krishna. 8 Mad 214.

Notes:—Fol: 2 M L J 261. Dist: 2 C W N 197. Ref: 24 Mad 504.

1184.—C. P. C. O. 41, r 22 (1882 S. 561)—Objections by pauper respondent not allowed.

A pauper respondent is not entitled to present objections under S. 561 of the Civil Procedure Code, without payment of stamp duty. 1 Bom 75; 8 Mad 214; 11 Cal 735 Fol.
Raja Ratan Singh v. Rani Beni Bai. 1 N L R 33.

1185.—Objections by respondents.—C P C O.

Appeal-*Contd.*

23 Objections by Respondent—*Contd.*

41 r. 22 (1882 S. 561). *Held*, that the plaintiff may be allowed to take *in forma pauperis* any objections to the decree which he could have taken by way of appeal.

Held, further, that the provisions of Ch XLIV C. P. C., so far as they can be made applicable, now apply to an objection filed in accordance with S. 561, *C.* P. C. 1 Bom 75: 8 Mad 214; 11 Cal 735 Dist: **Po Hlaing v Mao. 4 L B R 262**

1186—Civil Procedure Code (1882) S. 561—A plaintiff had obtained leave to sue in *forma pauperis*. He had been succesful in obtaining a decree for a portion of his claim on an appeal by the defendant, it was *held*, that he was not entitled to be heard in *forma pauperis* on cross appeal as to the portion of the claim decided against him in the lower Court. **Brojeshwari Dasi v Guroo Churn Das 11 Cal 735**

Notes—Fol: 1 N L R 33.

(23) Objection filed by respondent.

1187—Letters Patent s. 10. S. 561 is not applicable to a Letters Patent appeal. **Kausalia v Gulab Kuar. 21 All 297**

Notes—Fol 33 All 211; Ref: W N (1907) 150; 29 All 484; 18 M L J 157; 3 A L J 385. Dist: 4 A L J 452.

(23 (a)) Objection by respondent.

1188—The Sub-Judge decided the case did not fall under Ch. II of Act XVII. of 1879. *Held* it was open to the plaintiff respondent without filing cross-objections under s.561 to contend that the case did fall under said Ch.11, and that therefore no appeal would lie. **Rajai v. Appaji. 1888 P. J. 220.**

(23 (b)) Objection by respondents to the procedure adopted by plaintiff in preferring an appeal.

1189—Admission in evidence of unstamped document—(Act X of 1877).

Appeal-*Contd.*

23 Objections by Respondent—*Contd.*

A R sued A K, A, AB, B and AX, for an account and for any profits which might be found due to him and also for the recovery of Rs. 2,100 advanced by him to the defendants for the purposes of a certain partnership business. The defendant A K admitted a partnership but only as between himself and the plaintiff. A admitted the receipt of Rs. 600. All the defendants with the exception of A K denied the partnership and with the exception of A, they all denied the receipt of Rs. 2,100. The Court of first instance found that there was a partnership between the plaintiff and all the defendants but that no profits had been made. It also found that the Rs. 2,100 were advanced to the defendants and accordingly gave a decree for that sum against all the defendants. Separate appeals were preferred by AB, B and AX, joining in one and AK and A in the other. The first of these appeals was wholly decreed and the second was partly decreed by reducing the the amount to Rs. 1, 565. The lower appellate Court admitted an entry in the account book of AK as evidence of an acknowledgment of the receipt of Rs. 665 by the plaintiff from AK and A. This entry was not stamped. The plaintiff preferred a single appeal from the two judgments making all the defendants respondents, the grounds upon which he impeached the lower appellate Court's decision being common to all of them. The respondents, objected to this mode of procedure and they aslo contended that the unstamped entry in AK's account-book should not have been received in evidence. *Held*, that as the plaintiff's case against all the defendants was one and the same and the grounds of his appeal identical, the Court in the present case did not feel itself constrained to give effect to the first objection. With regard to the second objection, assuming that a stamp was necessary, the admission in evidence of the entry in account-book was not an error affecting the merits of the case and the Court therefore did not consider itself called upon to entertain such objection. **Abdul Rahim v Abdul Kadir, 1 W N 115.**

(23 c) Objection by respondents as to a next friend suing without certificate.

1190—Objection by respondents-Next friend suing without certificate—Objection not to be allowed in second appeal.—

Appeal-*Contd.*

23 Objections by Respondent—*Contd.*

The objection as to a next friend suing without a certificate cannot be allowed to be raised by the respondent in second appeal as the effect of allowing such objection would be not to support the decree of the lower appellate Court but to nullify the proceedings altogether. But it will be a ground of second appeal if it had been raised below and overruled. **Mussammat Attar Kour v. Man Singh. 62 P R 1883**

(24) Contention that decree should not affect defendant prejudicially.

1191--Appeal by plaintiff—No appeal by defendant—Right of defendant to contend that decree in appeal should not affect him prejudicially—

In an appeal by the plaintiff, the defendant, though he may not have appealed from the decree passed against him can contend that the decree should not be modified so as to affect him prejudicially. **Nanhey Lal v Himat Singh 4 C P L R 158.**

(25) Time for payment of stamp duty on a memoramdum of cross-objections.

1192—Ss. 4 16-Stamp duty on memorandum of objecions payable at the time of hearing:—Stamp duty on a memorandum of objections, under S. 561 of the Civil Procedure Code, need not be paid till the time of hearing of the memorandum. **Reference under Court Fees Act S. 5. 25 Mad 24.**

(26) Filing cross-objections where no appeal was mantainable.

1192A-C P C O. XLI, r.22—Cross objections Appeal filed where no appeal lay—Specific Relief Act (I of 1877), Ss. 39, 42—Suit for declaration that a document is void—Possession -Discretion.

Where a suit for declaration that a certain document was void was dismissed, but a finding was inserted in the decree that the document had not been executed by the person alleged to have executed it, and the defendant appealed to the District Judge, *held* that the respondent (plaintiff) was entitled to file cross-objections although the appeal was not maintainable.

Appeal-*Contd.*

23 Objections by Respondent—*Concld.*

Ordinarily where a plaintiff is out of possession and he is in a position to claim a decree for possession, he should not be permitted to obtain merely a decree for the cancellation of an instrument, according to which if genuine, he has no title.

But where both Courts find a document not proved, the High Court in second appeal will not disturb the decree of the lower appellate Court. **Shankerlal v Sarup Lal 8 A L J 1297**

(27) Co-respondents.

1193—A defendant or respondent cannot be heard by way of cross-appeal under s. 348, Act VIII of 185-, as against a codefendant or co-respondent. **Taruck Nath Roy v Tabooronissa Chowdhrain. 7 W R 39**

Notes—Ref: 10 W R 326. 26 Cal 114, 7 Mad 215

(24) GROUNDS OF APPEAL

(1) Objections to order of remand in appeal from final decree.

1194-Objections to order of remand in appeal from final decree—Civil Procedure Code, 1859, s. 333; 1877. 1882. s. 541.—

It is competent to an appellant appealing from the final judgment and decree to include in his appeal any legal grounds of objection against a prior decretal order of remand. **Mizajool Nissa v Bunshee Dhur. I N W 193 Ed. 1873,277**

1195—Appellants opening up a case which was not brought in before either of the Courts below. A suit was brought as that of the widow of one brother owing to have set aside the adoption made by the widow of another brother & was based on her presumptive title to succeed as reversionary hairess as soon as the death of the widow to whose husband the plaintiff's husband had been a sapinda, should occur. It was found that plaintiff's husband was illegitimate & hence not a sapinda. Consequently plaintiff's suit was dismissed. In appeal the widow or the plaintiff taking advantage of a finding of fact in another case that the defendant's husband was also illegitimate contented that the two illegitimate sons

Appeal-*Contd.*

24 Grounds of Appeal—*Contd.*

neither of whom could inherit from their father, can yet inherit from one another. *Held*, this was new case set up altogether, that the appeal cannot be maintained on a ground so inconsistent with all the previous proceedings in the case. **Gajapathi Radhika v Vasudeva Santa Singaro 15 Mad 503=19 I A 179.**

1196-Practice-Pleadings-Plaintiffs not allowed to set up in appeal a case inconsistent with that upon which they came into Court—Where in a partition suit the plaintiffs appellants came nto Court alleging joint possession along with certain other plaintiffs of a certain share and the lower Court decreed the appellant's claim only so far as their claim in the plaint was concerned while finding that the other plaintiffs who are not appellants were not entitled to partition by reason that they were not in possession of the property within 12 years prior to suit and the appellant plaintiffs consequent on that finding claimed in appeal a share in the property disallowed to the others—*Held* that the granting of the plaintiffs-appellants' prayer would involve the granting of a decree on a ground inconsistent with the case set up by them in their plaint, and therefore refused. 23 All 458 dist.

Bahi Khan v Sher Ali Khan 1904 A W N 33=26 All 33.

1197—Appeal—Plea of coercion and public policy to avoid sale-deed—Neither raised by pleadings nor in the grounds of appeal—Whethe entertainable.

Held, that an appellate Court ought not to decide a case on a plea that a deed was void as it was obtained to hush up crime and was, therefore, against public policy, where such a plea was not raised by the pleadings or in the grounds of appeal to that Court. **Bhagwanti v. Jagarnath 6 A L J 636.**

1198—Changing nature of claim in appeal—Refusal to allow.—

The suit as laid in the plaint being one for entry on immoveable property upon establishment of proprietary title, the appellant in the Chief Court set it up as one for recovery of possession in right of lien for unpaid dower. The Chief Court refused to allow him to entirely change the nature of the grounds upon which he alleged himself to be entitled to relief. **Jafar Ali v. Mussammat Jamil-un-nissa. 28 P R 1890.**

1199.—Transfer in lien of dower—Possession in lieu of dower.

A brought this suit to have certain property declared not to be liable to be sold in execution of a decree obtained against her husband, on the ground that the property had been transferred to her before the death of her husband in consideration of a dower-debt and she was since then in possession. The lower Court held the transfer not proved. *Held*, that A could not be allowed in appeal to change her ground and say that she was lawfully in possession and had a claim for a lawful dower debt.

Amir Bibi v Nathmal Das. 3 W N 147.

1200.—Insufficiently stamped document—Civ. Pro. Code. 1859, s. 372.

As the insufficiency of the stamp was the only ground urged in special appeal, the appeal was held to fail, the Court considering that the error in the admission of the document did not affect the decision of the case on the merits. **Makbul Ahmad v Musammat Iflikar-un-nissa Begam. 7 N W P 124.**

(2) Party making a new case in appeal.

1201.—Section 92—Written instrument-Oral agreement to vary its terms—Sale-deed—Deed of mortgage—Fraud or misrepresentation—Party making a new case in appeal—Practice.

The plaitiff sued to redeem certain lands alleging that the deed which he had executed to the defendant though a sale-deed in form was in rea-

Appeal-*Contd.*

24 Grounds of Appeal—*Contd.*

lity only a deed of mortgage, the defendant having promised at the time of the execution of the deed that he would allow redemption on payment of the money advanced. The defendant contended that the transaction was a sale. On these pleadings, the Court of first instance framed an issue, whether the sale-deed to the defendant was proved to be really a mortgage redeemable on the terms stated in the plaint. This issue was found in the negative. On appeal, the plaintiff contended that the frame of the issue was incorrect and that the case should therefore be remanded on the issue whether the deed was obtained or induced by the defendant by means of fraud or misrepresentation within the meaning of proviso 1 to S. 92 Evidence Act.

Held, that the case of the plaintiff was that he signed the deed knowing it to be a deed of sale, but that there was at the same time an oral agreement made by the defendant that he (the defendant) would treat it as a mortgage and he (the plaintiff) relied upon that oral agreement; and that the case, therefore, fell within the prohibition enacted by Section 92 of the Evidence Act.

Held, further, that the plaintiff sought to make a new case in so far as he endeavoured to base his case not upon a separate oral agreement, but upon some fraud which would invite the application of proviso 1 to S 92 of the Act. 12 Bom L R 972 ; 11 Bom L R 1130, Fol.

Somana v Gadigeya,
13 Bom L R 113.

(3) Gronnd not taken in memorandum of appeal.

1202.—C.P.C.S. 100, O 17, r 1 and O 41, r 2—Adjournment-Reasons to be recorded—Ground not taken in memorandum of appeal that evidence was not taken—Leave to be heard in support of such ground—Appeal—Pleadings.

Where a Court finds the adjournment of a case to be necessary beyond the following day, it is bound to record its reasons.

The failure of a Court to examine the witnesses of a party is a valid and substantial ground for interference under Section 100 C P C.

The failure of the Court of first instance to examine the defence witnesses was not mentioned among the grounds of appeal in the lower Appellate Court, but the defendant's pleader at the hearing asked permission to raise this point. The Judge refused permission, although he perceived the grave irregularity of the original Court's proceedings.

Held, that the lower appellate Court committed a serious error in disregarding this plea, because, although it was not mentioned in the grounds of appeal, it was not a matter to which the other side could legitimately object on the ground of surprise, and because it was a matter clearly affecting the decision of the suit on the marits. (2 L B R 93, Expl.)

Ma Daw Thu v Ma Daw.
8 Ind Cas 990

(3 a) Restricting appeal to specified grounds.

1203.—C P C O.41, r12-Appeal if may be limited to specified grounds—Jurisdiction of appeallate Court—Bengal Tenancy Act (VIII of 1885), Ss. 52, 135 and 106,

It is not competent to a Court of appeal under O. 41, r. 12 of the Code to restrict an appeal to some specified grounds in admitting the whole appeal and when an appeal is admitted, the whole appeal and not any selected ground is open to discussion.

Where, in a proceeding under S. 105, Bengal Tenancy Act, questions are raised and decided which properly fall within Section 106, a second appeal lies.

Lukhi Narain Serowji v Sri Ramchandra Bhuiya. **15 C W N 921.**

Appeal-*Contd.*

24 Grounds of Appeal-*Concld.*

(4) Refusal to examine witnesses constituting a good ground of appeal.

1204—1205.—Evidence, improper rejection of-Refusal to examine witnesses brought to Court by the plaintiff—Error or irregularity affecting the merits of the case.

On the application of the plaintiff in a civil suit the Court adjourned the case to admit of the appearance of certain witnesses for whom the Court granted summonses. On the day to which the case was so adjourned, some of the witnesses summoned were present in Court, and the plaintiff also produced other witnesses who had not been summoned, and tendered them for examination. The Court declined to examine such of the plaintiff's witnesses so produced as had not been summoned by it. *Held* that the refusal of the Court to examine such witnesses was a substantial irregularity which affected the merits of the case and was therefore a good ground of appeal. (A W N 1894, 19 Ref). **Misri Lal v Mashuq Ali. A W N 1894, 51.**

25. DISMISSAL OF APPEAL.

Appeal—Dismissal of appeal. See C P C O. 41 r. 11 **30 All 290.**

Appeal—Dismissal of appeal. See C P C O. 41 r. 11 **19 P R 1892 Rev.**

Appeal—Dismissal of appeal. See C P C O. 41 r. 11 **8 P R 1903 Rev.**

Appeal—Dismissal of appeal. See C P C O. 41 r. 11 **7 P R 1892.**

Appeal—Dismissal of appeal. See C P C O. 41 r. 11 **4 P R 1892 Rev.**

Appeal—Dismissal of appeal. See C P C O. 41 r. 11 **7 P R 1888 Rev.**

Appeal—Dismissal of appeal. See C P C O. 41 r. 11 **9 O C 32.**

Appeal—Dismissal of appeal. See C P C O. 41 r. 11 **4 C L J 566.**

Appeal—Dismissal of appeal. See C P C O. 41 r. 11 **5 Bom L R 233.**

Appeal—Dismissal of appeal. See C P C O. 41 r. 11 **A W N (1906) 186.**

Appeal—Dismissal of appeal. See C P C O. 41 r. 11 **9 P R 1900.**

Appeal—Dismissal of appeal. See C P C O. 41 r. 11 **5 C L J 348.**

Appeal-*Contd.*

25 Dismissal of Appeal—*Contd.*

Appeal—Dismissal of appeal. See C P C O. 41 r. 11

Appeal—Dismissal of appeal. See C P C O. 41 r. 11 **91 P J 239.**

(1) Power of the Lower Court to amend decree after dismissal of appeal.

1206.—Power of the lower Court to amend decree after dismissal of appeal—Civil Procedure Code (1882) ss. 551 and 577—Practice.

The dismissal of an appeal under s. 551 of the Civil Procedure Code (1882) leaves the decree of the lower Court untouched, neither confirmed, nor varied, nor reversed, and it remains the decree of the lower Court which can amend it, in order to bring it into accordance with its judgment. **Bapu v Vajir 21 Bom 548.**

Notes:—Disap: 22 Mad 293. Ref: 10 M L J 216 F B. Diss: 4 C L J 566; 30 All 290= (1908) W N 109=5 A L J 584.

1206A.—S. 152 N C (1882 S. 206)-Amendment of decree—Effect of dismissal of appeal.

The dismissal of an appeal under S. 551 C P C is a decree which supersedes the decree of the Court below. Hence the only Court which has jurisdiction under s. 206 of that Code Court to amend the decree is the Court which has acted under S. 551. 24 Cal 759; 4 C L J 566 and 22 Mad 293 foll: 21 *Bom* 548 diss from; 15 All 367; 2 All 819; 26 Mad 91; 10 B L R 101, 16 Cal 250, 1894 A W N P 46; 3 Mad 1. **Asma Bibi v Ahmad Husain. 5 A L J 584=1908 A W N 109 =30 All 290.**

(2) Effect of dismissal of appeal.

1207.—Dismissing an appeal, effect of—Civil Procedure Code (1882) Ss. 206 and 551—Amending a decree of a lower Court improperly drawn —Powers of High Court—Practice.

The order of dismissal of an appeal under s. 551 is a final determination of, and adjudication on, the questions raised in appeal, and as such it is a "decree". There is no distinction in this respect between an appeal dismissed under s. 551 and one dismissed under any other section after being fully heard. 3 Mad 1 Referred to. When an appeal is dismissed under s. 551 or in the case of second appeal,

Appeal-*Contd.*

25 Dismissal of Appeal—*Contd,*

when decree is one of dismissal, the effect is practically to make the decree which is confirmed the final decree to be executed in the suit. The High Court ordering this has power to amend the decree of the Lower Court which has been in effect confirmed by it, as to bring it in conformity with the judgment, which is also confirmed.

Uma Sundari Devi v Bindu Bashini Chowdhrani. 24 Cal 759.

Notes-Ref 22 Mad 293; 9 C W N 605; 6 C L J 542. Ap: 4 C L J 566. Fol: 30 All 290= (1908) W N 109=5 A L J 584.

1208—The appellant filed an appeal against the judgment of the Court of first instance without a copy of the decree. Subsequently the decree of the Court of first instance was filed within the time allowed for appeal, and accepted by the Judge. *Held* that the irregularity was cured, and the appeal should not have been dismissed on the ground of such irregularity. **Lullee v Ram Pershad 2 Agra Rep. 35.**

1209—Civil Procedure Code (Act X of 1877) Section 551—Dismissal of appeal without notice to respondent—Court bound to record reasons—Practice—Remand.

Held that a Court confirming a decision appealed against under Section 551, Act X of 1877, without sending notice to the respondent, is bound to record a statement of the grounds of its order, as well as the order itself.

Where an Appellate Court has omitted to record its reasons for dismissal, the proper course to be pursued is, when it is practicable to do so, to return the case to the Judge who disposed of it for a statement of the reasons of his order, the appeal meanwhile being retained in the Court ordering the remand.

Where the Judge has been removed to another district, the proper order is to reverse the order of dismissal, and direct the appeal to be re-heard, and fresh orders to be passed with reasons for such order by the Judge for the time being of the Court to which the appeal was presented. **Jiwan v Dhir Singh P R 100 of 1879.**

Notes:—Fol: 24 P R 1881.

1210.—Application for revision admitted by Judge in Chambers as a further appeal on ground that there is question of law involved—Punjab Courts Act, 1884, Section 40, sub-section (2)—Objection by respondent at the hearing that the appeal ought not to have been admitted as no question of law was involved.

Held, that when an application for revision has been admitted by a Judge in Chambers as a further appeal on the ground that there was a question of law involved, under Section 40, sub-section (2) of the Punjab Courts Act, 1884, the respondents are not bound by such *ex-parte* order, but are entitled to call it in question and show it was erroneous, and that a further appeal did not lie, and was admitted through mistake or misconception.

The Divisional Bench, finding that there was no question of law involved, dismissed the appeal on that ground. **Fatteh Singh v. Harnam Singh. 80 P R 1894.**

1211—Agreement to liquidate by instalments —Validity of contract—Appeal by judgment-debtor subsequent to agreement—Dismissal of appeal.

Plaintiff having obtained an *ex-parte* decree against defendant, which was appealed unsuccessfully to the Commissioner, proceeded to attach defendant's property in execution, whereupon a written agreement was entered into by the parties by which defendant under-took to liquidate the decree by specified instalments, which agreement was ratified before the execution Court, and proceedings in execution stayed. Two days after such ratification, defendant filed a petition for revision (for which an appeal was afterwards substituted) in the Chief Court, praying for reversal of the Commissioner's judgment.

Held, that the appeal must be dismissed as the agreement entered into to liquidate the decree was not a voidable contract, but a reasonable arrangement for a good consideration, and one which should be enforced. **Sirdar Amrik Singh v. Rambhaj P R 161 of 1879,**

(3) Confirmation of decree on appeal.

1212.—Civil Procedure Code (1882), s. 551.

The decision of the Full Bench in 18 Mad 214, that the jurisdiction of a Court of first instance

Appeal-*Contd.*

25 Dismissal of Appeal—*Contd.*

to amend a decree under s. 206 of the Civil Procedure Code is ousted by the confirmation of that decree on appeal, applies equally to second appeals dismissed under s. 551 of the Code and to second appeals tried after notice to the respondent. **Munisami Naidu v. Munisami Reddi. 22 Mad 293.**

Notes:—Fol: 30 All 290=(1908) W N 109= 5 A L J 584.

(4) Defendant-Discretion of Court in restoring the case dismissed for default.

1213.—C P C O. 9 r. 9; r. 13; O. 41 r. 19, (1882-Ss 103,108,558).

Restoration—Dismissal on default—Power of Court to restore when no "sufficient cause" shown —The effect of Ss, 103, 108, and 558 is·—When appearance was prevented by a sufficient cause, the Court has no discretion in the matter under the Code and must restore the case to file whatever may *prima facie* be the merits of the suit or defence thereto, but where there may be other just and reasonable cause for restoring a case to file, the merits of the applicant's case will form a very important element in the exercise by the Court of its judicial discretion. It is competent to, but not obligatory upon, the Court to restore the case to file even when no sufficient cause for non-appearance is shown. **Somayya v Subbamma. 26 Mad 599.**

Notes:—Ref: 30 Mad 274; 17 M L J 225; 32 Bom 534=10 Bom L R 301. Not Fol: 10 Bom L R 904.

(5) Dismissal of appeal though litigants not informed of place and date of hearing.

1214.—Of suit—Dismissal in default—Litigants not informed of place and date of hearing.

Appellant whose appeal was struck off in default in camp, was present in Lucknow on the date fixed for hearing the appeal. *Held*, that Courts are bound to let litigants have clear intimation of the time and place where their suit is to be heard and decided and proof of service of notice on defaulter ought to exist on the record before a Court is justified in striking a case off in default. **Mohamed Jafar v. Oudh Behari S C 165.**

Appeal-*Contd.*

25 Dismissal of Appeal—*Contd.*

(6) Dismissing appeal for not depositing fees for issue of notices within fixed time.

1215.—C.P.C,O. 41, r. 18 (1882 S. 557)-Talabana, not filed within period fixed—Appeal, whether can be dismissed for default—Civ. Pro. Code, (Act XIV of 1882) S. 557.

Held, that it was wrong for a Judge to dismiss an appeal before the date fixed for the hearing of the appeal had arrived, and before too it had been ascertained whether the notice to the respondents could or could not have been served by the date fixed for the hearing, on the simple ground of the failure of the appellants to deposit the necessary fees for issue of notices within the time fixed by the Court. **Chandra Nath Das v Kaliprasanna Chakravarti. 35 Cal 535.**

(7) Appeal dismissed on the ground of respondent's heirs not being brought on record

1216.—Defect of parties—Dismissal of appeal.

When during the pendency of an appeal against a decree for rent, one of the plaintiff's respondents, died and his heirs were not brought on the record.

Held—that the appeal ought to be dismissed. 6 C W N 196 Foll: **Tarif Dafadar v Khote Jannessa Bibi 10 C W N 981**

(8) Estoppel of point abandoned in appeal can be raised in further appeal.

1217.—Ss. 32—Pedigree, proof of—Statement as to relationship made by family members before dispute, admissibility—Pleading—Estoppel—Question of fact decided in favour of a party in the first Court—Abandonment of point on appeal, if same may be raised in further appeal—Hindu Law—Mitakshara—Succession—Samanodaka and sister's son, which to be preferred.

A pedigree put forward by the plaintiffs in support of their claim was accepted by the Court of first instance as proved; but on the appeal, the Appellate Court held the evidence adduced in support of it to be worthless, and moreover observed that "at the hearing of the appeal practically no attempt was made to support the finding of the Court of first instance."

Appeal-*Contd.*

25 Dismissal of Appeal--*Contd*

Held, upon a consideration of the circumstances of the case, that the plaintiffs were not estopped on this appeal from endeavouring to sustain the finding of the Court of first instance in their favour.

Pedigrees which did not constitute ancient family records—handed down from generation to generation and added to as a member of the family died or was born, but were drawn up on a particular occasion for a specific purpose by members of the family—must be treated as mere declarations made by the persons who respectively drew them up or adopted them. Such of them as were made *post litem motem* are inadmissible on this ground. The same thing must be shown to have been in controversy before and after the statement was made.

Plaintiffs' fathers and the deceased owner were proved to be only six degrees removed from their common ascestor, and being *Sapindodakas* the plaintiffs were held to be preferential heirs to the son of the deceased sister. **Kalka Parshad v. Mathura Parshad 4 M L T 380 =10 Bom L R 1088=18 M L J 424= 8 C L J 447=13 C W N 1=5 A L J 701= 1 1nd Cas 175=3 All 510= 35 I A 166 (P C)=11 O C 362.**

(9) Effect of review granted and fresh decree passed before hearing of appeal.

1218.—Practice— Appeal— Application to first Court for review before appeal filed-Review granted and fresh decree passed before hearing of appeal—No appeal from original decree.

On the 14th May, 1888, a second appeal was presented to the High Court, and on the 15th May, it was admitted for a decree passed on the 17th March. On the 12th April, the plaintiff-respondent applied to the lower Court for review of judgment under s. 623 of the Civ. Pro. Code, and in June 1888, the review was granted, and a fresh decree passed. On the appeal to the High Court coming on for hearing, *held* that there was no decree existing, the subject of appeal, and that the appeal must therefore be dismissed.

Kuar Sen v. Ganga Ram. A W N 1890, 144.

Notes.—Fol. 28 All 240=A W N 1905, 265.

Appeal-*Contd.*

25 Dismissal of Appeal—*Contd.*

(10) Order for attachment in Execution not without jurisdiction.

1219—S. 52—Decree for ejectment if arrears of rent not paid within 15 days Appeal, payment of amount pending-Dismissal of appeal with costs —Failure to pay costs within 15 days, if entails ejectment—Appellate Decree.

Where a decree was passed under S. *52* of Act VIII (B C) of 1869 for arrears of rent and for ejectment if the arrears were not paid within 15 days,and an appeal by the judgment-debtor,during the pendency of which the decretal amount was paid, was dismissed with costs but these costs were not paid within 15 days of the appellate decree

Held that the Munsif did not act without jurisdiction in making an order for the attachment of the judgment-debtor's moveable property in execution of the decree for costs and for his ejectment from the land.

The appellate decree must be presumed to have incorporated the terms of the original decree. **(13 Cal 13 rel.) Thamal Marap v Rani Abhoyessuri Debi. 13 C W N 1060.**

(11) Dismissal of appeal without calling for Record.

1220—Act IX of 1873, s. 7-Dismissal of appeal without calling for record.

It is not incumbent on the appellate Court to look at the files of the case before dismissing an appeal without notice to the respondent under s.7 of Act IX of 1873. **Ram Dass v Lachman Dass, 48 P R 1876.**

(12) Appeal dismissed as contrary to rule of equity, justice & good conscience.

1221- Civil Procedure Code, 1882, Section 622 —Revision—Appeal dismissed by lower Appellate Court on ground that it was unauthorised by appellant –Appeal filed by advocate—Power of Chief Court to revise order of the lower Appellate Court - "Failure to exercise jurisdiction vested by law" Appeal to dismissed as contrary to "rule of equity, justice and good conscience "—Material irregularity.

Plaintiff's suit for Rs. 825, the price of a horse alleged to have been sold by him to defendant, having been dismissed by the District Judge, an

Appeal-*Contd.*

25 Dismissal of Appeal—*Contd.*

appeal from the decree was filed by a certain advocate in the Court of the Divisional Judge. At hearing of the suit, an advocate of the Bombay Bar stated that he appeared on behelf of the appellant, but the respondent urged as preliminary objections (1) that the appeal was, as shown by certain letters written by the appellant; and (2) that inasmuch as the plaintiff had, after the decision of the first Court, advertised the horse for sale as his own property for a smaller sum than that he claimed from defendant as its price, he had deprived himself of any right of appeal even if the appeal were otherwise duly authorised and valid. The Divisional Judge considered both objections, and, holding that they were well founded, dismissed the appeal with costs against the appeallant, who thereupon applied to the Chief Court on the revision side. For the petitioner it was contended that the Divisional Judge, in dismissing the appeal (a) on the ground that it was unauthorised, had "failed to exercise a jurisdiction vested in him by law"; and (b) on the ground that it was contrary to some unspecified "rule of equity, justice and good conscience," had acted with material irregularity. The respondent, while admitting that the order of the Divisional Judge as to costs could not be supported, contended that there had been no failure to exercise jurisdiction or acting with material irregularity in the exercise of jurisdiction on the part of the lower Appellate Court, and that the Chief Court was incompetent to touch the decision on either point on the revision side.

Held, that the Chief Court has full power in an application for revision under Section 622, Civil Procedure Code, to go into the merits of the decision of the Court, whose proceedings are being revised on the question of jurisdiction.

Held, further, that the lower Appellate Court in deciding the first preliminary objection, had adjudicated on a question relating to its jurisdiction over the case, and in dismissing the appeal on the erroneous finding that it was unauthorised had "failed to exercise a jurisdiction vested in it by law."

Held, also, that the lower Appellate Court in dealing with the second perliminary objection, must be held to have taken cognizance of the appeal and in dismissing the appeal upon the assumption that there was some rule of equity, justice and good conscience, not, however, specified in the judgment, which barred the institution of the appeal, had acted with material irregularity in the exercise of its jurisdiction. **Roebuck v Henderson 54 P R 1896.**

(13) Other Cases.

1222-C P C O, 41 r. 1—Appeal—Memorandum of appeal not accompanied by copy of decree, appeal-from—Validity of appeal—Decree—Review-Amended decree, appeal from.

If a memorandum of appeal is not accompanied by a copy of the decree appealed against, it is not a valid memorandum and the appeal must be dismissed on that ground.

Where the decision of an Appellate Court is reviewed and an amended decree passed, an appeal from the amended decree must be accompanied by a copy of that decree; as otherwise the appeal is not a valid appeal and must be dismissed.

Keamat v Abhooram Mistry 11 Ind Cas 8

1223.—Appeal—Procedure-Summary dismissal of an appeal—Appeal—Special Power of Attorney-Stamped paper for special power of attorney.

A Court is not justified in summarily dismissing an appeal on the ground that the special power of attorney referred to in Civil Circular I, is unstamped. **The Agent Bengal Nagpur Railway v Jagannath Ramchandra 15 C P L R 65.**

(26) APPEAL AGAINST FAVOURABLE DECREE.

1224-C P C O. 41, rr.1, 12, 22, S.96 (Ss. 540 541, 561)-Appeal against finding inadmissible—Memo of objections inadmissible where appeal is inadmissible.

No appeal lies at the instance of party to a suit when the whole or any part of the decree appealed against does not go against the said party and is entirely in his favour. An adverse finding on any single issue or issues is not appealable unless such finding is incorporated in the decree. Where an appeal is inadmissible in law for the above mentioned reason, any memorandum of objections tacked on to such appeal is also inadmissible and cannot be heard and decided.

Naganna v Venkata Krishnamma. (1896) 6 M L J 87.

Appeal-*Contd.*

26 Appeal against favourable decree-*Concld*

1225.—An appeal lies from the decree, and not from the judgment of a Court of original jurisdiction.

In a suit to recover possession of certain lands by setting aside a zur-i-peshgee lease of them, a decree was made dismissing the suit, but in the judgment of the Court there was a finding against the defendant as to some items of the consideration for the lease. *Held* he could not appeal against that finding. **Pan Kooer v Bhugwunt Kooer. 6 N W 19=Agra F B 1874, 298**
Nowbat Rai v Bajrang Lal 6 N W 412.
Shama Soonduree Debia v Degamburee Debia. 13 W R 1.
Chowdhry Mahomed Momin v Lutafut Hossein 13 W R 239.
Contra **Sheogholam Singh v Nursingh. 4 N W 120.**
Stephenson v Unnoda Dossee 6 W R Mis 18.

Notes.—Fol· 6 N W P 412. Dist. 1 All 266; 3 All 152 F B. Con: 2 All 497 F B. Ref: 3 All 239; 9 C W N 584.

(27) REQUISITES OF A VALID APPEAL.

1226.—The requisites of a valid appeal are, first, that no one can appeal from a judgment or decree unless he was a party to the action or was treated as such or is the legal representative of a party or has privityof estate, title or interest-apparent on the face of the the record; secondly, that the appellant has an interest in the subject-matter of the suit, and thirdly, that the appellant is prejudicially affected by the decree complained of. **Srinath Das v Probodh Chunder Das. 11 C L J 580=6 Ind Cas 244.**

(28) ATTACHMENT.

(1) Remedy of creditor when decree attached by him is reversed on appeal

1227.—Attaching Creditor—Right of a creditor attaching a decree—Reversal of decree on appeal—Remedy of creditor.

G attached, in execution of a decree against R, a decree, got by the latter against M. Before G could reap the fruits of his attachment, an appeal, which had been preferred against the attached decree, was concluded by a compromise between R and M, the effect of such a compromise being to reduce the amount due to R under the original decree by a very large sum. The attaching-creditor, G, protested against the compromise, but the appellate Court passed a decree on the basis of the compromise, disallowing the objection of G. G, now, proceeded to execute the decree which he attached. The execution Court refused to execute the decree, on the ground that it had been replaced by the decree of the appellate Court based as it was on the compromise. Hence this appeal. *Held*, whatever might be the inconvenience or loss to which the attaching-creditor might be put by the compromise of the appeal, the original decree was no longer subsisting, the same having been replaced by the decree, of the appellate Court, and the attaching creditor was without remedy. He was himself to blame for having attached a decree as to the reversal of which, on appeal, there was a chance. **Ganpat Shah v Ram Chand. 22 P L R 1905**

Appeal-*Contd.*

28 Attachment—*Concld.*

(29) CONSOLIDATION OE APPEALS.

1228.—Connected appeals—Consolidation of —s. 17, sch. 1, Art. 1 Court Fees Act (VII of 1870).

Where, in a series of connected appeals, the parties are the same and trial of one appeal is had as a *test case*, with stay of proceedings in the other appeals all the appeals may be consolidated and Court-fees paid upon the consolidated value of the appeals.

Kashin Prasad Singh v Secretary of State for India in Council. 29 Cal 140.

1229.—Cases governed by one judgment but not consolidated—One appeal if lies.

Where, in several execution cases, one judgment was passed, but a separate order was recorded for each case, and there was no order for consolidation of the cases.

Held, that there should be as many appeals as there were original cases, and not one consolidated appeal against all the orders. **Rakhal Chandra Tewari v Manmatho Nath Mitter. 15 C W N 994.**

(30) COSTS.

"Appeal decreed with cost" interpretation of.

1230.—Appeal decreed with costs.

Held, that the words "appeal decreed with

Appeal-*Contd.*

30 Costs—*Concld.*

costs," refer only to costs of the appeal, and not to costs throughout the Courts. **RamjiDas v Charanji Lal.** **P R 45 of 1877.**

31 COURT FEE

(1) Amount of Court-fee payable on the memorandum of appeal

1231.—Memorandum of appeal—Court fees—Decree—Payable by instalments.

The first Court granted a decree payable by instalments conditionally upon the defendant furnishing security. *Held* that the proper fee on a memorandum of appeal by the defendants against the condition imposed was rupees 10. 19 Cal 272; 10 Mad 187 ref to. **Rai Sahib Beharilal v Seth Nanheylal. 14 C P L R 172**

1232.—Sch. ii art. 11 cl. (b)—Appeal against order in execution of decree when amount of mesne profits has to be determined—Civil Procedure Code s. 244, cl. (c).

Held, that under the notification of the Government of India No. 4344 of the 6th October 1893 the fee payable on a memorandum of appeal against an order under cl. (c) s 244, Civil Procedure Code, is limited to the fee chargeable under art. 11 cl (b) Sch. ii Court Fees Act. **Rani Itraj Kuar v Bacha Madho Kuar. 6 O C 86.**

(2) Computation of Court-fee payable by appellant

1232A—Court Fees Act, S. 7, cl. (IX)—Redemption, suit for—Court-fee on memorandum of appeal, how computed.

In a suit for redemption when the mortgagor or the mortgagee appeals, not raising the question of the right to redeem, but challenging the amount held by the Court below to be payable by the mortgagor, the Court-fee should be computed ad valorem on the difference between the amount found to be payable by the Court below and the amount which the appellant contends should be paid. 2 O C 87 foll: 6 All 488: S C A No 189 of 1905: 40: 18 All 94 referred to. **Ram Adhin v Hanuman. 9 O C 153.**

Appeal-*Contd.*

31 Court fee—*Contd.*

(3) Memorandum of appeal insufficiently stamped.

1233—S. 28 Cl. (i)—Applied to a memorandum of appeal insufficienty stamped and received through mistake or inadvertence:

S. 28 of the Court Fees Act is not applicable to a memorandum of appeal which being in fact insufficiently stamped, has, through mistake or inadvertence of the Court or its officer, been received as if properly stamped. 12 All 129 explained. **Debendro Mohan Rai v Sonakuar 1901 A W N 21.**

1234-S.28-Civil Procedure Code, S.582 A-Appeal—Court fee—Memorandum of appeal insufficiently stamped accepted and filed—Subsequent discovery of the mistake—Additional court fee paid within the time limited but appeal nevertheless not heard ·

A memorandum of appeal which, as a matter of fact, was insufficiently stamped was reported by the proper officer of the court to be sufficiently stamped and was filed. At the hearing, however, the court found that the stamp was insufficient and fixed a time within which an additional court fee stamp should be filed. The additional court fee was paid within the prescribed period, but at a subsequent date the court notwithstanding its previous order, declined to hear the appellant upon that portion of his case respecting which there had been a dificiency in the court fee. *Held*, that the court was not justified in so declining to hear the appellant, thus practically allowing an appeal against its own order. The case was further one falling within the provisions of S.28 of the Court Fees Act (1870) and S. 582-A of the Code of Civil Procedure.

Anupa v Madho Singh. 1902 A W N 153.

(4) Court fee paying advalorem court-fee on the memorandum of appeal.

1235—Court-fee—Mortgage suit—Compromise decree-Appeal from order refusing to make order Absolute—Transfer of Property Act S. 89—Advalorem court-fee.

Ad valorem court-fee on the value of the appeal should be paid in the memorandum of appeal from an order refusing an application for an order absolute under S. 89 of the Transfer of

Appeal-*Contd.*

31 Court fee—*Concld.*

Property Act. 25 Cal 133 ref to. **Charu Chandra Mitter v Bhagirath Persad, 12 C W N 1028.**

(5) Refund of Court—fee.

1236—C P C O. 8 r 10—(1882 s. 113).

'Fails to present'—Inability to supply particulars—Decree—Appeal—Costs—Taxation-Court Fees Act s. 13.

The filing of a written statement in compliance with an order under s. 112, C. P. C. expressing inability to supply the particulars asked for by the Court, is not a 'failure to present' the written statement within the meaning of s. 113, C. P. C., Though, no doubt, in acting under s. 113, C. P. C., the Court may pass a decree if the circumstances admit of any decree being passed, yet to operate as a decree, the decision should fall within the definition of the term 'decree' in s. 2, C. P. C., i e it should be an adjudication upon any right claimed or defence set up. An order merely dismissing a suit under s. 113 for not filing a statement as required by Court is not a decree and costs can be allowed in an appeal from such an order only on the footing of its being an appeal under s. 588, C. P. C. Where the order of the Court rejecting a plaint under s. 113 C. P. C., was in terms a decree dimissing the suit and the plaintiff in appeal from the order paid the full court fee. *Held*, on reversal of the order of the lower Court that s.113 of the Court Fees Act applied to the case and that the appellant was entitled to a refund of the court fee paid by him in appeal. 22 Mad 221 Ref. **Orr v Nagappa Chetty. 16 M L J 30**

32 ESTOPPEL.

(1) Amendment of plaint according to decision of appellate court not constituting an appeal.

1237—Partition suit—Court Fees Act (VII of 1870), Sch II, Art 17—Suit for declaration and possession—Amending plaint according to decision of Appellate Court—Appeal from order—Acquiescence—Conduct—Estoppel—Right to file appeal.

In a suit for partition a preliminary decree was made by the first Court. The District Judge on appeal considered that the Court-fee payable should be calculated *ad valorem* on the property in suit, and the case re-tried as a suit for declaration of title and recovery of possession. The plaintiff agreed to amend his plaint so as to make it one for a declaration of title as well as for partition and to pay the necessary Court-fee. The District Judge thereupon remanded the case to the first Court for retrial. The plaintiff appealed from that order:

Held, that, if the plaintiff has title to the property and was a co-owner of that property with the defendant, the suit was one for partition of joint property and not one for declaration of title and recovery of possession.

Held, also, that the plaintiff is not precluded by his conduct in acquiescing in the decision of the District Judge and amending his plaint, from filing this appeal, if, on reflection, he thought that the action he had taken was injudicious. 12 C W N 37, 6 C L J 651; 3 M L T 33, relied upon. **Shashi Bhushan v Jotindra Nath Roy. 10 Ind Cas 463.**

33 FINAL DECREE.

(1) Appeal against final decree on the ground of erroneous decision in regard to an interlocutory order.

1238—C P. C. S. 105 (1) (1882 S. 591)—Appeal against decree-Erroneous decision in an interlocutory order—Ground of Appeal.

An appeal lies against the final decree of a Court within the meaning of S. 591, C. P. C., 1882 though the only ground of apeal is the erroneous decision of Court in regard to an interlocutory order.

It is not necessary for a suit to appeal from every interlocutory order by which he may feel himself aggrieved. Any erroneous intrlocutory order may be set aside in the appeal from the final decree. (7 Cal 148; 14 Bom 232; 7 M I A 283 (302); 22 All 366; 23 Mad 260; 18 All 19 (24); 23 Mad 494; 21 Mad 324, Ref:

Rajah Dhamara Kumara v Bukkapatnam Yenkatacharlu. 6 Ind Cas 239= 8 M L T 72=20 M L J 805.

(2) Appeal against one decree only whether maintainable when the other became final.

1239—Cross suits—Appeal against one de-

Appeal-*Contd.*

33 Final Decree—*Contd.*

cree only, the other decree having become final.

One M. L. filed a suit to have a certain door opened. The defendants filed a cross-suit to have the same door kept closed. M L was defeated in both suits. He appealed against both decrees and was again defeated in both appeals. He appealed a second time, but only against one decree and the other decree before the hearing of the appeal became final. *Held* that under the circumstances M L's appealcould not be maintained. **Mangli Lal v Narain Das. A W N 1893, 190.**

Notes:—A W N 1908, 211.

(3) Effect of Appeal on decree appealed Against.

1240—Effect of, on decree appealed against.

The decree of the lower court does not cease to be binding upon the parties by the mere fact of appeal, though the pendency of the appeal would open the whole question for the appellate court. **Rajah M Bhaskara Setupati v Narayansawamy Gurukkal 12 M L J 360**

(4) Proceedings in the appellate court treated as a continuation of the proceedings in the lower court.

1241—S. 52—Transfer after decree and before appeal filed—Lis pendens—Appeal-Final decree.

The function of an appellate Court is not the final decree in the case and the proceedings in the appellate Court must be treated as a continuation of the proceedings in the lower Court.

The law of lis pendens in this conntry is founded on the necessity, if possible, of a final adjudication and it is unjust that a plaintiff who is delayed in filing an appeal by waiting for copies of the decree in judgment should be prejudiced by any act of the defendant subsequent to the suit and with the notice thereof. (20 W R 205 and 28 Cal 23 Fol) **Setta Goundan v Muthal Goundan 4 M L T 77=21 Mad 268.**

(5) Right to question correctness of preliminary order or decree in appeal against final decree.

1242—Suit—Preliminary decree—Final decree-Appeal—Objection to preliminary decree admissibility of.

Appeal-*Contd.*

33 Final Decree—*Concld.*

Held, by the Full Bench (Maclean, C J., and Rampini, J., dissenting) that in an appeal against the final decree in a partition suit it is open to the appellant to question the correctness of the preliminary order or decree for partition when no appeal was preferred against such order within the time allowed by law. 23 Cal 279 overruled; 23 Cal 406 approved of. **Khader Hossain v Emdad Hossain, 5 C W N 67= 29 Cal 758 (F B)**

Notes.—Fol: 10 Bom L R 514, Ref: 10 C L J 336=9 C L J 367=13 C W N 493=5 C W N 177.

(34) JUDGMENT,

(1) Necessity and mode of recording Judgment

1243-1244—C. P. C. O 41 r 11, O 41 rr 30, 31 (1882 Ss. 551, 571-574)—Subordinate Court dismissing appeal summarily—Discretion to send for records—Judgment, if must be recorded-Question of sufficiency of judgment.

There are no grounds for limiting the discretion given by the Legislature to a Court of appeal to send for the records or not, before proceeding to dismiss an appeal under S. 551 of the Civ. Pro. Code.

Whether the judgment of a Court of Appeal dismissing an appeal under S. 551 has sufficiently complied with the provisions of s. 574 of the Code must be decided upon the facts of the particular case, and no general rule in regard to it can be laid down.

Per Coxe. J.—S 551 of the Code is not controlled by S. 574.

Per Richardson J.-When a Subordinate Court dismisses an appeal under S. 551, it is bound under S. 571 to record a judgment, and the judgment must be sufficient to meet the requirements of s. 574.

But provided it substantially meets the requirements of the law, it is not necessarily defective because it is brief or because it does not repeat or recapitulate all that is contained in the judgment of the Court of first instance. 25 Cal 97; 5 Bom L R 233; 5 C L J 348; 30 All 319; 13 C W N 143 Ref. **Pachi Dsssi v Bala Das 13 C W N 1031 =2 Ind Cas 405.**

Appeal-*Contd.*

34 Judgment—*Contd.*

(2) Consent-decree in Appeal passed by Court having no Jurisdiction.

1245—Jurisdiction—Undervaluation of suit-Appellate jurisdiction, affected—Appeal heard by Court having no jurisdiction—Consent-decree passed by appellate Court-Stranger added as party—Reversioners not bound—Neither strangers to decree—Orders and proceedings passed by Court having no jurisdiction—Nature-Nullities.

Where a suit was deliberately and intentionally under-valued, and the effect of such under-valuation was to oust the jurisdiction of the High Court as a Court of Appeal, and the appeal in the suit was as a matter of fact taken to the Court of the District Judge, and where a consent-decree affecting properties beyond the pecuniary jurisdiction of the Court was obtained in that Court: *Held* that the consent-decree made by the District Judge was wholly without jurisdiction.

If a Court has no jurisdiction over the subject-matter, its judgments and orders are mere nullities, and may not only be set aside at any time by the Court in which they are rendered, but be declared void by every Court in which they are presented.

If a Court has no jurisdiction, its judgment is not merely voidable, but void, and it is wholly unimportant how precisely certain and technically correct, its proceedings and decisions may have been; if it has no power to hear and determine the cause, its authority is wholly usurped and its judgments and orders are the exercise of arbitrary powers under the forms, but without the sanction of the law.

These principles apply, not only to Original Courts, but also to the Courts of appeal.

Jurisdiction over the subject-matter, whether in the Court of first instance or in the appellate Court, is given only by law, jurisdiction cannot be conferred upon it by consent of parties: and any waiver on their part cannot make up for the lack or defect of jurisdiction.

A consent-decree made between the parties to a suit and a stranger who was brought on record in the appellate Court without leave of the Court cannot be binding upon a reversionary heir.

A consent-decree made, in a prior suit, between the mother, a Hindu widow with a qualified interest in the estate of her husband, and other persons who claimed title in that property, is not binding upon the daughter of the deceased, claiming as her father's reversionary heir.

A consent-decree cannot operate to the prejudice of persons not parties thereto. (11 A & E 179=52 R R. 301; 2 Bing 213=27 R R 597; 9 East 192=9 R R 531; 1823 T & R 209=24 R R 21; 2 Wilson 382; (1847) 4 C B 507 (525); (1800) 8 T R 424, Ref 36 Cal 193· 7 A L J 675; 1862 W R F B., 15; 9 C W N 956; 9 All 191=13 I A 134; 11 Mad 26=14 I A 160; 11 A & E 941; 20 Q B D 242 (248); 20 Q B D 258 (262) & 7 N W P 99, Ref. 9 M I A 539, Dist.; 6 C L R 76; 10 C L R 337; 8 All 365; 5 Bom L R 885; 29 All 487; 30 All 75; 1 White & Tud 234 (8th Edn)=1 A & K 2, 6 C L J 490; 13 C W N 147; 24 Cal 218, (1895) 1 Ch 37 & 10 P D 161 Dist. (189-) 2 Ch 273, Foll.)

Rajalakshmi Dassee v. Katyayani Dassee, 38 Cal 639.

(3) Jurisdiction of first court after appeal presented and after appeal disposed of.

1246-C.P.C.O. 5, rr. 9, 12, 17; O.9, r.13-"Resides", meaning of—Substituted service—Change in law—Jurisdiction of first Court—Amendment of decree after appeal presented and amendment after appeal disposed of—Limitation Act (1908), Sch. I, Art 164—"Knowledge", meaning of.

For the purpose of service of summons, residence is not identical with ownership, that is, a permanent absentee cannot be described as resident in a place merely by virtue of ownership.

Residence denotes the place where an individual eats, drinks and sleeps.

Substituted service can be justified under O. 5, r. 17 of the Code, only when it is shown that proper efforts were made to find the defendant. In this respect the new Code has altered the law.

The mere presentation of an appeal does not put it beyond the power of the original Court to deal in any manner with the judgment under appeal. But the position is different after the adjudication of the appeal, when the original judgment has been superseded by the judgment of the Court of Appeal.

Therefore, an original Court can entertain an application to set aside an *ex-parte* decree pre-

Appeal-*Contd.*

34 Judgment—*Contd.*

sented by one of the defendants, when an appeal preferred by the contesting defendants from the decree made against them in the same suit, is pending.

The term "knowledge" in Art. 164 of Sch. I of the Limitation Act, 1908, means certain and clear conception of a fact, the fact being the decree in the suit. The expression "knowledge of *the* decree" means knowledge not of a decree but of the particular decree which is sought to be set aside.

Therefore, where the petitioners' brothers had knowledge of the *ex-parte* decree made against the petitioner, the inference cannot reasonably be drawn that he had a similar knowledge of it, when it is proved that he lived away from his brothers who never communicated the fact of the decree to him. 4 B C 953; 107 Emg Rep 1313; 7 D & R 424, 1 L J (O S) K B 65; 1 O M and H 158; 21 R 559 at (564); 21 R 497 at (510), relied upon. 1 C L & F 234; 36 R R 111, 6 Bli (N S) 70; 37 I A 70, 32 All 295, 6 Ind Cas 669; 14 C W N 667; 7 A L J 507; 11 C L J 560; 12 Bom L R 444; 8 M L T 457; 20 M L J 587; 1 M W N 392; 13 C W N 846; 3 Ind Cas 468, relied upon. 5 Ind Cas 535; 12 C L J 53; 27 Mad 602; 14 M L J 321; 30 Mad 535; 17 M L J 436, Not Fol: 11 Bom L R 1296; 4 Ind Cas 586, Fol

Kumud Nath Roy Chaudhry v. Rai Jatindra Nath Chaudhry, 9 Ind Cas 189 = 15 C W N 399.

(4) Jurisdiction to hear application for setting aside exparte decree during the pendency of appeal.

1247—C. *P.* C O. 9, r. 13—(1882) S. 108.

Hearing of application under, during pendency of appeal.

Where after perferring an application for setting aside an *ex-parte* decree under S. 108, C. P. C., the defendant preferred an appeal against the decree.

Held, that the first Court had jurisdiction to hear the application during the pendency of the appeal. 9 W R 307, 27 Mad 602, Ref: B L R F B R p. 362, 35 W Va 384 = 14 S E 7, relied on.

Sarat Chandra Dhal v. Damodar Manna, 12 C W N 885.

Notes:—Affirm: 13 C W N 846.

Appeal-*Contd.*

34 Judgment—*Contd.*

(5) Order confirming partition of village.

1248—Jurisdiction of Civil and Revenue Courts—Act XIX of 1873, Ss. 132, 241—United Provinces Land Revenue Act (III of 1901, Local), S. 233 (k).

Where the whole of a village was under partition in the Revenue Court, and that Court directed that the village should be divided into 26 mahals, one of which, the mahal of the non-applicants for partition, should consist of 12 *pattis*, but rightly or wrongly land which should have formed part of the mahal of the non-applicants was allotted to one of the other mahals, *held*, that this was a question relating to the partition or union of mahals, and the remedy of the party aggrieved was an appeal against the order confirming the partition and not a suit in the Civil Court. (20 A W N 11, Dist:). **Tirbeni Sahai v. Jagannath, 5 A L J 725.**

(6) Prayer for incidental relief not affecting jurisdiction of the appellate Court.

1249—Specific performance — Relief asked for cancellation of deed—Incidental relief—Appeal to District Judge—Jurisdiction.

In a suit for specific performance of a contract of sale, if the plaintiff also asks for the cancellation of the sale-deed in favour of the defendant vendee, the relief is merely incidental to the claim for specific performance of contract, and the District Judge is competent to entertain an appeal in respect of such a suit, the value of the main relief being within his cognizance. 8 A L J R 266, Dist: **Nityanand v. Bishanlal, 8 A L J 660.**

(7) Setting aside the decree passed in appeal by a court having no jurisdiction.

1250—S. 70—Revision—Civil cases—Appeal triable by Higher Court decided by Lower Court.

When an appeal triable by a Higher Court is heard and decided by a Lower Court, the Chief Court would, in the exercise of its revisional jurisdiction, set aside the decree passed on appeal, on the ground of want of jurisdiction in the appellate Court; and the fact that the party, who applies for revision, had himself filed the appeal in the Lower Court does not cure the defect of

Appeal-*Contd.*

34 Judgment—*Concld.*

jurisdiction. Colonel G F Wilson v. Charaga Mal, 16 P L R 1907.

(8) Small Cause Court suit.

1251—Suit—Judge on leave.

A Small Cause suit was brought in the Court of First Class Subordinate Judge having Small Cause powers and the Subordinate Judge was on privilege leave, and the joint Second Class Subordinate Judge who was in charge and who had no Small Cause powers registered the suit as a regular suit: *Held*, that the trial of the suit by the First Class Subordinate Judge as a regular suit did not change the character of the suit and that the suit remained a Small Cause suit.

Narayan Ravji v. Gangaram. 33 Bom 664.

35 LIMITATION

(1) Amended application for rehearing of appeal returned after time.

1252-C P C O. 41 r.21 (1882S.560)-Rehearing of appeal—Application presented in time, but returned for amendment, and returned after time.

An application for rehearing of an appeal presented originally within the period of limitation, but returned for amendment and re-presented after amendment after the period of limitation, cannot be rejected as being out of time.

Shama Prasad Ghose v. Taki Mullick, 5 C W N 816.

(2) Execution of delay in the case of one defendant cannot benefit other defendants.

1253—**S. 5** — Delay, excuse of — Appeal—Barred by time—One appellant, excused delay—Position of the other appellants.

An appeal to a lower appellate Court was presented beyond time by several appellants, but of them only defendant No. 1 applied to have the delay excused on grounds personal to himself. The appeal of all the appellants was admitted and the decree was varied in their favour:

Held, reversing the decree of the lower appellate Court, that there was no ground on which the delay of the defendants 1-6 (who alone were concerned in the question) could be excused.

Viswanath v. Vasudev. 3 Bom L R 400=25 Bom 699.

Appeal-*Contd.*

35 Limitation—*Contd.*

See also other cases under:—

Limitation Act Ss. 4, 5 & 12.

(3) Meaning of the word 'appeal' as used in the Limitation Act

1254—Art. 182 cl. (2)—Appeal-Fresh starting point—Appeal, narrow sense—Same word—Two meanings—Anomaly.

An order by the High Court, in revision, is not an order on appeal, within the meaning of Art. 182, sub-clause 2 of the Limitation Act, creating a fresh starting point for the calculation of limitation.

The word 'appeal' is used in a narrow sense in the Limitation Act. There is no reason to suppose that the word is used in Art, 182 in a wider sense than in Arts. 150 and 157. To hold that the same word is used in the Act in two different senses would be anomalous. 22 Mad 68; 15 C W N 848; 15 C W N 879, Ref. **Subramania Pillai v. Seethai Ammal 2 M W N (1911)198**

(4) Meaning of "appeal" in Art 179 of Limitation Act.

1255—(1877) Limitation Act, sch. ii, Art 179 "Appeal" meaning of, in Art 179—Decree, execution of, in a case in which only one out of several defendants appeals—*Held* that the word 'appeal' in Art. 179 of the Indian Limitation Act means any appeals by any party. **Someshur Dat v Dunia Prasad 5 O C 217.**

(5) Mode of computation of time limited for payment.

1256—Condition—Time for payment—Computation—Appeal—Appellate decree confirming original decree.

A merely affirming appellate decree does not give the plaintiffs fresh time for performing a condition imposed by the original decree. A decree provided "that on the plaintiff's paying into Court the balance of consideration Rs 10 within a month from this date" the defendant should execute a sale-deed of the suit land in plaintiff's favour. The plaintiff did not pay into Court Rs. 10 within the month, and after the expiration of the month the defendant appealed. The decree of the appellate Court simply confirmed the decree of the lower Court and dis-

Appeal-*Contd.*

35 Limitation—*Contd.*

missed the appeal. *Held*:—That the plaintiff decree-holder was not entitled to count the time allowed by the decree for the deposit from the date of the appellate decree. **Ramasawmy Kone v, Sundara Kone. (1907) 17 M L J 495 = 30 Mad 28 = 3 M L T 26.**

(6) Order on application for extension of time for appealing.

1257—Cl 15—Appeal—Meaning of "judgment"

Application for extension of time for appealing. An order refusing to change the time for preferring an appeal, which was already dead at the time, cannot be regarded as a "judgment" within the meaning of cl 15, and is not appealable under the clause.

Parties should make their application for extension of time within which to file the appeal, before the time for appealing had run out. 8 B L R 433, 18 Cal 182. 21 Cal 473, 9 C W N 502 Ref; 5 C W N 781 Dist: **Gobinda Lal Das v Shiba Das Chatterjee. 10 C W N 986 = 33 Cal 1323**

(7) Presentation of appeal after the time limited therefor

1258—s. 82—Prosecution under—Time for ordering prosecution—Denial of execution of a document—Appeal from the refusal—Limitation.

On the Petitioner denying the execution of a document in favour of A, belore the Sub-Registrar that officer refused to register the document. Thereupon A lodged a complaint against the Petitioner for cheating under s. 417 I P C which was dismissed under sec. 203 Cr P C on the 26th March 1906. On the 27th April 1906 A appealed to the Special Sub-Registrar who rejected the appeal for not having been preferred within the prescribed period of 30 days from the Sub-Registrar's refusal to register but at the same time submitted a report to the District Registrar which ultimately led to an enquiry with the result that a proceeding was drawn up against the Petitioner under s 82 of the Registration Act (III of 1877), *Held*—That under the circumstances the Petitioner should not be prosecuted under sec. 82 of the Registration Act. That the presentation of an appeal to the Special Registrar after the time limited therefor, against

Appeal-*Contd.*

35 Limitation—*Contd.*

the refusal of the Sub-Registrar to register a document on denial of execution, does not give any *locus standi* for the institution of a proceeding for inquiry as to the execution of the dodument.

Sakanbari Debi V Adaitya Ganguli 12 C W N 47

(8) Other cases.

1259—Limitation Act. S 5—Appeal—Depositing appeal in the box put up for the purpose is proper presentaion or a sufficient cause.

Held, also that whether the circumstances disclosed in a particular case constitute a sufficient cause so as to bring it within S 5 of the Limitation and is an important question of law under S. 70 (b) of the Punjab Courts Act 101 P R 1890 and 29 All 638 Ref: **Mela Mal v. Natha Singh 71 P W R 1908.**

1260—Appeal in Civil cases—Presentation—Practice—Deposit in a box—"sufficient cause."

Where the practice of an Appellate Court as to the mode of receiving appeals had beed altered, and it did not appear that the change of practice was known to the appellant and his appeal was presented within time according to the former practice, but not according to the new practice, *held* that sufficient cause was shown for admitting the appeal after the period prescribed by law. **Sukh Dial v Jay Singh 101 P R 1890**

1261.—Appeal—Presentation—S 541 C P C.

The sending of an appeal by post is not a sufficient presentation within the meaning of S. 541 Civil Proredure Code. That section implies actual delivery of the appeal to the proper officer of the Court. 15 Mad 137: 8 Mad 417 referred to.

Kripasindhudas v Kunjbandas Mafidar 8 C P L R 93.

1262.—Appeal in "forma pauperis"—Limitation Act S 5—Discretion.

The plaintiff obtained a decree against the defendant on the 21st June 1895. The defendant applied for permission to appeal *in forma pauperis*. Her application was disallowed on 23rd September but time was granted till the 9th October to allow of her fully stamping her memorandum of appeal. The appeal was then heard and the claim dismissed. *Held*, that in admitting the appeal after the period of limitation prescrib-

Appeal-*Contd.*

35 Limitation—*Contd.*

ed therefor the Lower Appellate Court had exercised the discretion allowed by s 5 of the Limitation Act in a reasonable and proper manner.

13 All 305 Dist. **Gopal Modi v Mt Ganga Bania** **11 C P L R 3.**

1263.—Appeal—Presentation of appeal beyond time-Sufficient cause for admitting appeals after time—Limitation Act 1877, Section 5.

Plaintiffs, the daughters of defendant No 2 instituted a suit for a declaration that defendant No 1 was not and could not be validly adopted by defendant No 2 and that certain alienations made by the latter in favour of the former would not affect their reversionary rights. The appellant being a minor was represented by his adoptive mother (defendant No 2) as his guardian, but at the request of a relation of the minor the Nazir of the Court was subsequently appointed guardian who at the first hearing stated his inability to produce any evidence owing to the illness of the minor, and on the adjourned hearing on the ground that again the minor who possessed the necessary information had not been to see him. On 30th November 1900, the District Judge gave judgment for the plaintiff. On the 2nd January following the Nazir made an application under Section 108, Civil Procedure Code, to have this decree set aside, giving as his reason for failure to produce evidence that the minor had been ill and unable to instruct him. After notice to the plaintiffs on 20th March 1901 this application was rejected on the ground that the decree not being an ex-parte one the petitioner's remedy was either to apply for review of the judgment or appeal to the Superior Court. The minor on the 17th June 1901 filed an appeal against the original decree to the Chief Court and in explanation of the limitation having been allowed to expire contended that the period taken up in conducting the proceedings to set aside the *ex-parte* decree should be deducted under S 5 of the Limitation Act. It was also submitted that he being a ward of the Court was engaged from 1st April to 17th May 1901 in getting an order from the District Judge declaring the termination of his adoptive mother's guardianship and that he was also imprisoned by a Criminal Court at the instance of his adoptive mother's agent and was only released on the 12th June, and that therefore he was also entitled to a deduction of the time that had intervened between the date he applied to the District Judge for getting himself declared of age to enable him to act for himself and the date of his release from the prison.

Held, that the appellant had shown sufficient cause within the meaning of Section 5 and was fully entitled to claim the benefit of that section and that the appeal though filed after the prescribed period should be admitted to a hearing under the peculiar circumstances of the case. The time occupied in attempting to get the *ex-parte* decree set aside and in conducting proceeding before the District Judge for getting himself declared of age and also the period during which he was imprisoned ought to be deducted in computing the time that had occurred between the date of the judgment and the date on which the appeal was filed. (183 P R 1888) (8 Moo I *A* 160 20 Bom 104 cited. 23 Calc 325 distinguished.

Maharaj Narain v Mussammat Banoji 21 P R 1904.

1264.—Copy of decree—Affidavit.

A memorandum of appeal was presented to the Court unaccompanied by a copy of the decree appealed against. After the period of limitation for the appeal had expired, a copy of the decree was presented, with an affidavit explaining the delay, and was accepted by the Court. *Held*, that the Court must be taken to have exercised the discretion vested in it by s 5 of Act XV of 1877. *Held* also that such discretion might be exercised by a Court to which an appeal had been transferred by the Court to which it was originally presented. **Wahid Nur Khan v Haqdad Khan 17 W N 15.**

1265.—S 541 C P C.—Presentation.

Where a pleader duly appointed had prepared and signed a memorandum of appeal in a civil suit, but instead of presenting it to the Court himself gave it to a mukhtar of the appellant who handed it over to the Munsarim of the Court, the said mukhtar being authorised amongst other acts also to present appeals on behalf of his principal, it was *held*, that though such a presentation was irregular, yet it need not necessarily be held to invalidate the appeal. **Muhammad Golam Mohi-ud-din v Muhammad Abdul Karim 14 W N 131.**

Appeal-*Contd.*

35 Limitation—*Contd.*

1266.—(XV of 1877) Sch II Art 179—Decree—Appeal—Limitation runs from date of. When an appeal is entertained and an order is made by the Court to which the appeal is preferred, which has the effect of finally disposing of the appeal, time for execution runs from the date of the order of the Appellate Court.

Where an appeal was not pressed before an Appellate Court and was dismissed, *Held*, that the time began to run from the date of the decree in appeal. (16 M L J 393 fol: 1 All 293: 20 All 124, Dist.) **Fazl-ur Rahman v Shah Muhammad Khan, 5 A L J 580 = A W N (1908) 161 = 30 All 385.**

1267.—Appeal after execution of decree.

Where a plaintiff obtains a decree for part only of his claim, and sues out execution of that decree, his right of appeal against the order disallowing the remainder of his claim is barred. **Mahomed Khan v Fida Mahomed P R 82 of 1868**

Notes:-Ref. 16 P R 1907. overr. 31 P R 1907.

1268.—Limitation in-by some of the defendants, limitation as to those who have not appealed. Where only some of several persons affected by a decree have appealed against it, the date of the appellate decree forms the basis from which the period of limitation, under Art, 179 of the Limitation Act 1877, should be computed even in the case of those who have not appealed against the original decree. **Shivram v Sakharam 10 Bom L R 939.**

1269—Decree remaining unsigned—Time requisite for obtaining copy—Act XV of 1877, s. 12—

Held, that in computing the time to be excluded under s. 12 of the Limitation Act from a period of limitation the time requisite for obtaining a copy does not begin until an application for copy has been made. If, therefore, after judgment the decree remains unsigned, such interval is not to be excluded from the period of limitation, unless application for copy having been made, the application is actually unnecessarily delayed through the decree not having been signed. 12 All 461 Fol. **Kamikhya Singh v Indar Down Singh 10 C 184.**

Appeal-*Contd.*

35 Limitation—*Contd.*

1270—Obtaining copies which are not necessary for appeal—

The time required for obtaining a copy of the judgment appealed from cannot be deducted under S. 12 of the Limitation Act, when such copy is not required to be presented with the memo of appeal. **Jadhaoji v Raghoo 1 Bom L R 112.**

1271—Appeal—Admission of law—Admitted facts of the case—Limitation point—

The question of limitation, raised in the written statement but abandoned in the Court of first instance, is a clear question of law, and it could be raised in the Court appeal.

Under section 184, sub section (1) of the Bengal Tenancy Act, it is obligatory upon the Court to dismiss the suit on the ground of limitation although limitation has not been pleaded.

Refusal by a counsel or pleader to urge a question of law is a mere admission of law which is not binding upon the party, and the party may raise the question in appeal although not raised in the lower Court. specially where the question of limitation obviously arises upon the admitted facts of the case. **Abdulullah Sarkar v Asraf Ali Mandal. 7 C L J 152.**

1272—Time occupied in applying for review, deducted from time for appealing, where the reviewer's petition was dismissed after notice to the opposite side, without giving notice to the reviewer of the day appointed for hearing his application. **Chunda v Mihan. P R 35 of 1872.**

1273—T P A Ss. 86, 87—Mortgage—Suit for foreclosure decreed in part-Appeal—Application for order absolute for foreclosure.—A mortgagee brought a suit for foreclosure of five villages. The suit was decreed as to three villages, and dismissed as to the remaining two. The mortgagee appealed, and it took more than three years for the dismissal of the appeal. Subsequently an application for order absolute was made, i. e., three years after the day fixed for the mortgage money. *Held* the application was not barred by limitation, having been brought within three years from the appellate decree, and that Art. 178 does not apply to the case. The nature of proceedings for foreclosure is such that a mort-

Appeal-*Contd.*

35 Limitation—*Concld.*

gage must be foreclosed as a whole or not at all. 20 All 375; 16 Cal 246, ref to. 13 All 178 doubted, 1896 A W N 100 and 19 All 520 ref to.

Sham Sundar v Muhomad Ihisham Ali 1905 A W N 70=27 All 501 F B=2 A L J 180

1274—Ss. 2 cl. (10) and 31—Appeal filed before the passing of the Act—Whether S. 31 applies to such suit—Suit includes appeal—'Repugnant in the subject or context" The definition of the word "suit" given in S 2, clause (10) of the Limitation Act is subject to the rule that there is nothing repugnant in the subject or context.

To hold that the word "suit" in the last clause of sub-section (1) of S. 31 does not include an appeal would be repugnant to the context Therefore, the 1st paragraph of S 31 applies to a suit which is pending in the stage of appeal in an Appellate Court. **Birj Mohan Lal v Ram Sarup Singh. 2 Ind Cas 632**

36 PARTIES

(1) Abatement of appeal on reversioner appellant's death.

1275-C P C O 22 r 1 (1882 S 361)-Abatement of appeal—Right of next reversioner to prosecute appeal—An appeal by a plaintiff reversioner against a decree passed against him dismissing his suit abates on that reversioner-appellant's death, and his son, though the next reversioner, cannot prosecute the appeal. **Sakhyahari Ingle Rao Sahib v Bhavani Boyi Sahib 27 Mad 588.**

Notes.—Disap. 29 Mad 390 F B=16 M L J 307=1 M L T 183.

(2) Absolute abatement of appeal.

1276-*CPC.O 22* r 4 (1882 S. 368)-Penultimate clause-Abatement-Absolute-Limitation Act S. 7 -Per Davies J —

The abatement provided for in the penultimate clause of S. 368 is absolute and cannot subsequently be set aside. A minor cannot seek to set aside the order of abatement after the appeal has been ordered once to abate through the negligence of the former guardian, to apply to bring the legal representative of the deceased respondent on record. S. 7 Limitation Act, will not help him, there being no appeal pending at the time. *Paru* v **Variangatil Raman Menon 28 Mad 359.**

Appeal-*Contd.*

36 Parties—*Contd.*

(3) Appeal failing by reason of defect of parties.

1277—Death of one of plaintiff's Respondents—Effect of not bringing in the heirs of the deceased on the record—Suit for arrears of rent by several Plaintiffs—Joint decree in favour of all Where in an appeal by the defendant against a decree for arrears of rent passed jointly in favour of all the Plaintiffs, the heirs of one of the Plaintiffs, who died subsequent to the date of the delivery of judgment against which the appeal is preferred, were not made parties —*Held*—That the appeal could not proceed and must fail by reason of defect of parties.

Bejoy Gopal Bose v Umesh Chandra Bose 6 C W N 196.

(4) Decree in decree suit assigned before passing order absolute for sale.

1278—*C* P,C O 22 r 10 (1882 S 372)-Decree in mortgage suit assigned before passing order absolute for sale—Assignee of mortgage decree. An assignee of a mortgage decree order absolute can be made a party under S 372, C P C to an appeal against his assignor, but he cannot raise any defence of a plea of limitation to the appeal which could not be raised by the assignors **Chunni Lal v Abdul Ali Khan 23 All 331.**

(5) Decree in favour of all plaintiffs when only one has appealed.

1279—C P.C. R 33 of O XLI—Appeal by one plaintiff out of many—Decree in favour of all—Effect of Mutation entry—Punjab Land Revenue Act XVII of 1887 r 177 under S. 34.—

Held, that r 33 of O XLI of the new Civ. Pro. Code (Act v of 1908) justifies an Appellate Court to decree in favour of all the plaintiffs, what they are entitled to get collectively even if only one of them has appealed

Held, also, that P R No 6 (*Rev*) of 1883 and No.1 (Rev) of 1891 enunciate the well-known rule that Revenue Courts look to possession in the first instance as a guide in mutation of names proceedings, and the mutation order does

Appeal-*Contd.*

36 Parties—*Contd.*

not preclude title being set up by the losing party. **Bhagtu v Bua Ditta 26 P W R 1912**

(6) Effect of appeal decided without legal representatives of deceased being brought on record.

1280—Decree awarding costs against two defendants—Appeal by both—Death of one defendant pending appeal decided and judgment reversed, without legal representatives of deceased being brought on record—Effect.

A decree was passed against two defendants and both of them preferred an appeal. The first defendant died during the pendency of the appeal, and without his legal representatives being brought on the record, the appeal was heard and decided on behalf of the surviving appellant and the suit dismissed with costs, and it was expressly stated in the decree that the appeal was prosecuted only on behalf of the surviving defendant. *Held*, that it would be unreasonable to construe the decree as being intended to enure for the benefit of the first defendant also, and to consider that the decree appealed against was reversed in favour of his representative, and that, therefore, the decree of the lower Court must be regarded as still in force as against the first defendant, and so his heir was not entitled to restitution of the costs levied from his father under that decree until he successfully prosecutes the appeal. **Natesa Ayyar v Annasami Ayyar. 25 Mad 426.**

Notes—Ref 30 Cal 718

(7) Effect of death of guardian ad litem pending appeal

1281.—Death of guardian ad litem pending appeal—Appointment of fresh guardian—Irregularity cured.

While an appeal on behalf of two minor appellants was pending in the High Court, their guardian *ad litem* and also one of the appellants themselves died. The appeal was decreed without these matters having been brought to the notice of the Court. *Held*, that this was no more than an irregularity, which was cured by the subsequent appointment of guardian *ad litem* pending an appeal under s. 10 of the Letters Patent

Ram Dayal v Ajudhia Prasad. A W N 1906, 40=3 A L J 81=28 All 328

C. C 74

Appeal-*Contd.*

36 Parties—*Contd*

(8) Effect of failure to bring in legal representative of one of several defendants dying during pendency of appeal.

1282—Transfer of Property Act (1882) secs. 55, 67—Suit by puisne mortgagee for the enforcement of his mortgage-some of the mortgaged items sold by the mortgagor to pay off a prior mortgage decree—Whether the purchaser of these items can claim the money paid by him from the puisne mortgage—Revenue sale of some of the mortgaged properties—Purchase by one of the co proprietors—Whether the mortgagee has any interest in this portion—Death of one of the several defendants pending appeal—Failure to bring in his legal representative on record within 6 months—Effect of—Civil procedure Code (1882), secs 368, 582—Limitation Act (1887) Art 175 Cal.

Where the defendant paid a certain sum of money in discharge of a mortgage decree obtained against the plaintiff's mortgagor, which had priority over the plaintiff's mortgage and subsequently about the one-sixth of the mortgaged property was conveyed to him, the remainder being taken by the vendor (i e) the plaintiff's mortgagor.

Held, that the plaintiff could enforce his mortgage against the items of land conveyed to the defendant, and the defendant was not entitled to claim from the plaintiff the amount paid by him before the plaintiff can proceed to enforce his mortgage against the lands conveyed to the defendant by the plaintiff's mortgagor.

A purchased one item of a property which was subject to a mortgage but the Revenue Patta had not yet been issued in his name in respect of that item. There was default in payment of revenue in respect of the other items of the mortgaged property in consequence whereof, the item comprising A's property was brought to Revenue sale and purchased by A himself

Held, that when A purchased item of the property at the revenue sale his rights over the property were absolute and that the property was no longer subject to the mortgage.

Renga Srinivasachari v Gnanaprakash. 2 M L T 36=30 Mad 67.

Appeal-*Contd.*

36 Parties—*Contd.*

(9) Effect of one decree-holder respondent not being properly represented in appeal

1283.—Execution of decree-One decree-holder-respondent not properly represented—Decree not void.

The mere fact that one of the persons in whose favour there was a valid decree was not represented at the instance of the judgment-debtor in his appeal is not sufficient to render the decree void and incapable of execution.

Gobardhan Sahi v Mahabir Singh. 9 A L J 290.

(10) Effect of one of the appellants dying during pendency of appeal.

1284.—Appeal—One of the appellants dying pending the appeal—Representative of the deceased not brought on record—All persons interested not before court—Abatement of appeal.

One of the appellants against a joint decree died during the pendency of the appeal in the High Court. His representatives were not brought on the record. *Held*, that the appeal must abate, as the Court had not before it all those persons whose interest might be affected by the decree. (22 All 222 Foll.) **Ram Lal v Debi Singh. 4 Ind Cas 385**

1285.—S. 544—Joint decree—Joint appeal—One of the appellants dying during pendency of appeal—Representative of deceased not brought on record—Abatement.

Where several defendants jointly appeal against a joint decree, to which S. 544 of the Code of Civil Procedure, 1882, applies, the death of one of such appellants, if no legal representative of the deceased appellant is brought on the record within limitation, can only have the effect of causing the appeal to abate so far as the deceased appellant is concerned. It cannot have the effect of causing the appeal as a whole to abate. 25 All 27, Fol: 22 All 222, overruled. **Ram Lal v. Debi Singh 10 Ind Cas 27.**

(11) Effect of party preferring an appeal.

1286.—Judgment in previous suit—Evidence—Appeal—Effect of.

Appeal-*Contd.*

36 Parties—*Contd.*

The effect of a party preferring an appeal is to re-open the decree appealed against, and it is competent to the parties to agree that the case should be remanded for the trial of fresh issues even on points not raised by the appellant in the grounds of appeal. **Natesa Gramani v. Venkatarama Reddi. 2 M L T 455= 17 M L J 518=30 Mad 510.**

(12) Effect of substitution of legal representative of deceased respondent not made within time

1287—C.P.C. O 22 r 4 S. 107 (2), O 23 r 11 (1882 Ss. 368, 582)—Revenue Sale Law Act XI of 1859—Sale of joint residuary estate, suit to set aside—Plaintiffs, respondents, death of one of several—Substitution not made within time—Abatement of appeal.

Where a decree which had been obtained by several plaintiffs, proprietors of a joint residuary estate set aside the sale of the said estate held under Act XI of 1859, and two of the plaintiffs, respondents died during the pendency of the appeal by the defendants against that decree to the High Court and their representatives were not brought on the record within the time allowed by law.

Held, that the decree could not be reversed in appeal without the representatives of the deceased proprietors being placed on the record, and that as the decree set aside the sale of the entire joint estate, under no circumstances should that decree be affirmed as to the unascertained shares of some joint-holders and reversed as to the unascertained shares of other joint share-holders.

Held further, that as sufficient cause was not shown by the appellant as to why the application was not made within the time allowed by law to bring in the heirs of the deceased respondents and as the right of the appeal did not survive against the surviving respondents, alone,

Appeal-*Contd.*

36 Parties—*Contd.*

the appeal had abated under the provision of section 368 read with section 582 of the Code of Civil Procedure. **Chandreswar Persad Narain Singh v Dharamjit Narain 5 C L J 393=11 C W N 504.**

(13) Delay in Substitution of legal Representative of deceased respondent.

1288—C. P. C. s. 368— Substitution of legal representative of Respondent who died leaving Will—Delay—Sufficient cause.

In a suit which was in substance one for taking the accounts and winding up the affairs of a partnership which had subsisted between the Plaintiff and several Defendants to that suit, a final decree was made directing the Plaintiff and some of the Defendants to contribute in certain proportions a sum of money of which a portion was directed to be paid to another Defendant A. Pending an appeal before the High Court, preferred by some of the former, A (Respondent) died leaving a Will. About four months after A's death, A's son obtained probate of the Will. The Appellants applied for substituting the name of A's son for A, within six months of his obtaining the probate but more than six months after A's death, *Held*—That the appeal could not have proceeded in the absence of a representative of A, and no sufficient cause having been shown for not applying for substitution within six months of A's death, the appeal had abated under secs. 368 and 582 of the Civil Procedure Code and Art. 175C of Sch. II of the Limitation Act. **Raj Chunder Sen v Gangadas Seal (P C) 8 C W N 442.**

(14) Fact of representative not being brought on record-no bar to delivery of judgment.

1289—C. P. C. O 21, R. 16 (S. 333)—Appeal—Hearing—judgment reserved—Death of party—Repre-sentative not brought on record—Delivery of judgment—Locus standi of representative to appeal:

Where after the hearing of the appeal, but before delivery of the judgment, the appellant dies, the fact that his representative has not been brought on the record is no bar to the judgment being pronounced. The judgment so pronounced relates back to and speaks from the date when judgment was reserved. The representative of a deceased appellant has under such incumbrances a *locus standi* to appeal from a decree passed in such appeal, notwithstanding the fact that he may not have been brought on the record. He is not bound under S. 232, C. P. C., to apply to the Court which passed the decree. It is enough if he applies to the Court to which he appeals to be brought on the record as representative.

Thathachariar v Venkatesa Tawker (1902) 12 M L J 435=26 Mad 101.

(15) Jurisdiction to enquire into the right of the legal representative to proceed with the suit.

1290—*C.* P. C. O. 22 rr. 3 (1), 5 (1882 Ss 365, 367)-Civil Procedure Code Act XIV of 1882 s.365, 367, 371, 588 (18) 32—Plaintiff—Legal representative of deceased plaintiff—objection to the legal representative—Nearest heir to the deceased—Appeal—Practice—Procedure.

When a plaintiff dies, the suit cannot proceed because there is none suing. The Legislature provides that his legal representative can come in his place; when he is allowed to come, the defect is made up, there is a suit to proceed. The suit is then a suit on the merits. A Court has no jurisdiction after that stage has been reached to go back and enquire into the right of the legal representative to proceed with the suit side by side with an enquiry into the merits.

Where a person has once been admitted to the record as legal representative of a deceased plaintiff that person is a party and any dispute raised inter parties as to that substituted plaintiff's right of representation (not inheritance) so as to have such substituted plaintiff struck out comes properly under s. 32 and not under s. 367 of the Civil Procedure Code

If S. 367 be read with s. 588 (18) of the Civ Pro Code, it becomes clear that the dispute contemplated in S 367 is not an issue on the merits framed and recorded between a plaintiff and defendant. **Balaba v Ganesh 4 Bom L R 980=27 Bom 162,**

Notes:—Ref 1 C W N 584.

Appeal-*Contd.*

36 Parties—*Contd.*

(16) Objection by respondent that application for substitution of representative of deceased appellant made out of time.

1291—Objection at hearing. An application for the substitution of the legal representative of a deceased Appellant was made more than 6 months after his death. No notice of the application was given to the Respondents and the Judge's attention was apparently not drawn to the fact that the application was made out of time. *Held*,—That the *ex-parte* order granting the application did not preclude the Respondents from urging at the hearing that the appeal should abate, and it was open to the Court to go into that question. **Tripura Sundari Debi v. Dakshina Mohun Roy, 11 C W N 698.**

(17) Order of remand directing addition of parties.

1292—C P C (1882 S. 564)—Appeal-Order of remand directing addition of parties-Preliminary point—Legality of order.

An order of remand, under S. 564, C. P. C., by an appellate Court, directing addition of new parties is an order upon a point which is necessarily preliminary to the proper decision and trial of the suit, and is perfectly legal. 23 All 167, Fol. **Jadab Gobinda Singh v. Anath Bandu Saha. 37 Cal 171=5 Ind Cas 998.**

(18) Power of Appellate Court to add parties

1293—C P C S 22—Power of appellate Court to add parties—Adding of respondents—Civ. Pro. Code. S. 559.—

There is nothing in the Limitation Act, which controls the powers of the Court, under S. 559 of the Civ. Pro. Code, in the matter of allowing to be added as respondents, persons who were not made respondents at the time when the appeal was presented; and it makes no difference whether the application so to add has been made by the appellant himself to bring in such persons as respondents, or the Court considers it necessary for the ends of justice and with a view to enable it to make an effectual order between all the parties concerned, that they should be added as respondents. (9 Cal 325 and 12 Cal 642 Ref:)

Girish Chander Lahiri v. Sasi Sekhareswor Roy, 33 Cal 329.

Appeal-*Contd.*

36 Parties—*Contd.*

(19) Restoration of appeal upon application by heirs of deceased defendant.

1294—C P C O. 22, r. 9(1), (2); S. 107 (2); O. 23, r 11 (1892 Ss 371 and 582)—Death of one defendant—Withdrawal of suit against surviving defendant, pending appeal by him—Restoration of appeal upon application by heirs of deceased defendant.

Where two defendants, who were jointly interested in a suit, preferred an appeal to the District Judge, and, the appeal being dismissed, one preferred a second appeal, the other having died, and, on remand by the High Court, the plaintiff withdrew the suit as against the surviving appellant by arrangement with him, and the appeal was dismissed.

Held, that an application by the heirs of the deceased defendant for restoration of the appeal ought to be allowed, inasmuch as it was not necessary for them to prosecute the appeal so long as the other defendant was prosecuting it.

Chandra Kumar Majhi v. Sandhyamoni, 13 C W N 338=36 Cal 418=2 Ind Cas 412.

(20) Right of respondent filing memo of objections to have parties added.

1295-C P C O XLI, rr. 20, 22-Appeal-Addition of parties—Court's power — Respondent filing memo of objections—No right to add thereto as party a person not necessary party to appeal.

A respondent, who has filed a memorandum of objections, should not be permitted to add, as parties to the memorandum, parties who, though parties to the suit, are not necessary parties to the appeal, and who are in no way affected by the decision of the question to be decided between the appellant and the respondent preferring the objection. He must proceed not by way of memo of objections but by way of appeal.

It cannot be contended that the Court has no power to add parties to an appeal except under O. XLI, r. 20, Civ. Pro. Code. 15 C L J 61 and 26 Cal 714, Fol. **Yalliammal Achi v. Nataraja Pillai, 11 M L T 157=(1912) M W N 198.**

(21) Substitution of wrong person in appeal, effect of.

1296—Mortgage by widow—Decree on mortgage—Subsequent decree declaring mortgage to

Appeal-*Contd.*

36 Parties—*Contd.*

be honest transaction and executed for legal necessity—Whether mortgage-decree binding upon reversioner—Appeal—Death of appellant—Substitution of wrong person, whether affects respondent's decree.

A Hindu widow mortgaged certain property, which she inherited from her husband. The mortgagee obtained a decree against her precluding her from redeeming the mortgage. The widow appealed but died during the pendency of the appeal. The present plaintiff and one J, applied to be substituted, but the application of the plaintiff was rejected, and J, was substituted; subsequently the appeal was dismissed. The plaintiff then brought a suit for the recovery of the property alleging that the mortgage was fraudulent and executed without legal necessity. That suit was dismissed and the mortgage was found to be an honest transaction and executed for legal necessity. After that, the plaintiff brought this suit for redemption:

Held, that the plaintiff was bound by the mortgage-decree obtained by the defendant against the widow, and that his suit must fail:

Held, also that though J, was a wrong person to represent the widow in the unsuccessful appeal, yet the present defendant cannot be deprived of the value of the decree he had obtained.

Girija Sundari Debi v. Kailash Chandra Bose, 10 Ind Cas 32.

(22) Appeal against order of judge sitting on original side.

1297—Appeal—An order of a Single Judge —Appeal.—

An appeal lies against an order of a Judge sitting on the original side if that order decides a question of some right between the parties.

Sir Jehangir C Jehangir v. Hope Mills, Ltd 10 Bom L R 488=33 Bom 216= 2 Ind Cas 294.

Notes:—Ref: 10 Bom L R 1057.

(23) Appeal by one defendant as to the disposal of certain money decreed to be paid by plaintiff.

1298—Appeal by one defendant as to the disposal of certain money decreed to be paid by plaintiff—Separate suit.—

Appeal-*Contd.*

36 Parties—*Contd.*

Where in a suit for specific performance of a contract of sale, the lower Court ordered a sum of money to be paid by plaintiff, which money he thereupon deposited in Court, *held*, that an appeal by one defendant, lodged against the other defendants and the plaintiff as respondents, on the ground that the money should be paid to him (the appellant) alone, and not to all the defendants jointly, could not be entertained, there being no dispute between the appellant and the original plaintiff.

Held further, that such a dispute could form the subject of a separate suit. **Sarup Singh v Jowahir Singh P R 37 of 1881.**

(24) Appeal from decisions when substantial justice meted out.

1299—Duty of Court to discourage appeals about trifles.

Parties should accept a decision by a Court, unless there is some substantial grievance. Appeals about trifles, when there has been substantial justice done, should be discouraged. The Chief Court declined to interfere with the rate of interest awarded by the lower Court in the exercise of its discretion. **Ram Lal v Shahmad Khan. 129 P R 1907.**

(25) Cases in which Court can make new case for parties in appeal.

1300—Practice—Pleading Parties to be kept to their pleadings—Court making a new case for a party—Oppressive or unconscionable bargains—Court's duty to investigate—Second appeal—High Court—Specific ground on which appeal is fought in lower Court-Waiver by the parties of the other grounds—Presumption—Trustee and Cestui que. As a general rule, parties ought to be kept to their pleadings, and the Court should not raise a new point for them in appeal. There are exceptions to this rule. One of them relates to agreements entered into between persons who stand to each other in relation of mortgagor and mortgagee, or trustee and *cestui que trust*. A Court, as a Court of Equity, is bound to examine into the nature of such agreements, where, on the face of them, or having regard to the surrounding circumstances, the Court finds *prima facie* grounds to suspect that the transaction is oppressive or unconscionable.

Appeal-*Contd.*

36 Parties—*Contd.*

When a question is fairly raised either at the original trial or in appeal, or it is met there by one of the parties on a specific ground, though other grounds were open, and the specific grounds fail, that party should not be allowed, as a general rule to rely upon any of the other grounds in second appeal, if the allowing of that ground necessitates a remand for the taking of fresh evidence and thereby prolongs the litigation. In such a case the Court will presume, in the absence of clear indications from the record to the contrary, that the other grounds were waived by the party. **Jagannath Rango Dandekar** v **Bhaskar Gopal Bhat. 12 Bom L R 795**

(26) Fresh and inconsistent case cannot be set up in appeal,

1301—Repudiation of title-Ejectment-Notice-Appeal, setting up fresh case in:—In a suit brought by the plaintiffs for ejectment against the defendant described as a trespasser, he repudiated the plaintiff's title altogether, and set up a title in himself. His plea, however, was found to be fraudulent.

Held, that the defendant could not be allowed to set up an entirely fresh and inconsistent case in appeal, and say that he was a tenant, and as such entitled to six months' notice. He was liable to ejectment without any notice, as a trespasser. 13 Cal 248; 17 Mad 278; 15 Bom 407, Dist. **Sujjad Ahmed Chowdhury** v **Ganga Charan Ghose. 1 C L J 116=9 C W N 460**

(27) No appeal lying against decree where grounds of appeal directed solely against interlocutary order.

1302—*Held* that no appeal would lie where the appeal being ostensibly against the decree in the suit, the grounds of appeal were solely directed against an interlocutory order passed in the suit.. (18 All. 19) followed. **Sher Singh** v **Diwan Singh. 22 All 366=20 W N 901.**

(28) Presentation of appeal.

1303-Presentation of—Moonsarim. An appeal must be presented to the Judge,and not to the Moonsarim. **Taj Uldeen Khan** v **Musst. Ghafoor-ul-nissa. 3 N. W. P. 341**

Appeal-*Contd.*

36 Parties—*Concld.*

(29) Raising new point in appeal

1304—A Muhammadan on his death left, among other heirs, a widow I and a daughter M. Subsequently I died and was succeeded by M. The plaintiff represents this daughter by purchase and sues to recover the estate from the defendant who is purchaser in execution of a decree obtained against M, as representing the estate of her deceased father. The lower Court has given a decree in favor of the plaintiff for a share inherited by M from her mother on payment of a proportionate amount of the debt for which the estate was sold. The appeal by plaintiff refers to two points. (i) is the plaintiff entitled to recover the estate without payment of the debt ? (ii) What was the share inherited by M from her mother ? *Held* as to the first question that the defendant being a *bona-fide* purchaser in execution of a decree against M as representing the state the plaintiff who represents M can only recover by payment of the proportionate share of the debt. 7 All., 822 followed. As to the second point, *held* that it was not taken in sufficient time to allow the Court below or to permit this Court to entertain it. **Wilayat Husain** v **Saiyyad Husain 7 W N 59**

(37) PRACTICE.

(1) Transfer of part-heard appeal.

1305—Appeal part heard—Transfer by District Court to Subordinate Court—Ultra vires.—

A District Judge has no jurisdiction to transfer a part-heard appeal before him to a Subordinate Judge's Court, and the judgment of such Subordinate Judge after such transfer must be set aside as illegal and *ultra vires*. *23 Mad 314 Fol.*

Sriramamoorthy Chetty v **Pandara Goundan 12 M L J 117.**

(2) Two appeals to lower Court and one appeal to High Court.

1306—Procedure— Appeals, filing of—Two appeals to lower Court and one decree—One appeal to High Court—Decree, form of-*High Court Rules* (Madras) Rule 105—Where from a decree in a suit there have been two appeals to the lower appellate Court, but only one decree was passed, it is enough if one appeal is preferred to the second appellate Court; and even if two appeals are preferred, the proper course will be to

Appeal-*Contd.*

37 Practice—*Contd.*

pass only a single decree. (26 Mad 97 Ref:)
Sanyasi Lingam v. Gavarammah 16 M L J 411.

(3) Other Cases.

1307—The District Judge in deciding an appeal should give actual and precise findings of fact and not merely doubt and inclination and a statement of the belief of the lower Court.
Ramappa v Guru Basawa. 1 Bom L R 845.

1308—Cognizance of events happening since appeal.

A Court is entitled to take cognizance of events which have happened since the filing of the appeal. **Ahmedjee v Mahamadjee 1 Bom L R 218**

Rustomji v Purshottamdas 3 Bom L R 227

1309—Appeal—Review of judgment—New decree.

An appeal will not lie from a decree, a review of which has been granted and which has merged in a new decree. **Nawab Ghulam Mahbur Subhani v Pandit Prem Narain. 85 P R 1891**

1310—Separate appeals against two decrees passed in the suit-Procedure of appeals when separate decrees passed in cross appeals.

In a suit for arrears of rent the plaintiff's claim was decreed in part. Both parties appealed. The District Judge dismissed the appeal of the plaintiff, allowed the appeal of the defendant, and dismissed the plaintiff's suit. Two decrees were prepared in the Court of the District Judge. The plaintiff attached copies of both the decrees to his memorandum of appeal to the Court of the Judicial Commissioner and the grounds of appeal showed that he intended to appeal against both of them. *Held*, that one appeal against two decrees is not permissible even though those decrees are passed upon cross-appeals arising out of the same suit. **Mathura Singh v Jagdat Singh. 5 O C 146.**

1311—Preliminary decree, against—Preliminary decree, appeal against—Final decree in the suit made before appeal was lodged-Preliminary decree, correctness of, if may be challenged without preferring appeal against final decree-Appeal lodged if competent.

The right of appeal from interlocutory orders ceases with the disposal of the suit.

This principle is equally applicable to cases of suits in which there is first a preliminary decree and ultimately a final decree.

If the final decree has been made, it is not only open, but the duty of the party, who is aggrieved by the interlocutory order or preliminary decree, which up to that stage has not been questioned by way of appeal, to prefer an appeal, against the final decree and to question the validity of the interlocutory order. 32 Cal 1023 ; 6 L J 547 Ref: and Fol: 30 All 479, Expl: and Dist.
M H Mackenzie v Lala Narsingh Sahai. 10 C L J 113=36 Cal 762= 1 Ind Cas 413.

1312—Right of-Appeal by defendant against whom suit has been dismissed—C P C., S. 540:

Held on review of authorities, that a defendant has the right to appeal notwithstanding that the suit has been dismissed against him, if he is aggrieved by the decree. (17 W R 279 dist). The question whether a party is aggrieved by a decree is a question of fact to be determined in each case according to its peculiar circumstances.
Krishna Chandra Goldar v Mohesh Chandra Saha. 9 C W N 584

Notes.—Ref · 17 M L J 260; Appr : 30 Mad 447.

1313—From intermediate order—Decree illegally setting aside an intermediate order.

There is no appeal against an intermediate order, but there is an appeal from decree illegally setting aside an intermediate order declining in effect a re-hearing of the suit on the merits.
Krishna Chandra Goldar v Mohesh Chandra Saha. 9 C W N 584 at 590

Notes:—Ref · 17 M L J 260. Appr : 30 Mad 447.

1314-C P C O.23 r 1; S.107 (2):O,22, r.11 (1882 —Ss. 373-582) -Plaintiff withdrawing from appeal—Partition suit—Practice,

Appeal-*Contd.*

37 Practice—*Contd.*

When, in a partition suit a defendant has by concession of the plaintiff acquired rights which otherwise could not have existed, it is not open to the plaintiff who has made that concession afterwards to annul its effect by withdrawing from the suit in the appellate Court.

Sections 373 and 582 of the Civil Procedure Code do not support the conclusion that rights actually vested and created by the decree of the first Court can be afterwards annulled by a plaintiff withdrawing of his own free-will and without the permission of the Court.

Satyabhamabai v Ganesh. **6 Bom L R 533 =29 Bom 13**

1315—Interlocutory decision of lower Court not reversed on appeal, how far binding on Appellate Court on appeal from a final order in same proceeding.

Held, that though a decision by a competent Court in an execution proceeding that an application for execution is not time-barred, is unless reversed on appeal, conclusive between the parties in a subsequent proceeding for execution of the same decree, such decision is not binding upon an Appellate Court on an appeal from a final order *in the same proceeding*, merely because the interlocutory order was not appealed from immediately. 8 Cal 51, referred to.

Sardar v Fatteh Chand. **89 P R 1894.**

1316-Appeal from decree passed by inadvertence against, or in favour of, a dead party.

Held that a decree passed by inadvertence against, or in favor of, a dead party, is one from which no appeal lies, because in such case the heir of the deceased party, or the opposite party, has no *locus standi*, as an appellant, or as a respondent, as the case may be. **Gohar v Muhammad.** **7 P R 1889.**

1317—Civil Procedure Code, 1882, Section 36, 541—Presentation of memo, appeal by pleader's clerk—Legal Practitioners Act, 1879, Section 10-"Recognised agent".

The Code of Civil Procedure does not provide for the delegation by a duly appointed pleader of any portion of his duties to others and, therefore, the presentation of a memorandum of appeal by the clerk of such pleader is not permissible.

Appeal-*Contd.*

37 Practice—*Contd.*

Where, however, the appellant personally accompanied the clerk and authorised him to present the memorandum of appeal, *held*, that the presentation was valid, inasmuch as in the Punjab a person specially authorised by a party to appear and act on his behalf in any particular suit, is a recognised agent within the meaning of Section 36 of the Code, and it is not necessary that the authorization should be in writing.

Mula Mal v Atma Ram. **6 P R 1896.**

1318—Appeal by plaintiffs to Chief Court, who did not appeal to Divisional Judge—Competency of appeal.

Eighteen persons instituted a suit for an account against seventeen others. The first Court dismissed the suit.

Two of the plaintiffs appealed to the Divisional Court, and, after a remand under Section 566, Civil Procedure Code, a decree was made in their favour against defendant 1 for Rs. 103-8-0, being the proportion to which they were held entitled out of a total sum of Rs. 1,467-5-0 for which defendant was found to be liable.

Some of the other plaintiffs, who had not appealed to the Divisional Court, then preferred a further appeal to the Chief Court urging that the Divisional Judge should have given them a decree for their proportionate share.

Held, that such further appeal was not competent, the appellants not being parties to the appeal before the Divisional Judge, nor affected in any way by the decree made by him. 46 P R 1892. **Mahbub Singh v Kahna 123 P R 1892.**

1319—C P C S.110 (1882 S. 596)—Concurrent finding of facts—Application of principle of law to facts found, how far a reversal.

Where the first Court and the Court of first appeal had decided that a party had notice of a particular fact on a certain date (*i. e.* when he first became personally cognizant of it), but the Judicial Commissioner, on the same facts, held that a notice which had been received earlier by the party's mukhtar amounted to notice to himself on the earlier date. *Held*, that the Judicial Commissioner had not reversed the concurrent finding of fact of these Courts, but had as he

Appeal-*Contd.*

37 Practice—*Concld.*

had jurisdiction to do, merely applied a universal rule of law to the facts before him. 29 1 A 203.

Rajah Rampal Singh v Balbhaddur Singh 4 Bom L R 832=6 C W N 849=25 All 1=29 I A 203 P C.

1320—Where the parties to a suit expressly agreed to rely upon certain evidence only and that the decision of the Court, given upon that evidence and a personal inspection of the promises, should be final. Held, the lower Court having passed a decree accordingly, that no appeal would die.

Rao Bahadur Raoji Trimbak Nagarkar v. Govind Vinayak Nagarkar P J (1897) 413.

(38-39) REFERENCE TO COLLECTOR.

(1) Collector's order on appeal preferred to Divisional officer.

1321–1322—Regulation VI of 1803, S 9 and Regulation VII of 1825 S 3—Execution Act—Delegation of power-Scope of authority-Rules prescribing only procedure—Appeal to superior officer—Validity of grant—Consultation of Municipal Council—Grant vitiated by fraud, etc.—Appeal to Divisional Officer—Collector's order on appeal—Fiction of law:—Per Moore J.

Under para 9 of the Standing Orders of the Board of Revenue, No 470 dated 16th August 1893 in case of applications for house sites within Municipal limits, the Municipality concerned must be consulted before the application is considered. This rule is not a mere idle formality, though it may be open to the Tahsildar (the officer concerned in granting applications for house site) to accept or reject the opinion given by the Municipal Council. A non-compliance with his rule is a fatal defect in the title of the grantee. It is open to a Collector to set aside the order of the Tahsildar, his subordinate, on the ground of grave irregularity in not complying with this rule. There is no question of a Civil Court setting aside the order. 18 Mad 434 distinguished. Semble:–Under the general powers of supervision given to a Collector under Regulation VI of 1803 S 9 and Rgeulation VII of 1828, S 3 there is an appeal to such Collector against the order of a Tahsildar granting an application for house-site and it is open to the Collector to set aside such order as irregular. Though the power of graning lands for house-sites might have been delegated by the Governor-in-Council to the Tahsildar,

Appeal-*Contd.*

38-39 Reference to Collector—*Contd.*

yet as the exercise of this power was at the same time subject to certain rules, a grant of house site by the Tahsildar in violation of the rules is irregular and liable to be cancelled by the Collector, his official superior in all other respects. Where an appeal was provided from the order of the Tahsildar under the dharkhast rules, to the Divisional Officer and the appeal was presented to the Sub-Collector, the Divisional Officer, but the latter officer asked the Collector for instructions on the matter, and on the Collector passing an order on such letter of reference that the Tahsildar's order should be set aside, the Sub-Collector issued a takid to the Tahsildar cancelling the latter's order. *Held by Moore* J.—That the order was substantially that of the Divisional Officer within the meaning of the rule as to appeals, and that there was no irregularity on the part of the Divisional Officer in making a reference to get instructions. Per *Bhashyam Aiyengar*, J. :—A power conferred by the Governor-in-Council on Tahsildars or Divisional officers, in regard to the disposal of Crown lands cannot be controlled by the Collector under Regulation II of 1803, S 9 or under Regulation VII of 1828. It is open to the Governor in-Council by an executive act to subject the exercise of a power conferred by an executive act to the control of a superior authority but in the absence of any such provision, a grant made by the Tahsildar is final and the Collector acts ultra vires in entertaining an appeal from the Tahsildar's order and in revoking the grant he has made. Where the Tahsildar acts in excess of his authority in making the grant, the grant of course, will not bind the Crown. A distinction must be drawn between so much of the rules as are in the nature of a power-of-attorney defining the scope of authority and so much as are in the nature of instructions to such officers while exercising the power conferred upon them. A rule which has the effect of deligating the power the Governor—in--Council solely to the Tahsildar and enjoining the latter that in acting within the scope of his authority, he should consult the Musif is one relating to the procedure to be adopted by the agent and therefore a grant made by the Tahsildar without consulting the Municipal Council is, nevertheless, valid as being within the scope of the agent's authority. But if the rule should provide that no grant should be made by the Tahsildar without the prevsion

Appeal-*Contd.*

38-39 Reference to Collector—*Concld.*

sanction of Municipality, it would amount to delegation by the Government not to one officer, but to him jointly with another body. 18 Mad 434, foll. If the grant is vitiated by fraud, misrepresentation, collusion or mistake, it does not bind the Crown. An appeal allowed from the order of a Tahsildar to a Divisional Officer is not in the nature of a judicial act or appeal, and such Divisional Officer may consult and seek the advice of the Collector or of any other person, and may also be implicitly guided by such advice. But where the Collector issues his order, such order cannot be construed as that of the Divisional Officer and cannot be construed as a mere advice, especially in a case where on the faith of a grant made by a public servant in the discharge of his duty, persons have invested labour and expense and made considerable improvement. A fiction of law may be resorted to when calculated to further the ends of substantial Justice and not otherwise.

Sappani Asari v. Collector of Coimbatore. (1903) 13 M L J 472=26 Mad 742.= 12 M L J 417

Notes:—Ref 14 M L J 37 F B; 27 Mad 386; 30 Mad 270; 31 Mad 264; 18 M L J 62; Appr; 29 Mad 461 = 1 M L J 278.

(40) REHEARING.

(1) Appeal against preliminary decree dismissed for non-prosecution.

1323.—Notice on pleader if notice to client —Appeal for preliminary decree, disposed of— Arrival of records in lower Court-Parties how to be notified.

An appeal preferred to the High Court against a preliminary decree for accounts having been dismissed for non-prosecution, the record was returned to the lower Court, which directed notices to be served on the pleaders of the parties for the further hearing of the case, a week hence. Notice was served on the defendant's pleader but he did not inform the defendant; *Held*,—That the notice was not a good notice on the defendant and an *exparte* decree passed against the defendant on the date fixed should be set aside. That the case should be reheard upon notice served on the defendant personally. **E. F. Sandys v Upendra Chandra Sinha Rao. 13 C W N 142=2 Ind Cas 547.**

Appeal-*Contd.*

40 Rehearing—*Concld.*

(2) Whether all appeals are by way of rehearing.

1324.—Whether all appeals are by way of rehearing—English and Indian Law.—

There is not to be found in the sections of the Code which relate to the powers of an appellate Court, or in the rules, any provision which corresponds to O. LVIII, r. 1 of the English Rules of the Supreme Court that all appeals shall be by way of re-hearing. **Raja of Venkatagiri v Muthu Narasayya, 8 M L T 258= 7 Ind Cas 202.**

41 RESJUDICATA.

(1) Decree not appealed against not operating as Resjudicata.

1325.—Pre-emption—Heard and decided-Different suits—Appeal in one—Consideration.

Where with regard to the sale of certain property three suits for pre-emption were instituted all questioning the amount of the price, and they were disposed of by one judgment awarding to the different sets of plaintiffs separate shares in the property on payment of proportionate amounts of the sale consideration which was put at a much lower figure than that claimed by the vendees, and the vendees preferred an appeal against the decree in one of the suits. *Held*, that the decree not appealed against did not operate as *resjudicata* on the question of the sale consideration.

Jhamun v Bilass Kunwar 1 A L J 466.
See also 33 Cal 1101=29 Mad 333 F B.

(2) Effect of Appeal against only one of two Decrees.

1326.—Res-judicata—Appeal against only one out of two decrees.

Where there have been two decrees passed by the lower appellate Court, and both of them require to be set aside in order to give the dissatisfied party the relief which he seeks, but a second appeal is filed against one decree only, *held*, that the decision, which has been allowed to become final, operates as *res-judicata* in respect of the second appeal. **Waliulluah v Ezaz Ali, 15 O C 22.**

Appeal-*Contd.*

41 Res judicata—*Contd.*

(3) Finality of decree in defendant's appeal whether bars plaintiff's appeal.

1327—Contract Act (IX of 1872) Ss 198, 211 and 216—Secret profits by the agent-Ratification—Res judicata—Two appeals from one decree—Decrees in appeal drawn up in identical terms—appeal from one decree only.

The defendant has entered into a contract for sale of merchandise with the plaintiff on his behalf. The defendant supplied his own goods in fulfilment of these contracts, but when subsequently the goods consigned by the plaintiff arrived, he sold, the same to another merchant at a higher rate than the contract rate. The plaintiff claimed the difference as profits and asked for a settlement of accounts.

The Court of first instance found a certain amount to be due to the plaintiff and decreed the claim in part. Both parties appealed to the District Judge, who dismissed the plaintiff's appeal, and allowed that of the defendants. But the decrees that were drawn up in these appeals were exactly similar. The plaintiff appealed from the decree passed in his appeal. A preliminary objection was taken that the decree in the defendant's appeal having become final, the plaintiff's appeal ought not to be heard.

Held, that there was in fact but one decree settling the accounts between the parties, and the decree in the case in which no appeal was preferred did not operate as *res judicata* and preclude the hearing of the other appeal.

Held, further, that the defendants, being the plaintiff's agents, could not be permitted to make any profits out of the plaintiff's goods, and were liable to account to plaintiff for the sale of his goods at a higher rate. It is a well recognised principle of law that an agent is not entitled to make a secret profit by dealing in the business of the agency on his own account.

Duty of agent discussed.

So long as the relation of principal and agent subsists, the principal is entitled to the exercise of the disinterested skill, diligence and zeal of the agent for his exclusive benefit.

There can be no ratification, until the person ratifying comes to know all the material facts. Where the principal did not know, until after the institution of the suit, that the agents had sold to him their goods at a price which was in excess of the market price, he could repudiate the transaction after the institution of the suit. (33 Cal 1101 and 29 Mad 333, Ref.) **Damodar Das v Sheoram Das** **4 A L J 587=29 All 730 =A W N (1907) 245.**

Appeal-*Contd.*

41 Res-judicata—*Contd.*

(4) Finality of one decree barring appeal against another decree.

1328—Res judicata-Two suits-One judgment, but two decrees—Appeal against one decree—Finality of the other decree—Appeal—Practice.

The Code of Civil Procedure requires a separate judgment and decree for each suit for appeal, and two or more decrees cannot be challenged by one appeal.

A decree, unless it be a decree, which is a nullity, by reason of, for example, fraud, cannot be superseded, except it be upon appeal in the regular course.

An appellate Court is bound to apply the rule of *res judicata*, even though the decision pleaded in bar is the decision of an inferior Court, provided that that Court was competent to decide the case.

Where, therefore, two suits were tried together and disposed of by one judgment and a decree was passed in each suit, but an appeal was preferred against the decree in one of the suits only, *held* that the appeal would be barred by the other decree which stood unreversed and was binding upon the appellant. 10 All 123; 11 All 148; 12 All 578 *approved* and *followed*. 29 All 730 *overruled*. **Zaharia v Debia,** **7 A L J 861 F B= 7 Ind Cas 156.**

1329—Res-judicata—Two decrees in the same suit—Appeal against one decree only—Other decree allowed to become final—Appeal barred.

The plaintiff brought a suit for the removal of certain constructions and for a mandatory injuction against the defendant. The first Court decreed the suit in part. Both parties appealed. The lower appellate Court disposed of the appeals in one judgment but framed two decrees, whereby the decree of the Court of first instance was modified. The plaintiff preferred an appeal to the

Appeal-*Contd.*

41 Res-judicata—*Contd.*

High Court against the decree framed by the lower appellate Court on the defendant's appeal.

Held, that the appeal was barred by *res judicata*. Ref: 7 A L J 861; 7 Ind Cas 156, 33 All 51; 7 A L J 995; 7 Ind Cas 909 Fol.

Lala Ramcharan v Lachman Pershad, 9 Ind Cas 667.

(5) Judgment in the Case not appealed against operating as Res-judicata.

1330—S 11.—"Former suit"—Same issue in two suits—Findings in one incorporated in the other—Appeal against one decree only—Effect.

In two suits for sale upon different mortgages one of the defendants, a prior mortgagee, pleaded that his mortgage had not been satisfied. The Subordinate Judge found in the one case that the mortgage had not been satisfied and incorporated that finding in the other case. The plaintiff appealed in the one case against that finding but allowed the decree in the other to become final. *Held*, that the judgment in the case not appealed against operated as *res judicata*. 7 A L J 816 F B foll. **Dakhni Din v Syed Ali Asghar. 7 A L J 995=7 Ind Cas 909.**

(6) No appeal by appellant entirely in his favour.

1331—Practice—No appeal—Lower Court decree entirely favourable—Not even when res judicata.

No appeal can be preferred by an appellant when the decree of the lower Court has been entirely in his favour.

No appeal would lie even if the matter were *res judicata*. 27 Mad 80, 29 Mad 50, 31 Mad 252 Expl. 21 All 117 Dist. **Secretary of State for India v Saminatha Kavundan 10 M L T 291 =2 M W N (1911) 303**

(7) Party not entitled to appeal when decree in his favour.

1332—Appeal—Party not entitled to appeal when decree in his favour—Finding upon unnecessary issue—Res-judicata.

Plaintiff sued defendant for rent of a house. Defendant pleaded that he himself was the owner and denied that he was the tenant of the plaintiff. The Court found that the defendant was not the owner of the house but dismissed the suit on the ground that there was no proof of the defendant having ever been the tenant of the plaintiff, who (the Court found) was the owner.

Held, that, although the finding of the Court upon the issue of ownership was adverse to the defendant, the decree being in his favour upon other grounds, no appeal could lie, at his instance, from the finding of the Court upon that particular issue.

In view of the fact that the plaintiff claimed rent from the defendant, the finding that the latter was not a tenant was *per se* sufficient for the purposes of the case so far as he was concerned, and the finding that he was not the owner was not *necessary* for the decision of the suit against him.

Obiter—Therefore, the finding on the question of ownership could not be successfully pleaded as *res judicata* as against the defendant in future litigation between the parties. **Nur Bakhsh v Ahmad Bakhsh. 120 P L R 1911.**

(8) Point not decided in appeal is not resjudicata.

1333—S 11—Res judicata-Point not decided in appeal—Hindu Law—Mitakshara—Mortgage of family property by father—Son's pious duty to pay debt—Redemption of mortgaged property by sons, after sale if allowed—Son not impleaded in suit on mortgage.

B and N mortgaged ancestral property to R. to pay off debts incurred by their father. N's interest in the property was sold in execution of a money decree and purchased by M R. Afterwards R sued B N and M R on his mortgage and obtained a decree in execution of which he purchased the property himself. The sale was confirmed, but the certificate was not obtained by R for more than three years. R applied for certificate and it was granted to him. Upon appeal, R objected that no appeal lay. The lower appellate Court held that an appeal did lie, but rejected the application as barred by limitation. In second appeal by R, the High Court pronounced no opinion as to whether an appeal would lie, but dismissed the appeal, holding the application

Appeal-*Contd.*

41 Res-judicata—*Concld.*

barred by limitation. In a suit by R for possession, *held, by Chamier* J (1) that the suit was not barred by the rule of *resjudicata*, inasmuch as the judgment of the High Court which was the final judgment in the case expressed no opinion on the question whether an appeal lay or not; (2) that, the property having been sold in execution of a decree on a mortgage made to pay off the family debt, the son was not entitled to redeem it on the sole ground that he was no party to the suit on the mortgage. 25 All 214. Expl. **Baldeo Singh v. Hiralal. 9 A L J 67.**

(9) Sufficiency of one appeal from judgment in cross Suits.

1334—S. 13—Res-Judicata—Rival suits—Same judgment in both suits—One appeal sufficient,—Cross suits—When two suits are filed by two persons in respect of the same subject-matter, (*e g*). for pre-emption, against the same defendant, and they are impleaded in each other's suit, and the same issues are fixed in each, and the suits are heard together and disposed of by one judgment and decree, it is not necessary for the party against whom the decree is passed, to file an appeal in each case. It is sufficient for enabling the Court of appeal to give a binding decision with respect to any matter common to the cases, if that party appeals in his own suit, though such matter has been decided adversely to him in the other suit also. The adverse decision, in the other suit not appealed against, does not preclude the Court of appeal from entering into the question in each party's appeal. 83 P R 1888; 10 All 123; 16 Cal 233; 23 P R 1897; 31 P R 1898; 8 P R 1904=104 P L R 1903, Refd. to **Jugal Kishore v Chammo. 151 P L R 1905 (F B)**

42 REVIEW.

(1) Appeal to be heard by two Judges if review granted.

1335—Review—Appeal heard before two Judges—One Judge leaving Court—Application for review heard before other Judge—Appeal to be heard by two Judges if review granted—Sufficient reason—Discretion of Court.

When an appeal is heard by two Judges of the High Court, one of whom leaves the Court, the Judge who continues in the Court is competent

Appeal-*Contd.*

42 Review—*Contd.*

to hear an application for a review of the decree made in the appeal, and also the application for a rule for the review and the rule. If the rule is made absolute the appeal should be heard by a Bench of two Judges.

The discretion of a Court in saying what constitutes good and sufficient reason for an application for review, or what are the proper requisities for the ends of justice to support such an application, is not limited. **Maksud Mahi v The Secretary of State for India in Council 9 Ind Cas 532.**

(2) Application for review presented after filing of appeal.

1336—C P C S 114 O 47 r 1 (1882 s. 623)—Subsequent filing of an appeal—Jurisdiction to grant review, whether barred by—Court's duty—

Where an application for review is presented by a party and an appeal is afterwards preferred, the Court to which the application for review was made is not thereby deprived of jurisdiction to entertain the application but in such a case, the jurisdiction ought to be exercised with the greatest care and only in a very strong case. (28 Mad 210 Over; 30 Mad 535; 13 Bom 520 (P C) B L R (F B) 362; 18 Mad 214 Ref (1880) 14 Ch D 1 Appl:) **Chenna Reddi v Pedda Obi Reddi. 6 M L T 135 (F B)= 2 Ind Cas 802=19 M L J 338=32 Mad 416.**

(3) Effect of appeal from decree superseded.

1336A—Review of judgment—Effect of order on review—Appeal from original decree.

Where an application for review of judgment is granted, and an order passed thereupon, the original decree is superseded.

Held, therefore, that where the original decree was modified upon review by the Court which passed it and an appeal was filed from the original decree, and not from the order upon review the appeal could not be heard, inasmuch as the decree under appeal had ceased to exist. (1890) A W N 144 and 28 All 340; Fol; 30 All 479 Distgd. **Brijbasi Lal v Salig Ram 9 A L J 133.**

(4) Effect of appeal from decree superseded on review.

1337—C P C S 114; O. 47, r.1 (1882 S. 623)—

Appeal-*Contd.*

42 Review—*Concld.*

Review of judgment—Effect of order on review —Appeal from original decree.—

Where an application for review of judgment is granted, the result is a new decree superseding the original decree, and not merely some amendment thereof. An appeal was filed pending an application for review of judgment in the Court below; the review was granted; an order passed which purported merely to amend the decree then under appeal. *Held*, that the order for review superseded the original decree; the decree under appeal had ceased to exist and the appeal could not be heard. 1890 A W N 144 foll.

Kanhaiya Lal v. Baldeo Prasad, 1905 A W N 265=28 All 240.

(5) Review of Judgment pending appeal.

1338—C P C S.114 O.47 r.1; s.115 (1882 ss. 623 622)—Review of judgment pending on appeal—Appeal dismissed under s. 551 of the Civil Procedure Code—Procedure-Practice.

Where there has been an appeal there still may be review of the judgment of the Court against whose decree the appeal was preferred, provided the appeal to the Higher Court is withdrawn. Where however, an appeal is preferred but the same is rejected under s. 551 of the Civil Procedure Code, the Court of the first instance cannot entertain an application for review of its own jodgment. (7 Bom 287; 9 Bom H C (A C J) 89 Ref).

Ramappa v Bharma. 8 Bom L R 842= 30 Bom 625

43 REVISION.

(1) If no appeal no revision.

1339.—Order appealable—Revision does not lie.—

No application for revision can lie to the High Court when the order sought to be revised is capable of being appealed against.

Gnana Sambanda Pandara Sannadhi v David Nadar. 14 M L J 433.

Notes.—Dist 31 Mad 24=17 M L J 441= 3 M L J 19.

1340.—Appeal—Revision—Civ. Pro. Code (1908), O XLI, r 23.

Held, that, where the order of remand under r. 23 of O XLI is not appealable, it is not also subject to revision. (50 P R 1911; 101 P R 1910; 9 P R 94; C R 897 of 1910, Foll.)

Ramji Das v. Shankar Das. 10 P W R 1912.

Appeal-*Contd.*

43 Revision—*Contd.*

(2) Revisional powers excercised.

1341-C P C S.47; O.21 r.58 (1882 Ss. 244, 278) -Appeal—Claim as by shebait—Decree for personal debt.

A claim to attached property preferred by the judgment-debtor in the capacity of a Shebait to a Hindu Deity, when the decree was obtained agaist him for his personal debt, comes within S. 244 C P C., and not under S. 278. When such a claim was investigated summarily as a proceeding under S. 278, and the lower appellate Court held that no appeal lay; *Held*, that the proceedings of the first Court under s. 278 C P C were null and void and wihout jurisdiction; and the first Court was directed to conduct the proceedings in the manner directed by s 244, 17 Cal 711 referred to. The investigation having been held in the first Court as a proceeding under s. 278, the High Court passed the order in exercise of its revisional powers although the matter came before it in second appeal.

Beg Raj Marwari v Sreemutty Kundali Debya. 8 C W N 353.

Notes—Ref: 8 C L J 20.

(3) Memorandum of appeal treated as petition in revision.

1341A.—C P C S 47; O 21 r.58 (1882—Ss.244. 278)—No appeal—Parties or representatives—Transfer of Property Act, Ss. 88, 89—Execution of decree—Appeal—Revision—Auction purchaser.

Certain property comprised in a decree under Section 88 was proclaimed for sale. As to a portion of this property an application was made by a person who alleged himself to be the owner thereof praying of its exemptiom from sale. This application purported to be, and was dealt with by the Court as an application under Section 278 C P C and was allowed. The decree-holder appealed, and her appeal was entertained as an appeal under Sec. 244 and was allowed. *Held*, on appeal by the objector to the High Court neither S. 278 nor S. 244 of the Code was applicable, the former, because the property in

Appeal-*Contd.*

43 Revision—*Contd.*

question had not been attached, the latter because the objector was not the representative of the judgment-debtors, but claimed adversely to them. No appeal lay to the High Court, but the memorandum of appeal was treated as a petition in revision. **Muhammad Vahya v Lalta Dei. 1906 A W N 62.**

(4) Other Cases.

1342.—C P C O 27, r.79. (Ss.623, 591, 584,629) —Appeal from final decree—Objection to be taken, limit to—Review granted for any other sufficient reasons —No appeal:-

Ss. 584, 591, C P C, do not control S. 629, C P C, so as to confer a right of appeal in a case where the appeal is not based on one of the objections mentioned in Section 629; and, consequently in an appeal against the final decree, no objection against the order granting the review can be taken except one of the grounds mentioned in S. 629, C P C. When an application for review of judgment is granted "for any other sufficient reason" within the meaning of S. 623 C P C., the sufficiency or otherwise of the reason is not a good ground of appeal.

Gopala Aiyar v Ramasawmi Sastrial. (1907) 17 M L J 603.

1343—C P C O.21, rr.66,70, 115; S. 104; O 43, r. 1, (1882 secs. 287, 622, 588)—Order purporting to issue under one section—Not appealable—Appeal treated as revision—Orders going beyond decree.

Where a decree directed all properties to be sold and the lots into which it was to be divided and the order in which they were to be sold was reserved for consideration when the proclamation of sale was to be settled, *held*, that an order purporting to have been passed under s. 287, Civil Procedure Code directing that the shares of the judgment-debtor should be sold in a particular order, was one passed without jurisdiction and the High Court can interfere with the order so passed in revision. 27 Mad 559 Ref.

Krishnaswamier v Swaminadhiar. 4 M L T 352=18 M L J 568.

3144—C P C O. 17 r 3; O 41 r 19; 114, O 47 r 1 (1182 Ss. 158, 558, 623).

Limitation Act (XV of 1877), Schedule 11, Article 168—Suit dismissed in default—Appeal against dismissal also dismissed in default—Application to restore appeal made after expiry of 30 days—Application treated as review—Review.

A suit was dismissed under s. 158. C P C. The plaintiff appealed but the appeal was dismissed by the Divisional Judge in default of prosecution. An application to restore the appeal was made after the expiry of 30 days prescribed by the Limitation Act for such application. Notice was issued to the defendants to show cause against the granting of the applications, and the Divisional Judge after issue of the notice was succeeded by another Judge, who re-heard the appeal and upheld the other of the original Court, The plaintiff apllied for revision.

Held, that the order passed under S. 158 of the Code was illegal and the case must be tried on the merits.

It was contended that, the application to rehear the appeal having been made after the expiry of 30 days and the period not being extendible the order of dismissal became final.

Held, that treating the application as one for review, there was no irregularity in the proceedings of the lower appellate Court. 23 All 462 Ref,

Kashi Ram v Gopi Mal. 7 P L R 1910= 6 Ind Cas 482=124 P W R 1910

1344A—Appeal—Revision.

Appeal turned into Revision petition.

49 P W R 1911.

1345.—Ss. 153, 186A—C. P. C. (Act V of 1908), S. 115—Landlord and tenant—Estoppel—Evidence Act (I of 1872), S. 116—Facts necescary to be found to constitute estoppel of tenant —Material irregularities under S. 115, C. P. C.

A suit for rent was valued at Rs. 99. The first Court decreed the suit and also awarded Rs. 25 damages against the defendant under S. 186-A (1) of the Bengal Tenancy Act. The defendant preferred a second appeal:

Held, that it was doubtful whether a second appeal lay or not.

A High Court can under S. 115 of the C.P.C. interfere with an order of a Subordinate Court, of its own motion and without an application made to it by a party to the suit.

Appeal-*Contd.*

43 Revision—*Contd.*

Where in such a case, it is clear upon the face of the judgment that there has been an illegality and irregularity in the trial of the case, it is a proper one for interference under S. 115.

In a suit for rent, the defendant denied the title of the plaintiff saying that he was the *benamidar* for his daughter. There was no issue raised in the first Court as to whether the defendant was estopped from denying the plaintiff's title. The Court of appeal below held as a matter of law that the defendant was estopped from denying the plaintiff's title.

Held, that it was irregular on the part of the Court to hold this, in the absence of any finding whether or not the defendant was inducted into the land by the plaintiff, or if he was so inducted, into what land he was inducted or whether there was an attornment to the plaintiff, and as to the question of *benami* as bearing upon the question of estoppel.

Held, further, that it was a material irregularity on the part of a Court to come to a finding under a serious misapprehension as to actual facts.

An admission without being aware of the circumstances is not binding.

A previous deposition of the defendant, who did not appear in a subsequent case, was admitted without any proof whatever that it was his deposition: *held*, that this was an irregularity within S. 115.

Before awarding damages under S. 186-A of the Bengal Tenancy Act, the Court should find as a fact as to whether there was reasonable or probable cause, and state its ground for coming to that conclusion. **Sibu Sant v Netai Charan Das.** **9 Ind Cas 806.**

1346.—Mortgage by a member of Hindu joint family—Suit by co-parcener to set it aside—Value for purposes of jurisdiction—Remedy of plaintiff and the mortgagee—Delhi Brahmins.

Held, that:—

In cases governed by the Mitakshara Law, one co-sharer has no authority, without the consent of his co-parceners, to dispose of his undivided share in the joint immoveable property by gift, mortgage or sale &c., and such alienation is liable to be set aside on the suit of the dissentient co-parceners.

But where a mortgage is thus cancelled, it still remains operative as a simple bond so far as the mortgagor is personally concerned.

The jurisdictional value of the suit to have a mortgage declared null and void, on the grounds that (a) it has been executed without consideration and necessity and (b) is *ultra vires* and illegal as the mortgagor has no right to mortgage his share as a co-parcener, is the mortgagee's rights, and not the market value of the property itself.

So where the mortgage-money charged on house property in such a suit is Rs. 2,000 and both Courts concur in passing a certain decree therein, a further appeal to the Chief Court is not competent.

But the petition of appeal can be treated as a petition for revision if there are grounds to proceed under either clause (a) or (b) of S. 70 of Act XVIII of 1884 as amended, with the result that the findings on fact by the Appellate Court cannot be disturbed. 153 P R 1883; 3 B L R (F B) 31; 5 All 384; 6 C W N 651 Foll. **Piare Lal v. Ramchand and Jagan Nath.** **112 P W R 1911.**

1347.—C P C O. 21, r. 89, S. 47—Auction sale, setting aside of—Money deposited not in time through Court's action—"Actus curiae neminem gravabit"—Second appeal—Decree-holder, auction purchaser—Revision petition treated as memorandum of appeal.

Judgment-debtors made an application under r. 89 of O. 21 of the C. P. C. to have the execution sale, in which the decree-holder was the purchaser, set aside, on the thirtieth day from the date of sale. Their agent was present in Court with money and was ready to deposit it; for that purpose a *challan* was duly filled up and placed in the hands of the proper officer for signature of the presiding officer; and he was informed later on in the day, that as the Presiding officer had left the Court, his signature could not be obtained on that day. The result was that the *challan* was signed on the authority thereof by the treasury officer.

Held—That the sale should be set aside.

Appeal-*Contd.*

43 Revision—*Contd.*

A mere presentation of an application without deposit of money within 30 days under r. 92 of O. 21 of the C. P. C., is not sufficient compliance with the law When a party litigant has found it impossible to comply with the requirements of the statute, not because of his own fault, but by reason of the action or inaction of the Court, the principle applicable to such a contingency is expressed by the maxim "*Actus Curiae neminem gravabit*" (An act of Court prejudices no man).

As the order is passed under r. 92 of the C P C., in proceedings between the decree-holder and the judgment-debtor, a second appeal lies under S. 47 of the said Code.

The true nature of an order under r. 89 of O. 21 of the C. P. C., must be examined and the character of the parties affected thereby ascertained, before it can be determined whether the order does or does not fall within the scope of S. 47.

An application for revision presented to Court within the time allowed for the presentation of an appeal, may be treated as a memorandum of appeal. **Mahomed Akbar Zaman Khan v. Sukhdeo Pande. 13 C L J 467.**

1348.—S. 373—Withdrawal of suit with liberty to bring fresh suit—Application to be treated as indivisible—Leave to withdraw without liberty to bring fresh suit, not to be given—Appeal treated as application for revision.

An application for leave to withdraw from a suit with liberty to bring a fresh suit on the same cause of action, should be dealt with as an indivisible whole. A Court, which grants leave to withdraw, but does not give the liberty prayed for, acts without jurisdiction, and if the order is not appealable, the High Court will interfere in revision, treating the appeal as an application for revision. 32 Bom 345; 10 Bom L R 293; 9 Ind Cas 994, relied upon. **Bhagwat Pershad v. Lachmi Pershad. 10 Ind Cas 346.**

1349-1350.—Ss. 167, 177, 196, 197—Execution of decree—Appeal—Revision—Jurisdiction.

A suit was dismissed by the Revenue Court as not cognizable by it, and the District Judge, upon appeal, having dealt with it under Ss 196 and 197 of the Tenancy Act, made a decree, execution of which was applied for in the Court of the Assistant Collector of the first class who rejected the application. *Held*, that no revision lay against the order of the Assistant Collector refusing execution. **Damber Singh v Sri Kishan Dass. 6 A L J 552=2 Ind Cas 377=31 All 445.**

44. Right of appeal.

1351.—Pre-emption decree—Vendee drawing pre-emption money out of Court before decision of appeal.

After filing further appeal against a decree for possession of property, passed in a pre-emption suit in favour of the pre-emptor, the vendee, defendant, applied for stay of execution. The application was granted on the condition of his furnishing security for payment of interest, till the decision of the appeal, on the amount of the purchase-money deposited by the pre-emptor in Court. Before the decision of the appeal, the vendee drew the amount of the Court. *Held*, that, by so doing, the vendee lost his right of appeal. 82 P R 1868, 49 P R 1882, 138 P R 1888 Ref. **Mian Feroz ud-din v Sheikh Ghulam Rasul. 76 P L R 1906.**

See also cases under.
"Right of Appeal."

1352.—Right of Appeal—Loss of appellant's interest in the subject-matter of the appeal before appeal filed—Subsequent re-vesting of property in appellant ineffectual to validate appeal:—

Where an appellant, after suit but before the appeal was filed, lost all her interest in the property, the subject-matter of the appeal, it was *held* that the appeal must be dismissed nor would it avail the appellant (if it was the fact) that she regained her interest in the property in dispute after the finding of the appeal **Indomati v Bhabhuti Singh 1905 A W N 167.**

1353.—Pre-emption finding of no sale. Vendee's right of appeal. In a suit for pre-emption the vendee pleaded that there was no sale as she had not purchased the property. The Court of first instance decreed the claim but the Appellate Court dismissed it finding that as a matter of fact there was no sale. Held that the so called vendee had an interest in maintaining the appeal before the lower appellate Court. **Wasiuzaman v Nasiran Bibi 3 A L J 843=1906 A W N 160.**

Appeal-*Contd.*

44 Right of Appeal—*Concld.*

1354.—C P C O 1 r 10 (1) (1882 s 27) Suit by agent in his own name—Dismissal of suit—Right of principal to appeal—Substitution of principal's name as plaintiff—S 230, Contract Act.

Where a suit was dismissed on the ground that agent could not sue in his own name, it was held, on appeal by the principal.

That, as the suit was commenced in the name of a wrong person through a *bona fide* mistake the principal's name should be substituted for that of the agent under s 27, C P C,, on the initiative of the principal, or of the agent, or of the Court itself. Case remanded with the substitution of the principal as plaintiff, for determination on the merits, (I L B R 191: 350 Dist: 2 N W P H C 179; 21 Bom 205. 20 Mad 467; 12 W R 117 Ref.)

A I S P S Soobramanion Chetty v Myat Tha U. 4 L B R 95.

45 Second appeal.

(1) Contention that Court should have made decree against defendant.

1355.—Appeal—Practice—-Procedure. The plaintiff having obtained a decree against one of two defendants acquiesced in that decree, but the defendant, judgment debtor appealed making the other defendant also a party to his appeal, with the result that the plaintiff's suit was dismissed. *Held*, that it was not open to the plaintiff in second appeal to contend that the Court below should have made a decree against the defendant with regard to whom he had acquiesced in the dismissal of his suit. **Lohre v Deo Hans 3 M L T 176=30 All 48.**

1356.—S 586—Suit to recover books and money cognizable by a Court of Small Causes-Second appeal-Valuation for fiscal purposes and for jurisdiction to be determined by the value put by plaintiff.-The plaintiff, a widow of a deceased Brahmin priest, entrusted the defendant with certain books, containing the list of her husband's clients and had authorised him to carry on the business of *purohit* on her behalf and make over the proceeds to her. The suit was brought to recover those books and a sum of Rs 60, which had been raised by the defendant from the *jujmans*. The valuation of the suit was below Rs 500.

Appeal-*Contd.*

45 Second Appeal—*Contd.*

Held, that the suit was of a nature cognisable by a Court of Small Causes, as it was one for the recovery of moveable property and money, and, consequently no second appeal would lie. The value of the subject-matter of the suit must be determined by reference to the value put by the plaintiff upon it in the plaint not only for fiscal purposes but also for purposes of jurisdiction. Where the value is below Rs. 500, S 586 of the Code forbids the entertainment of a second appeal. **Hans Raj v Ratani alias Jwala Dei 27 All 200=1904 A W N 227.**

See also cases under:—

" Special or second Appeal. "

1357.—Mortgage of a portion of ancestral land to pay decree against his son—Necessity-Incompetency of other sons to object—Heirs of alienor competent to resist a claim for possession by alienee on the ground of no necessity, etc.-Plea given up in the Lower Appellate Court cannot be re-taken before the Chief Court.

Held, that:—

(a) A mortgage by landowner of a portion of his ancestral land in order to rescue one of his sons from being imprisoned in execution of a decree against him (son), is valid and binding upon his other sons.

(b) A suit for possession of ancestral immoveable property by an alienee against the heirs of alienor can be resisted by them on the ground that there was no consideration or necessity.

(c) A plea given up before the lower Appellate Court cannot be re-taken in appeal to the Chief Court. **Jaimal v Lal Singh 88 P W R 1911.**

1358.—Intention to keep alive mortgage not known as existing——Intention, question of law. The Defendants obtained a mortgage over certain properties which were subject to plaintiff's mortgage and several earlier mortgages, on the stipulation that these earlier mortgages should be paid off and the mortgage deeds made over to the Defendants. On the question whether it was the intention of the parties to keep alive the mortgages, so paid off, in favour of the Defendants, the lower Appellate Court found that the Defendants were not at the time of the execution of their mortgage, aware of the Plaintiff's mort-

Appeal-*Contd.*

45 Second Appeal—*Contd.*

gage and therefore could not have intended to keep alive those mortgages as against Plaintiff's mortgage: *Held*, (reversing the judgment of the lower-Appellate Court and remanding the case.), that the conclusion of the lower Appellate Court as to intention could not legitimately be drawn from the fact found by that Court; and the error was one which, under the rule laid down in L R 19 I A 228 (1892), the High Court could interfere with in second appeal. The intention to keep alive an earlier lien may be found in the circumstances attending the transaction or may be presumed from a consideration of the fact whether it is or is not for his benefit that the charge should be kept on foot. L R 11 I A 126; s c 10 Cal 1035 (1884) and 6 C W N 209; s c L R 29 I A 9; 29 Cal 154 (1901) followed. Sec 80 of the Transfer of Property Act does not exclude the application of the principle laid down in these cases.

Girdhar Das v Ram Autar Singh
8 C W N 690.

1359.—Hindu Law—Private debutter—Conversion of debutter to secular property—Consensus of family—Property whether really or nominally debutter—Question of fact—Second appeal-C.P.C. (Act V of 1908), S. 100.

Properties dedicated to a family idol may be converted into secular property by the consensus of the family.

In dealing with a question as to whatever properties alleged to be debutter are really or only nominally so, the manner in which the dedicated properties have been held and enjoyed is the most important point.

Whether certain land is really debutter or only nominally so, and whether the *shebaits* put an end to its *debutter* character by consent, are questions of fact with which the High Court will not interfere in second appeal. 12 C W N 98, Rel. **Tulsidas Bairagi v Siddhi Nath Misser.**
9 Ind Cas 650.

1360.—S. 100—Second appeal—Custom—Evidence legally insufficient—Power of High Court to interfere.

Where there is legally insufficient evidence to prove a custom, a finding that the custom exists may be questioned in second appeal. But when the sufficiency or insufficiency of the evidence is not a matter of law, and depends on the weighing of that evidence, it is not the practice of the High Court to allow a second appeal. 29 Mad 24; 16 M L J 8; 28 All 608; 3 A L J 467; A W N (1906) 187, Ref. **Makund Murari Dass v. Kishna Dhone Ghose.**
9 Ind Cas 839.

1361.—Practice—Witnesses—Court expressing opinion as to sufficiency of evidence—Pleader declining to call further evidence—Second appeal.

Where the pleader of a party, in view of the expression of opinion by the Subordinate Judge in the midst of the case that it was unnecessary for him to examine any more witnesses, declines to examine more witnesses and this fact is not mentioned in the lower Court of appeal, the party cannot be heard in second appeal to say that he should be allowed the opportunity of adducing the evidence. 18 Bom 336, Ref.

Pannalal Nathulal Marwadi v. Ganu Babaji Nhavi. **13 Bom L R 1021.**

1362.—Art. 142—Plaintiff's possession—Form of issue—High Court's power—Second appeal.

In a suit for possession falling under Art. 142 of the Limitation Act, the issue should properly be "whether the plaintiff was in possession within 12 years prior to the suit."

The High Court will, in second appeal, satisfy itself only with regard to the lower appellate Court having applied its mind to the evidence on record and pronounced its finding upon a consideration of the evidence. **Rangachariar.**
(1912) 1 M W N 175.

1363—C P C O.41, r.20, O.21 r.16 (1882 S. 559, 232)—Preferring a second appeal against parties against whom there was no appeal—Application to make parties appeal after expiry of time.

The validity of an assignment of a decree cannot be questioned after the assignee has been placed on the record as substituted decree-holder. 23 Cal 450=6 C W N 5 foll=9 Cal 839 Con.

A respondent should not be placed on the record under S. 559 of C P.C., after the time for appealing against him has expired.

Appeal-*Contd.*

45 Second Appeal—*Concld.*

In a second appeal no decree can be passsd against a respondent against whom there was no first appeal **Ram Ratan Chuckerbutty v Jogesh Chandra Bhattacharya. 12 C W N 625.**

1364.—S. 182—Third appeal—Rent—Suit—High Court, Jurisdiction of.

S 182 of the N W P Tenancy Act was intended to meet, and was confined to, suits which were instituted in the Court of an Assistant Collector of the first class or of a Collector, and was not intended to embrace suit instituted before an Assistant Collector of the second class. No third appeal lies to the High Court from the decree in second appeal of a District Judge in a rent suit. **Lachmi Narain v. Narotam. Das. 1906 A W N 272=3 A L J 688 =29 All 69.**

1365.– Ss. 10 A, 64-A-Notice, publication of-"Date of the publication of notice"—Interest to cease when—Pleader, admission of—Mistake of law—Second appeal.

Under S. 64-A of the Court of Wards Act, the notice must be published in the Gazette and the Judge's office as well as in several other ways, and until it is so published, the publication cannot be regarded as complete.

The words "the date of the publication of the notice," at the conclusion of the first clause of S. 10-A, ought to be construed as meaning the date of the last publication under S 64-A. Therefore, where a claim is brought within six months of the last publication of the notice, under S. 10-A of the Act, the claimant creditor is entitled to subsequent interest.

An admission by a pleader based on an erroneous construction of an enactment amounts to a mistake of law which does not bind his client, and the High Court is competent in second appeal to interfere with a decision given on the basis of such admission **Krishna Prosad v. Udit Narain Singh 9 Ind Cas 621**

46 Sale in execution

1366—Sale in execution pending appeal in suit under Sec. 283, C. P. C.

Where a person buys in an auction property which is the subject of an appeal in a suit under S. 283, C.P.C., the doctrine of *lis pendens* applies, and the purchase will be subject to the result of the appeal. 8 Cal 690; 21 W A C R 349; 2 All 828, 12 Moo I A 366 ref to. **Sukhadeo Prasad v Jamna 23 All 60=A W N 1900, 199.**

Appeal-*Contd.*

46 Sale in execution—*Concld.*

1367—S. 144 (1) (*1882* S 583) Restitution—Inherent Jurisdiction to direct.

When a wrong has been done by an order of a Court which has been set aside on appeal, the Court executing the decree is competent to put the parties in the position which they occupied before the wrong was done. The appellant obtained a decree against L and proceeded to sell certain properties to which the respondent laid claim. The appellant had to bring a suit for declaration that the property was the property of L and obtained a decree from the Court of first instance and sold the property. On appeal, the decree was set aside and the suit was dismissed. Held that the respondent was entitled to recover back the property in the execution department and it was not necessary for the respondent to bring a fresh suit for possession. 6 C W N 710 ref. **Shiam Sundar Lal v Kaisar Zamani Begam. 4 A L J 19=1906 A W N 315=29 All 143.**

Notes.—Fol 5 A L J 527; Ref 30 All 476=1908 W N 206=5 A L J 327.

47 Miscellaneous cases.

1368—(1) A Kobin-nama or deed of dower, hypothecating immoveable property of the value of Rs. 100 or more for its satisfaction, is compulsorily registrable under section 17 of Act III of 1877.

(2) In settling a dower on a wife as well as in incurring marriage expenses a tenant for life is bound to keep within reasonable limits and to spend in accordance with his rank and social position. Anything in excess should be disallowed as not being for necessity and constituting a charge on the ancestral land which might go to the reversioners.

(3) Unreasonable expenses incurred on his illness by his wife or her family members is not such a necessity so as to be binding on the reversioners.

(4) An appeal is not competent in such a suit

Appeal-*Contd.*

47 Miscellaneous Cases—*Contd.*

falling below Rs. 250 even where the Courts below differ. **Murad v Ghulam Fatima 71 P W R 1910=6 Ind Cas 931.**

1369—Marriage—Legitimacy-Acknowledgment of parentage—Alienation by a Sikh Jat in favour of issue from a Mahomedan woman—Declaratory suit to set aside alienation—Dismissal of suit—Appeal by some only of the plaintiffs. The Mahomedan Law of acknowledgment of parentage with its legitimising effect has no reference whatsoever to cases in which illegitimacy of the child is proved and established, either by reason of lawful union between the parents of the child being impossible or by reason of marriage necessary to render the child legitimate being disproved. The doctrine relating to cases where either the fact of the marriage itself, or the exact time of its occurrence with reference to the legitimacy of the acknowledged child is not proved in the sense of the law as distinguished from disproved.

In other words the doctrine applies only to cases of uncertainty as to legitimacy and in such cases acknowledgment has its effect;but that effect always proceeds upon the assumption of a lawful union between the parents of the acknowledged child.

Held, that a gift of immoveable property by a Sikh Jat in favour of his sons by a Mahomedan wife before the alienor embraced Mahomedanism was void as the alienees could not be regarded legitimate issues.

Held, also, that where claim of reversioners to set aside an alienation is dismissed and only some of them appeal on their own behalf only the appellate Court, if it accepts the appeal, should only grant declaration as to the right of the appellants and not the reversioner who did not join in the appeal. **Khushal Singh v Jaimal, 190 P L R 1908.**

1370—Right of *ala malıks* to succeed on the death of an *adna malık* as against collaterals—Right of one of several appellants to withdraw his appeal as to his share only—*Held*, (1) that the respondent had failed to prove any special custom whereby *ala malık* succeeds to the land left by an *adna malık* as against a near collateral of the deceased.

(2) That one of the appellants can withdraw from the appeal so far as his own interest in the appeal is concerned. C A No 300 of 1902 (published) *175* P R 1888; 9 P R 1898, 72 P R 1907 Ref. **Gopala v Hira Singh 119 P W R 1908.**

1371—Court Fees Act (VII *1870*). section 7 cl. 9-Redemption suit—*Amount* disputed in appeal—Fee payable.

The plaintiffs obtained a decree for redemption on payment of Rs. 1155 considering that the amount exceeded that property payable by Rs 288 they appealed and valued the appeal at Rs *288* paying court fee on that amount.

Held that in the case of an appeal in a suit for redemption, if the subject matter of the appeal can be determined. the appellant is only bound to pay a court-fee on the amount ascertained to be the value of the subject matter of the appeal. (13 All 94 not followed.) **Nepal Rai v Debi Prasad 2 A L J 105=1905 A W N 40=27 All 447.**

Notes.—Fol 29 Mad 367; 16 M L J 287; 5 A L J 531; 30 All 547=(1908) W N 247; 6 A L J 155; 31 All 265.

1372—Improper admission of secondary evidence—(Act X 1877.)

This was a suit under s. 93 (c) of Act XVIII of 1873 to cancel a lease for the breach of its conditions—a copy of the lease and not the original was produced by the plaintiff, the original being with the defendant. The defendant did not deny the existence of the lease, nor raise any objection as to the admissibility of the copy and the first Court tried the suit upon the merits. In appeal also by the plaintiff the defendant did not object to the admission of the copy as evidence, but the lower appellate Court dismissed the appeal on the ground that the original of the lease had not been produced. *Held* that under the circumstances the lower appellate Court was not justified in summarily throwing out the plaintiff's suit, but should have decided it on the merits. **Ata Husain v Jamna Das. 1 W N 9.**

1373.—By party not named in decree.

Certain plaintiffs sued as second assignees of a debt to recover the debt and made defendants to the suit their assignors, the original debtors, and certain persons whom they alleged to have

Appeal-*Contd.*

47 Miscellaneous Cases—*Contd.*

been prior assignees of the debt, but whose assignment, according to them, had become void through non-fulfilment of the conditions upon which it was made. The Court of first instance gave a decree to the plaintiffs against the original debtors. An appeal by the first assignees was dismissed by the lower appellate Court on the ground that there being no decree against the appellants their appeal would not lie. *Held* on second appeal that the appeal would lie inasmuch as the decree, though not a decree against the appellants by name, necessarily implied a finding that the assignment to the appellants had become void. **Jamna Das v. Udey Ram. 18 W N 201.**

1374—Application as further appeal, when admissible.

In this case an application was admitted as a futher appeal as there was a question of custom involved and the case was one of sufficient importance. **Khan Muhammad v Sher Muhammad. 136 P R 1908.**

1375—Reversing of decree—Lower appellate Court.

It is always unsatisfactory to reverse a decree for the reason that the ground on which it rests was not that on which the parties come to issue. But it is obvious that great injustice may be done by shifting the issue in the Court of appeal and so deciding without due investigation. **Mahomed v Savvasi. 2 Bom. L. R. 640.**

1376—Act X of 1877.

The plaintiff sued to enforce a right of pre-emption under the *wajib-ularz* in respect of a contract which he alleged to be a *zar-i-peshgi* lease. The alleged contract was the subject of two separate deeds, the one an hypothecation bond, the other a simple lease. These documents were in favor of different parties and the property which was the subject of one was not precisely the same as the property the subject of the other deed. The parties to the two deeds who were all made defendants contended that the two transactions were separate and independent. The first Court gave the plaintiffs a decree against all the defendants regarding the two deeds as a single *zar-i-peshgi* lease. One set of the defendants *viz*, parties to the lease

Appeal-*Contd.*

47 Miscellaneous Cases—*Contd.*

appealed from the whole decree and the lower appellate Court taking a contrary view to that taken by the first Court dismissed the plaintiff's suit. *Held* that the Court below was competent to dismiss the suit as against those defendants as well who had not appealed. **Chiragh Ali v Salik Ram 2 W N 36.**

1377—Suit for account–Value of relief sought—Jurisdiction—Courts of appeal—Authority of Appellate Court disclaiming jurisdiction to order payment of additional Court-fee.

The plaintiff sued the defendant for an account valuing the relief sought at Rs. 100, and expressing his willingness to pay the Court-fee due upon any sum decreed in excess of this amount, in accordance with the provisions of Section 11, Court Fees Act, 1870.

After the defendant had produced the books containing the parties' accounts and a commission had examined the same, the plaintiff filed a petition stating that he appeared to be *prima facie* entitled to recover a sum over Rs. 12,000, and praying that the matter might be fully investigated. No amendment of the plaint was, however, either asked for or ordered, and the suit eventually resulted in a decree in plaintiff's favour for Rs. 2343.

The plaintiff then appealed for a further sum of Rs. 1,716 and the defendant, against the decree in plaintiff's favour, for Rs. 2,343.

Both parties presented their appeals to the Divisional Judge, who held that the appeals lay to the Chief Court.

Held, that the appeals lay to the Divisionl Judge: under Section 7, clause (iv) of the Court Fees Act, the valuation of the original suit for purposes of Court-fee is fixed at the amount at which the relief sought is valued in the plaint. This, in the present case, was Rs 100, and the amount was never altered by any amendment of the plaint : and under Section 8, Suits Valuation Act, 1887, the value of a suit for an account as determinable for the computation of Court-fees and the value for purposes of jurisdiction, shall be the same.

The value of the suit for purposes of jurisdiction was Rs. 100 and the appeal lay to the Divisi-

Appeal-*Contd.*

47 Miscellaneous Cases—*Contd.*

onal Court under Section 39 Punjab Courts Act (as amended).

Semble:—If an Appellate Court has no jurisdiction to hear an appeal, it is not competent to it to pass orders for the payment of any additional Court fee which it considers should have been levied in the first Court. **Fatteh Muhammad Khan v Mohan Lal 86 P R 1892.**

Notes—Cf No. 40 P. R., 1892.

1378—Act XL of 1858, Section 28—Subject-matter—Course of appeal.

Held by the Full Bench, that there is only one appeal from orders passed under Act XL of 1858, and that such appeal lies to the Chief Court or to the Divisional Court according as the subject-matter does or does not exceed Rs, 5,000 in value.

Firdans Khan v Bahram Khan 32 P R 1887 F B.

1379—Representative not brought upon record.

Held that when at the time the case was heard by the lower Court a party to the suit was dead and no application was put in by any person to be brought on the record as his legal representative, the legal representative has no *locus standi* to prefer an appeal. **Durga Kuar v Har Sahai. 3 W N 134.**

1380—Jurisdiction—Further appeal—Land-suit—Claim for share in an orchard, i. e. of the fruit trees.

A suit for possession of a half share in an orchard, that is, in the fruit trees, is not a "land-suit" within the definition of that term contained in Section 3, Punjab Courts Act, 1884. 119 P R 1890, referred to. **Dhani Das v Aya Ram. 15 P R 1892, F B,**

1381—Decree directing registration of mortgage deed—Appeal—Registration Act, 1877, Section 77—Further appeal—"Land-suit."

Plaintiff sued under Section 77 of the Registration Act, 1877, for a decree directing registration of a deed whereby certain land was mortgaged for Rs. 199. The suit was decreed in the first Court and the deed was duly registered, but subsequently the Divisional Judge, on appeal dismissed the suit. Plaintiff, thereupon, preferred a further appeal to the Chief Court, and it was contended, on his behalf, that no appeal lay from the decree of the first Court, and that, even if an appeal did lie, it must be infructuous, as the document had been already registered and there was no provision of law for the cancellation of registration once effected. For the defendant it was objected that a suit under Section 77 of the Registration Act was not a "land-suit" within the terms of Section 3 (2) of the Punjab Courts Act, 1884, and that, therefore, no further appeal lay from the decree of the Divisonal Court.

Held, that an appeal lay to the Divisional Court from the decree of the first Court, and that the fact that registration had already been effected under that decree was no bar to such appeal being heard.

Held, further, that inasmuch as the mortgage operated to create an interest in land, a suit under Section 77 of the Registration Act to secure legal efficacy for the mortgage transaction was a suit "relating to a right of interest in land" and that, therefore, a further appeal lay to the Chief Court. **Devi Ditta v Ahmad Khan 43 P R 1896.**

1382—No issues.

When appellant satisfies the Court that he has been injured materially by issues not being framed effect will be given to such objection.

Koondan Lal v Makhan Lal. 1 N W P 247.

1383—Mutation proceedings—Object—Order—Nature of—Revision.

Though there is no appeal from an order in mutation proceedings, the Financial Commissioner may entertain a revision of the same. The said proceedings are not judicial. The process is a mere declaration of fact, and constitutes an entry in a register of the name of the proprietor of the land, the object being to keep the revenue registers up to date, so that the Collector may know at once whom he is to look to as responsible for the payment of the revenue. The name of the person in possession, *i e*, the *de facto*

Appeal-*Contd.*

47 Miscellaneous Cases—*Contd.*

proprietor should be entered in the register.

Sirdar Nuran Khan v Nawab Imam Baksh Khan. **6 P R 1883, Rev.**

1384—Appeal by one of several defendants without power from others—Decree of the 1st Court againt defendants upon a common ground.

An appeal, presented by one of several appellants without a power of attorney from the others, was returned by the clerk of the Court. *Held* that the appeal ought to have been received and laid before Commissioner for the orders and that, as the decree of the first Court against the defendants proceeded upon a common ground, the Commissioner was competent under s 544, Act X of 1877, to hear and determine the appeal on its merits, and to make an order which should enure to the benefit of his co-defendants. **Ganda Singh v Kishen Singh,** **6 P R 1879**

1385—Appeal presented on behalf of deceased party legal representative brought on record-Delay—Limitation Act, s. 5.

Although an appeal presented on behalf of a deceased party may be bad, yet the Court has power, in a proper case, to treat the appeal as having been properly filed on the day on which the legal representatives were made parties to the appeal, and to excuse the delay under s. 5 of the Limitation Act, 1877. **Noothi Subbarayadu v Dara Lingayya Garu Suryapracharalingam Garu.** **18 M L J 461**

1385A—Non-appealing defendant seeking to have decree set aside against him—appeal not against whole decree—Applicability of s. 544 Civ. Pro. Code, 1892—Decree in force under Civ. Pro. Code, 1882—Whether Civ. Pro. Code, 1908, operates retrospectively.

Where a non-appealing defendant seeks to have the decree set aside against him also, *held*, that s. 544, Civ. Pro. Code, 1882, does not apply to the present case, as the present appeal is not against whole decree. Where, prior to the date when the present Code came into force, the plaintiff had become entitled to hold her decree against the defendant undisturbed, *Held*, that the present Code cannot be applied retrospectively, so as to deprive the decree-holder of it.

Sree Rajah Venkata Narasimha Appa Row Bahadur v Sree Rajah Malraju Lakshmi Venkayamma Row Bahadur. **7 M L T 296=5 Ind 102**

1385B—C.P.C. O. 41 r. (1882 S. 544)—Death of defendant—Right to appeal—Appeal—Practice.

Where a decree is passed against defendants, and one of them dies, it is open to the rest of the defendants, to appeal against the whole decree, if the ground of appeal is common to all the defendants. **Chintaman v Gangabai,** **5 Bom L R 90=27 Bom 284.**

1385C—Special jurisdiction of the First-class Subordinate Judge—Claim reduced subsequently.

An appeal lies to the High Court from the decision of a First-class Subordinate Judge in a suit tried by him under his special jurisdiction where the claim was originally 10,000 although owing to subsequent realisation of sums on account of the defendants, the plaintiffs gave credit to them for the same, and reduced the claim to Rs 1786-12. The original claim having given rise to that jurisdiction, the jurisdiction itself continued and could not be ousted by the mere fact of the subsequent reduction.

Nanchand v Mussa, **6 Bom L R 692.**

1386—Appeal—Usurpation of jurisdiction by Court below—Party not to assume inconsistent position—Execution—Court executing decree not to question validity of decree—Civ. Pro. Code, (Act XIV of 1882), s. 457—Married woman appointed guardian ad litem—C, P. C, (Act V of 1908), s. 47.

When jurisdiction has been usurped by a Court, an appeal against its order cannot be successfully defeated on the ground that the order has been made without jurisdiction; in other words, a party, who has induced a Court to act without jurisdiction, cannot be permitted, when the validity of the order made for his benefit is challenged by way of appeal, to take up an inconsistent position and to defeat the appeal by proof that the order was made without jurisdiction. Therefore, where an order of the Court below purports to have been made under s. 47 of the

Appeal-*Contd.*

47 Miscellaneous Cases—*Contd.*

Civ. Pro Code, 1908, it must be taken to be a decree and appealable as such. A party litigant cannot be permitted to assume inconsistent position in Court to the detriment of his opponent. An execution Court when called upon to execute the decree, must proceed on the assumption that there is a valid decree capable of execution. The party who seeks to attack the decree must do so in a separate proceeding for example, by a suit or an appeal or an application for review. An infant was represented by his mother a married woman, as his guardian *at litem* in contravention of s. 457 of the Civ Pro Code, 1882. A decree was passed against him. When the decree-holder applied to execute the decree, it was objected on behalf of the infant by his mother that the decree could not be executed against him : *Held*, that the objection must be overruled on the ground that the question of the validity of the decree could not be examined in execution proceedings under s. 47 of the Code of 1908. **Bindeswari Prosad Singh v Lakpat Nath Singh. 8 Ind Cas 26**

1386A—Misjoinder of parties—Single appeal.

It is an irregular proceeding amounting to misjoinder for two defendants to file a single appeal, when they have different defences and their reasons in support of the appeal are different. **Hodges v Delhi and London Bank Ltd 2 Bom L R 967.**

1386B—Amendment of the heading, whether allowed by the appellate Court—Practice.

Where an appeal, which ought to have been presented under s. 588. Civ. Pro Code, 1882, was presented under a wrong section, *Held*, that the heading might be allowed to be amended and the appeal should be heard under s. 588. **Nanjundiar v T Venkata Rao 8 M L T 199=7 Ind Cas 797.**

1386C—Party absent on date of hearing—Duty of parties.

It is the duty of a person who has a case on the paper to be present, prepared to support it by counsel or in person. **Zahur-ud-din v Nur-ud-din 14 M L J 7 P C.**

1386 D.—Appeal from one Civil Judge to another—No appeal lies from one Civil Judge

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47 Miscellaneous Cases—*Contd.*

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Dwala v Rao Sahib Balwant Rao Bhuskute 12 C P L R 10.

1386 E—Appeal Case in which a petition of appeal was treated as a petition for revision.

Godu Ram v. Suraj Mal. 2 A L J 18=A W N 1905, 10=27 All 380.

Appeal—From order of Court in exercise of its inherent powers to punish for contempt—Whether such appeal lies—Appeal memorandum treated as revision petition. Civ. Pro. Code, 1908, ss. 2, 47, **A. W. N. (1905) 10=2 A. L. J. 18=27 All. 380.**

Appeal—Order settling valuation of property to be published in the sale proclamation, whether appealable.—Civ. Pro. Code, 1908, ss. 2 (2), 47, 104. O. XXI, r. 66; O. XLIII r. 1,

6 M. L. T. 252=3 Ind. Cas. 342.

Appeal—Objection taken for the first time before Appellate Court-Civ. Pro. Code, 1908, s. 73, **18 M. L. J. 562=7 M. L. T. 126.**

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8 O C 281.

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decree of first Court based on agreement of parties—Civ. Pro. Code, 1908. O. XXIII, r. 1, s. 107 (2), O. XXII, r. 11, **29 Bom. 13.**

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Appeal—Decree against some defendants—Appeal to enforce liability against other defendants—Amount of Court-fee payable—Court fees, **12 C P L R 43.**

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Appeal—Decree in favour of plaintiff for portion of his claim——Execution of such decree—Whether he can prosecute appeal as regards portions of claim dismissed—Execution of Decree—Miscellaneous, **31 P R 1907 F B. =64 P W R 1907=1 P L R 1908.**

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Appeal—In a new and inconsistent plea cannot be set up — Pleadings. **88 P R 1905=179 P L R 1905.**

Appeal—Decree in favour of pre-emptor—Payment of purchase-money into Court—Withdrawal of such money by vendee effect of—Vendee's right of appeal——Pre-emption—General. **16 P R 1907=104 P L R 1908= 127 P W R 1907.**

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47 Miscellaneous Cases—*Contd.*

Appeal—by Official Assignee-Maintainability —St. 11 and 12 Vic C 21 S 73.

7 M L T 214=33 Mad 134=5 Ind Cas 974.

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8 M L T 347=8 Ind Cas 492.

Appeal—Order absolute for sale—Appeal—Transfer of Property Act 1882, ss. 88, 89.

10 C L J 91=1 Ind Cas 677.

Appeal—Opinion expressed by Court under s. 34—Trusts Act-No Appeal—Trusts Act 1882 s. 34. **11 Bom L R 495=33 Bom 429=3 Ind Cas 164.**

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Appeal——Presentation of unstamped memo on last day of limitation memo—Return of memo —Representation on next day properly stamped-Bar of Limitation-Limitation Act 1908 S 29. **16 C P L R 89.**

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47 Miscellaneous Cases—*Concld.*

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1 C P C 1908 Ss 2,47,104.
2 Decree.
3 C P C 1908 O 21 rr.71,90,92.
4 Succession Act 1865 ss 50,251.
4A Right of Appeal.
5 C P C 1908 O 2 rr 1 and 2,
6 Provincial Small Cause Court Act S 35 cl 1
7 Succession Certificate Act S 6.
8 Mortgage (Mortgage Decree).
9 C P C 1908 O 5 rr 9,12,17,19,20.
10 C P C 1908 O 9 rr 13,2,8.
11 C P C 1908 Ss 107,73.
12 C P C (1908) O 6 rr 17,18.
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14 C P C 1908 O 22 r. 11,
15 „ O 43 r 1.
16 „ O 20 r 6.
17 „ O 14 r 6.
18 „ O 41 rr 33,23.
19 „ O 17 r 2.
20 „ O 15 r 4.
21 C P C 1908, ss 115,154.
22 Registration Act Ss 72,73,74.
23 Guardian and Wards Act ss 31, (3), 47.
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27 Companies Act S 69.
28 Appellate Court.
29 Land Acquisition Act s 54.
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See (1) Appeal orders
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(2) Limitation Act.
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Appeal by one of several plaintiff's claiming under a joint right.

See C P C O 41 r 4.

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Appeal from appellate decree.

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See Letters Patent.

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See Appeal to Privy Council.

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See (1) Appeal orders.
(2) Withdrawal of suit.

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See (1) Appeal sale in execution of decree.
(2) Appeal orders

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See (1) Court fee Act.
(2) Special Acts.

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See Appeal Costs

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See Sale in execution of decree.

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See Limitation Act Ss 5 & 4.

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8 A—Cases in which an appeal lies or not appealable orders.

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1. CASES IN WHICH APPEAL LIES OR NOT.

(a) Appellate orders.

(1) Orde of High Court Dismissing Munsiff.

1.—Beng Reg V of 1831, s 26, cl 2.

An order of the High Court at Calcutta, under s 26, cl 2, of Bengal Regulation V of 1831 dismissing a Munsif for corruption in the exercise of his functions as Judge, is final, and there is no jurisdiction in the Judicial Committee to admit a special appeal therefrom. **Shree Mohun Ghuttuck 13 Moore's I A 343.**

(2) Decision to admissibility of special appeal.

2.—Act III of 1843.

By Act III of 1843, the decision of a single Judge of the Sudder Court of Bombay as to the admissibility of a special appeal was final so far as the Sudder Court was concerned; but the Act did not extend to take away the right of appeal to the Privy Council. **Modee Kaikhoosrow Hormusjee v Cooverbaee 4 W R P C 94= 6 Moore's I A 448.**

(3) Award under Act XVIII of 1848.

3.—Administration of private estate of Nawab of Surat—Statutes 7 & 8 Vict., c. 69; 3 & 4 Will. IV, c. 41.

An Act of the Legislature of India—(XVIII of 1848)—empowered the Governor in Council of Bombay to administer the private estate of the late Nawab of Surat, and it was by s. 2 enacted "that no Act of the said Governor of Bombay in Council in respect of the administration to, and distribution of, such property, from the date of the death of the said Nawab, should be liable to be questioned in any Court of law or equity." No provision was made for an appeal from the Governor's decision. In pursuance of the power conferred by this Act, the Government agent at Surat, to whom the matter was referred, made an award distributing the estate in certain shares among the heirs of the deceased which award was confirmed by the Governor in Council. On an application by a claimant dissatisfied with the award to the Judicial Committee, for leave to appeal from the Governor in Council's confirmation of the award,—*Held* that the award was not such a judicial act as to come within the operation of S. 3 of the Statutes 3 & 4 Will. IV, c. 41, or the 7 & 8 Vict., c. 69, and could not be entertained by the Judicial Committee without a special reference to them by the Crown under s. 4 of the Statutes 3 & 4 Will, IV, c.41.

Nawab of Surat. 5 Moore's I A 499.

Notes.—Ref: 6 Bom 309.

(4) Order under Act XL of 1858.

4—An Appeal from an order under Act XL of 1858, appointing a person to be guardian of a minor and manager of his property, bears no value and cannot be carried to Her Majesty in Council **Pearee Daye v Hurbuns Koer 14 W R 299.**

Notes—Dist 22 Bom 267; 3 C L J 158.

(5) Order rejecting application for review.

5—An appeal lies to the Privy Council, under s. 39 of the Charter of the High Court, from an order rejecting an application for a review of judgment. The petition of appeal must be presented within six months from the date of the said order. **Nazur Anithan v Ojoodhyaram Khan 1 W R Mis, 13.**

Ameeroonissa Begum v Inderjeet Koonwar. 5 W R Mis 17.

Notes—Ap:12 M I A 107; Foll: 5 W R Mis 17.

(6) Order Confirming sale in execution.

6.—Order made on appeal—Letters Patent cl. 39—24 & 25 Vict., c. 104, s. 15.

Certain property having been sold in execution of a decree, the judgment-debtor applied to have the sale set aside. This application was

Appeal to Privy Council-*Contd.*

1 Cases in which appeal lies or not—*Contd*

rejected; but a review of the order rejecting it was subsequently granted, and the sale set aside, and an application by the auction-purchaser for the cancelment of the order setting aside the sale was refused. Thereupon the purchaser applied by petition to the High Court, praying that the order made on review might be reversed. In his petition he submitted that " the sale ought to have been confirmed " when the application of the judgment-debtor to have it set aside was first rejected, but the petition did not contain a formal prayer for confirmation of the sale. A rule, however, was granted, calling on the judgment-debtor to show cause why the order reversing the sale should not be set aside and the sale confirmed, which rule, after argument, was made absolute. The judgment-debtor having obtained leave to appeal to the Privy Council from the order making the rule absolute, the purchaser objected that such order was not appealable under cl. *39* of the Letters Patent, 1865, on the ground that it was not an order " made on appeal. " *Held*, that, as the purchaser had obtained a rule calling on the judgment-debtor to show cause why the sale should not be confirmed, and had allowed that rule to be made absolute, he could not contend that the order making the rule absolute was not an order made on appeal. *Semble*—Orders made by the High Court under s. 15 of 24 & 25 Vict c 104, are subject to appeal to the Privy Council,

Hurdeo Narain Sahu v Gridhari Singh. 13 B L R 103

Gridhari Singh v Hurdeo Narain Sahu. 21 W R 263.

(7) Order rejecting review.

7.—Order made on appeal—Letters Patent, cls. 39 and 42.—

An order rejecting a review of judgment is not an " order made on appeal " within the meaning of cl. 39 of the Letters Patent of the High Court. In cases of appeal made under cl. 42 of the Letters Patent, the Court ought not, in transmitting the proceedings connected therewith, also to send such proceedings as applications for review of the judgment of the High Court and the orders of the Court thereupon. **Enayet Hossein v Roushan Jehan. I B L R, F B 1 =10 W R, F B 1.**

Appeal to Privy Council-*Contd.*

1 Cases in which appeal lies or not—*Contd*

(8) Difference of opinion between Judges of Division Bench of High Court.

8—Letters Patent, 1865, Ss. 15 and 39.—

An appeal lies directly to the Privy Council from the decree of a Division Bench of the High Court on an appeal from the mofussil, although the Judges differed, and upon the points of difference a further appeal to the High Court is given under cl. 15 of the Letters Patent.

Court of Wards on behalf of the Raja of Darbanga, 7 B L R 730=16 W R 191.

(9) Letters Patent Cl. 39.

9—Appeal from the decision of the Appellate side of the High Court—cl. 39 of the Letters Patent of 1865 does not derive its authority from the *24* and 25 Vict, c. 104, and was not inserted in pursuance of that Act; consequently any power which it gives to admit an appeal to the Privy Council from a decision of the High Court on its Appellate side is not one of the powers which the High Court is, by the first part of s. 9 of 24 and 25 Vict, c. 104, commanded to exercise.

Feda Hossein. 1 Calc. 431.

Notes—Appr. *3* Cal 63 F B; Ref. 20 Bom 699.

(10) Interlocutory Judgment.

10.—Letters Patent, cl. 40—Question of practice—Order for inspection of documents.

No appeal lies, under s. 40 of the amended Letters Patent of the High Court, to the Privy Council from an interlocutory judgment or order of a Judge of the High Court, until such judgment or order has been subjected to an appeal to the High Court under cl. 15 of the Letters Patent except in those cases in which, by reason of the number of the Judges who have made such order, an appeal under cl. 15 is given directly to the Privy Council. *Semble*—The High Court will not in the exercise of its discretion, allow an appeal to the Privy Council upon a mere question of practice, such as an order for the inspection of documents. **Sonbai v Ahmedbhai Habibhai. 9 Bom 398=9 B H C 398.**

Notes :—Ap: 14 Bom 555. Dist: 12 B H C R 129; I Mad 148. Ref: 11 All 375; 11 Bom L R 248.

Appeal to Privy Council-*Contd.*

1 Cases in which appeal lies or not—*Contd*

(11) Interlocutory decree.

11-Where the High Court reverses the decree of the Court below and remands the case for retrial on the merits and for a new decree to be passed, no appeal lies as a matter of right, under sec. 595, Civil Procedure Code (Act XIV of 1882), to the Privy Council, albeit the value of the subject-matter admittedly exceeds Rs. 10,000 as such a decree of the High Court is not a final but an interlocutory decree. In such a case a certificate should first be obtained under cl. (c) of the section that the case is a fit one for appeal to Her Majesty in Council. **Mahant Ishvargar Budhgar v Chudasama Manabhai Madansang P J (1884) 142=8 Bom 548.**

Notes.—Fol. 13 Mad 349. Ref. 25 All 630.

(12) Interlocutory order.

12—Civil Procedure Code, 1877, s. 595 cl. (a)—Final order—

An order of the High Court, directing execution to proceed, is not a " final " decree, judgment or order within the meaning of cl. (a), s. 595 of the Code of Civil Procedure, Act X of 1877, and therefore no appeal lies from it to the Privy Council. **Jogessur Sahai v Muracho Kooer. 1 C L R 354.**

Notes.—Ref. 18 Cal 169.

12 A—Civil Procedure Code (Act XIV of 1882), Sec. 108.

No appeal lies to Her Majesty in Council from an order which is a purely interlocutory order, directing procedure; such appeal only lies if the order is a final order in the sense of section 595 (*a*) as modified by section 594 of the Civil Procedure Code. The mere fact that the High Court, apparently on the assumption that it was such an order, have certified the sufficiency of the amount and value of the suit cannot make appealable an order which does not fulfil the statutory conditions.

The application of defendant, under s. 108, of the Civil Procedure Code, to set aside an *exparte* decree was dismissed by the Subordinate Judge. Against that order of dismissal an appeal was taken to the High Court by the defendant. The High Court set aside the order of the Subordinate Judge and ordered that " the case be, and it hereby is, remanded, under section 562 of the Code of Civil Procedure, to the Court of the said Subordinate Judge to be disposed of on the merits."

Held, on the construction of this order, that what was remanded was merely the application immediately before the Court, to wit, the application to set aside the decree, and that it was that application which the Subordinate Judge would under the remand, proceed to dispose of, by allowing the respondent to endeavour to satisfy him of the conditions specified in section 108 and then, if that be done, by setting aside the decree.

Rai Radha Kishen v Collector of Jaunpur 3 Bom L R 78=5 C W N 153=11 M L J 65 =28 Cal 424=28 I A 28 P C= 23 All 220.

13—Interlocutory Order-Execution of Decree —Civ. Pro. Code 1877, s. 594—

The District Judge of Ghazipur recalled to his own file the proceedings in the execution of a decree which were pending in the Court of the Subordinate Judge of Shahabad, and disallowed an application for the execution of the decree which had been preferred to that Judge. The High Court, on appeal from the order of the District Judge, annulled his order as void for want of jurisdiction, and remitted the case in order that the application might be disposed of on its merits, directing that the record of the case should be returned to the Subordinate Judge of Shahabad. On an application for leave to appeal to Her Majesty in Council from the order of the High Court, *held* that such order was in the nature of an interlocutory order, and was not one from which the High Court ought to grant leave to appeal to Her Majesty in Council. **Palak Dhari Rai v Radha Pershad Singh. 2 All 65.**

13A—Leave to appeal—Interlocutory order Jurisdiction.

Leave to appeal to the Privy Council can be given where the order appealed from transferring a case from one Court to another is intercutory, and raises a question of jurisdiction.

Municipal Officer, Aden v Abdul Kareem 6 Bom L R 85=28 Bom 292.

Appeal to Privy Council-*Contd.*

1 Cases in which appeal lies or not—*Contd*

(13) Final decree or Order.

14—Civil Procedure Code (Act X of 1877), ss. 595, 600—

An order in a partnership suit for account refusing to allow the plaintiffs to have their accounts taken in a particular manner suggested by themseves, unless they would consent to give certain credits in their accounts to the defendants, is not a final decree within the meaning of cl. (b) of s. 595 of the Civil Procedure Code, although the effect of such order may be to make it impossible for the plaintiffs to proceed further in the case, and consequently an appeal from such an order of the High Court to the Queen in Council does not lie. **Aben Sha v Cassirao Baba Saheb. 6 Bom 260.**

Notes—Ref. 8 Bom 548.

15—" Final decree "—Leave to appeal to Her Majesty in Council.

Held, that an order passed by the Chief Court on an appeal under Section 588 (6) of the Civil Procedure Code, from an order of the District Judge, returning a plaint for presentation in the Revenue Court, and reversing that order, is not a " final decree " within the meaning of Section 595 of the Code, from which leave to appeal to Her Majesty in Council can be granted.

A final decree within the terms of Section 595 of the Civil Procedure Code is one which finally determines some cardinal point in issue in the cause, in respect of the rights of the parties and on the merits of the case. **Ganda Mal v Thakar Harkishen Singh. 12 P R 1896.**

16—S. 109 (1882 s. 595)—" Final decree " —Order of remand—Suit to annul incumbrances—Bengal Tenancy Act (VIII of 1885) s. 167 —Notice—Dismissal of suit on the ground of non-service of notice—Appellate Court holding service proved and remanding case.

Where a suit to annul incumbrances by the purchaser of a *putni* at a sale for its own arrears was dismissed by the Subordinate Judge, on the ground that the plaintiff had failed to prove the service of notices under s. 167, Bengal Tenancy Act, but the High Court, on appeal held that the service of notices was proved and remanded the

Appeal to Privy Council-*Contd.*

1 Cases in which appeal lies or not—*Contd*

suit for the trial of the other issues in the case.

Held, that though the order of the High Court was in form an order of remand, it finally decided the cardinal point in the case, *viz*, whether the notices were properly served or not. The order was therefore a " final decree " within the meaning of s. 595 of the Civ. Pro. Code (17 All 113 and 15 Bom 155 Ref.) **Ananda Gossi Gossain v Naffor Chandra Pal Chowdhury. 12 C W N 545=35 Cal 618 =8 C L J 168.**

Notes—Ref. 10 C L J 336.

17—S. 109 (1882 s. 595)—Final—Remand order—Decision of issue governing the case—Leave to appeal to Privy Council.

The purchasers of a putni, which was sold for its own arrears, sued the defendants for khas possession on the ground that they were trespassers after annulment of their encumbrances by notices duly issued under s. 167 of the Tenancy Act: The Court of first instance dismissed the suit on the ground that the plaintiffs failed to prove that the notices were duly issued and served. The appellate Court took the opposite view, holding that the notices had been properly served and remanded the case for the trial of other issues.

Held, that though the order purported to be only an order of remand, yet as the appellate Court reversed the decision of the first Court upon an issue which governed the whole case, the decree of the appellate Court is a final decree within the meaning of s. 595 of the Code of Civil Procedure. (1890) 15 Bom 155;(1814)17 All 113 ref to. **Rajbala Debi v Duffer Cheunder Pal Chowdhury. 8 C L J 168.**

18—Ss. 595, 608—Order of the Judicial Commisioner prescribing the manner in which a decree of his Court should be executed—Final decree—Appeal to Privy Council.

An aplication was made for leave to appeal to Her Majesty's Privy Council against an order of the officiating Judicial Commissioner of Oudh, prescribing the manner in which, and the extent to which, the decree of his predecessor should be executed. *Held*, that an order prescribing, under s. 608, Civil Procedure Code, the manner in which and the conditions under which execution of a decree was to be had is not a " final " decree or

Appeal to Privy Council-*Contd.*

1 Cases in which appeal lies or not—*Contd*

order in the meaning of s. 505, Civil Procedure Code. **Maharani Indar Kuar. S C 105**

18 A—Privy Council appeal—Civ. Pro. Code (Act V of 1908), s. 109, cl. (a)—Remand order—Final order—

The term " final order " in s. 109, Civ. Pro. Code, 1906, denotes an order which finally decides any matter directly at issue in the case in respect of the rights of the parties. An order of remand may be a final order within the meaning of this section, if it decides in effect finally the cardinal point in the suit or an issue which goes to the foundation of the suit. Whether a particular order falls in this category must depend upon its contents When the fundamental question in the case was whether the suit was barred under s.244 of the Code of 1882, and the first Court held that the suit was so barred, but the lower Appellate Court took a contrary view and remanded the suit for trial on the facts, and this order was subsequently affirmed by the High Court. *Held*, that the order of the High Court was a final order within the meaning of s. 109 of the code of 1908. **Saratmani Debi v Bala Krishna Banerji. 10 C L J 336=4 Ind Cas 459.**

Appeal to Privy Council—Against Punjab Chief Court's order of remand—Such order not a final decree—See Civ. Pro. Code. 1908, O. XLI, r. 23, s. 109. **52 P R 1907=34 P L R 1908= 119 P W R 1908.**

19—Final Decree—Civ. Pro. Code 1877, ss. 595 & 595 (a).

Certain persons interested in an award applied under section 525, Code of Civil Procedure to have it filed in Court. The Court made an order under s. 526 " that the claim of the plaintiffs be decreed ". The defendants appealed to the High Court from this 'decree". The High Court held that the appeal would not lie and suggested to the plaintiffs to apply to the lower Court to give Judgment according to the award and a decree to follow it. Thereupon the plaintiffs made an application to the lower Court of the nature suggested, but styled it one for review of Judgment. The lower Court granted the so-called review of judgment. The defendants appealed from the order of the lower Court, contending that the " review of judgment " had been improperly granted. On the 23rd June 1880, the High Court held that the order of the lower Court was not appealable, not

Appeal to Privy Council-*Contd.*

1 Cases in which appeal lies or not—*Contd*

being one passed on review of judgment, but on an application to give judgment and decree in accordance with an award which had been filed in Court. The defendants applied for leave to appeal to Her Majesty in Council from the order of the High Court of the 23rd June, 1880. *Held* that such order was not a " final decree" within the meaning of section 595 (a), and therefore it was not appealable to Her Majesty in Council. **Ramadhin Mahton v Ganesh. 4 All. 238.**

20—Civil Procedure Code s. 595—application for leave to appeal to Privy Council—Order dismissing suit on preliminary issue.—

In a suit to recover certain property, plaintiff alleged adoption. The first Court dismissed the suit, holding that the fact of adoption was not proved & did not try other issues that were framed in accordance with pleadings in the case. The plaintiff appealed and the High Court set aside the decree of the 1st Court & *held*, the alleged adoption to be satisfactorily proved & remanded the suit for the trial of the remaining issues. The defendants applied for leave to appeal to the Privy Council against the decree of the High Court. This application was refused on the ground that the decree was not a final decree & therefore no appeal lay. **Tirunarayana v Gopalasami 12 Mad 349.**

Notes:—Ref 10 C L J 336

21—S. 109 (1882 s. 595)—Final decree passed on appeal—High Court—Appeal-Privy Council-High Court's order refusing to admit appeal beyond prescribed period.

An order passed by the High Court, refusing to admit an appeal presented beyond the prescribed period, is not a decree passed on appeal under s. 595 (a) of the Code of Civil Procedure. and is therefore not appealable to His Majesty in Council. **Karsondas Dharamsey v Gangabai 9 Bom L R 566=32 Bom 108.**

22—Civil Procedure Code. 1882. s. 595-Order directing accounts to be taken-Decree not final —Application for leave to appeal.—

Where a decree has been made directing accounts to be taken, but there is nothing so special in the case as to bring it under cl. (c) of s. 595 of the Civil Procedure Code (Act XIV of 1882) leave

Appeal to Privy Council-*Contd.*

1 Cases in which appeal lies or not—*Contd*

to appeal to the Privy Council will not be given. **Rahimbhoy Hubibbhoy v Turner. 14 Bom 428.**

Notes—Ref: 10 C L J 336

23—Prerogative right of Crown to admit appeal where leave to appeal refused by High Court-Final decree-Meaning of "final" in s. 595 of Civil Procedure Code (XIV of 1882)— Civil Procedure Code, s. 601-Procedure—

Where a decree directing the taking of accounts which the defendant contends ought not to be taken at all decides in effect, that, if the result should be found to be against the defendant, he is liable to pay the amount, the decree is final within the meaning of S. 595 of the Civil Procedure Code (XIV of 1882) for the purpose of appeal. On the ground that a decree for an account was not final within that section, the High Court refused, under s. 601, to grant the defendant a certificate. On his application for special leave to appeal to Her Majesty in Council, not by way of an appeal from the local Court's refusal, but asking for the exercise of the prerogative right to admit an appeal—*Held* that, as leave could be granted on any other ground, should any appear, besides the ground that the Court had refused the certificate without good cause, while leave could also be granted on the latter ground, if established, to make this application was perhaps, more convenient than to appeal from the order of refusal. *Held* also, that the real question in this suit having been the liability of the defendant to account to the plaintiff upon several claims, the decree had decided this against the defendant in such a way that, although the account had not been taken, the decree was final within s 495. **Rahimbhoy Habibbhoy v Turner. 15 Bom 155=L R 18 I A 6**

Notes.—Ap 5 M L J 20 P C; Fol 17 All 112 P C; 36 Cal 493. Ref 22 Cal 928; 4 Bom L R 212; 8 C L J 168; 35 Cal 618= 12 C W N 545; 12 C W N 1102; 10 C L J 336.

24—Order refusing to appoint a receiver-Civil Procedure Code (1882) s. 595-Letters Patent of the High Court ss. 39 and 40—

An appeal to Her Majesty in Council would not lie against an order refusing the appointment

Appeal to Privy Council-*Contd.*

1 Cases in which appeal lies or not—*Contd*

of a receiver in a suit. Such matter is not one which finally decides any matter directly in issue in the case in respect to the rights of parties and is not 'final" within the meaning of cls. (a) and (b) of s. 595 of the Civil Procedure Code (1882) and s 39 of the Letters Patent; nor does matter form a special case falling within the terms of cl. (c) of s. 59 of the Code or s. 40 of the Letters Patent. 8 B L R 433 J L R; 17 Cal 455: 18 Cal 182, and 15 Bom 155: 18 I A 6 referred to. **Chundi Dutt Jha v Pudmanund Singh Bahadur. 22 Cal 928.**

25—s. 595 C. P. C.—Final decree.

An order comprising the decision of the appellate High Court upon a cardinal issue in a suit, which goes to the root of the suit, and which can never, while the decision stands, be disputed again, is a final decree, notwithstanding that there may be subordinate enquiries yet to be made in disposing of the suit. (15 Bom 155. P C) appr. The certificate of leave was refused by the High Court on the ground that the proposed appeal was from an order of remand under s.562 of theCode of Civil Procedure. The first Court had not disposed of the suit on a preliminary point and s. 565 appeared to be more applicable than s. 562. Therefore the order, if properly made under s. 562, would probably be not a final order within the meaning of s. 595 cl. (a), but here s.562 was not applicable and the order was a final order. **Sayed Muzhar Husian v Musammat Budha Bibi. 17 All 112 P C.**

Notes—22 I A 1. Fol: 22 All 405. Ref: 5 C W N 617 F B; 18 All 19 F B; 25 All 630; 29 Cal 758 F B; 35 Cal 618=12 C W N 545; 6 A L J 786; 10 C L J 336; 31 All 545; 8 C L J 168.

26—S. 106 cl (1)—Privy Council Appeal—Order of remand—Decision on cardinal question.

Where, in a suit for the winding up of a partnership business, the High Court on appeal disagreed with the first Court in respect of the respective liabilities of the parties, and remanded the suit for fresh accounts: *Held*, that the decision of the High Court on this cardinal question amounted to a final decree in suit. (18 I A 6; 15

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1 Cases in which appeal lies or not—*Contd*

Bom 155; 22 I A 1; 17 All 112, followed).

Dwarka Nath v Haji Mahomed. 7 Ind Cas 622.

13A. Appeal from High Court's order of remand.

26A—Decree against absent defendant—Pleader having no instructions—Application under s. 108, Civ. Pro. Code, to set aside, dismissal of—High Court's order of remand under s. 562, whether appealable to Privy Council.

On the adjourned date of the hearing of this defendant was absent, and on his pleader informing the Court that " he had no instructions to proceed with the case." the Court went on, as in absence, heard evidence for the plaintiff,and gave him a decree for the claim. An application by the defendant to set aside the decree under s. 108 of the Civ. Pro. Code, was disallowed without opportunity given to him to satisfy the Court in terms of s. 108 that he was prevented by any sufficient cause from appearing at the hearing, the theory of the decision being that the applicant had in fact appeared so that the decree could not be regarded as having been passed *ex-parte*. The order dismissing the above application was reversed on appeal by the High Court which *held*, that the decree was an *ex-parte* one and passed an order remanding the case for disposal on the merits. On this order of remand by the High Court being appealed against, the Judicial Committee, *held* that the appeal was not maintainable, because there was no final order or decision of an ultimate Court of appeal within the requirements of s. 595 (a) of the Civ. Pro. Code, and the mere fact that the High Court, apparently on the assumption that it was such an order, had certified the sufficiency of the amount and value of the suit, could not render appealable the order not fulfilling the statutory conditions for an appeal to the Privy Council. The Judicial Committee agreed with the High Court that the lower Court was in error in having disposed of the case without considering whether the defendant was prevented by sufficient cause from appearing at the adjourned hearing, and laid down that what was remanded by the order of the High Court was merely the application to set aside the decree, and that it was that application which the first Court should, under the remand, proceed to dispose of by allowing the defendant to proceed to satisfy the Court of the conditions specified in s. 108, and, then, if that be done, by setting aside the decree.

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1 Cases in which appeal lies or not—*Contd*

Radha Kishan v The Collector of Jaunpur. 23 All 220=28 I A 28=5 C W N 153 P C.

Notes:—Diss: 1 S L R 115, 34 Cal 403=11 C W N 329= 5 C L J 247=2 M L T 123; Dist: 17 C P L R 1, 8 C W N 621.

(14) Decree affirming the decision of the Court immediately below.

27—Decree affirming decision of Court below.

Held,that a decree of the High Court dismissing an appeal for want of prosecution, the appellants not having supplied their counsel with materials upon which to argue the appeal when it was called on for hearing, was a decree affirming the decision of the Court immediately below within the meaning of s. 596 of the Code of Civil Procedure.

Beni Rai v Ram Lakhan Rai. 20 All 367=18 W N 77.

27A-(*1877*)—Arts 178, 180—Order dismissing appeal on default by the Privy Council—Affirmance of decree below—Limitation for execution of decree

The decree-holder obtained a decree for sale upon mortgage. The judgment-debtor appealed, but the High Court dismissed the appeal on 8th April 1893. The appellant appealed to the Privy Council,but took no steps to prosecute the appeal. His appeal was dismissed for want of prosecution on 13 th May 1901. On 14 th May 1904, the decree-holder applied to the Court below to make the order for sale absolute. The application was dismissed on the ground that the procedure prescribed by s. 610, Code of Civil Procedure 1882, had not been followed. An application was made by the decree-holder on 11th June,1906 under s.610, and the decree was transmitted for execution to the Court below. The present application was then made for order absolute. The judgment-debtor pleaded limitation in bar of the application. *Held*, that the dismissal of the judgment-debtor's appeal for want of prosecution was an affirmance of the decree of the High Court within the meaning of S. 596 of the Code, it being immaterial on what grounds appeal was dismissed. The order of His Majesty dismissing the appeal for default was an affirmance of the decree of the High Court and was alone capable of enforcement. An application for such enforcement made within twelve years of the date of the order was governed by Art 180 of the Limitation Act 1877, and was an application

Appeal to Privy Council-*Contd.*

1 Cases in which appeal lies or not—*Contd*

which was made within time. L R 6 A C 482; 20 All 367; approved of and applied.

Abdulajid v Jawahir Lall
7 A L J 1001 F B=33 All 154

(15) Cancellation of notification on the ground of error.

28.—Pleadership examination—Notification of a candidate having qualified—Civil Procedure Code, chap. XLV.

A candidate at an examination for pleadership, a mistake in the computation of his marks having been made, was erroneously declared qualified for admission as a vakil of the High Court by a Government notification. The mistake having been discovered, such notification was, so far as he was concerned, cancelled. He then petitioned the High Court in the matter, and was informed by it that his name must be excluded from such notification, as he had not qualified by obtaining the requisite number of marks. The candidate having applied for leave to appeal to Her Majesty in Council,-*Held* that chap. XLV of the Civil Procedure Code had no application, and the matter was not one in which the High Court was concerned to grant or refuse leave to appeal to Her Majesty in Council. **Sakhnandan Lal.**
6 All 163

(16) Order remanding suit for retrial

29.—*Held* that the High Court has not any power under Act X of 1877 or cl. 31 of the Letters Patent to grant leave to appeal to the Privy Council from an order of remand. **Tetley v Jai Shankar.** **1 All 726.**

(16A) Appeal from order of remand not usually admissible

30—C. P. C. S. 109; O 41 r *23* (1882 Ss. 596 and 562)—Appeal to His Majesty in Council.

Appeal from order of remand not usually admissible.

An order under section 362 of the Code is not ordinarily capable of being the subject of an appeal to His Majesty in Council, though it may possibly be so, if the order in question has the effect of deciding finally the cardinal point in the suit. (A W N (1903) 159, Fol 2 C W N p 201 Ref.) **Ram Sarup v Ram Dei.**
A W N (1907), 291=5 A L J 57.

Appeal to Privy Council-*Contd.*

1 Cases in which appeal lies or not—*Contd*

31.—Application for leave to appeal to Privy Council—Order of remand under Section 562, Civil Procedure Code—"Final decree."

Held, that an order of remand under Section 562, Civil Procedure Code, made in consequence of a finding that a cause of action had been disclosed by the plaintiffs, and directing a trial of the case set up for the plaintiffs on its merits, is not a "final decree" within the meaning of Section 595 (a) of the Code of Civil Procedure.
Yusaf Shah v Ghulam Jilani. 56 P R 1888

32.—C.P.C. S. 109 (1882 s. 595)—Final decree—Appeal from order under s. 592, C P C.

An order under s. *562* is not ordinarily capable of being the subject of an appeal to His Majesty in Council though it may possibly be so, if the order in question has the effect of deciding finally the cardinal point in the suit. 17 All 112; 8 Bom 548 and 10 M I A 340 referred to. **Habibunnissa v Munawarunnissa.**
1903 A W N 159.

(16B) Order of remand disposing of cardinal issue constituting a final decree.

33.—C. P. C. Ss. 109, 110; O 41 r *23* (1882 ss. 595, 596, 562)—"Final decree"—Remand order—Cardinal issue.

A cardinal issue in a case is an issue which goes to the foundation of the suit and not one which merely relates to a matter of procedure, e. g, the competency of the *forum* before which it is brought to dispose of.

An order of remand is a "final decree" within the meaning of s. 595, Act No XIV of 1882, when it disposes of the cardinal issue in the case.

An interlocutory order may be impeached before the Privy Council when appeal is preferred against the final decree in the cause.
Mujtaba Husain v Jamal-ud-din 1 A L J 26.

(17) Power to admit appeal.

34.—Admission of appeal—Privy Council's Appeals Act (II of 1863), s. 1—Act XXXII of 1871, S. 18-Subordinate Court.

The words "Courts of highest civil jurisdiction in any Province" in Act II of 1863 refer to

Appeal to Privy Council-*Contd.*

1 Cases in which appeal lies or not—*Contd*

the general jurisdiction of the Courts, and not to the finality of their decisions in particular cases. A Court which, under the provisions of Act XXXII of 1871, is a Subordinate Court, has no authority, under Act II of 1863, to admit an appeal to Her Majesty in Council even where its decision is final. **Hardoe Bux v Jawahir Singh 3 Calc 522.**

Notes.—6 I A 161=4 I A 178. Appl: 8 Cal 769. Dist: 17 Cal 311 P C. Ref: 5 Bom L R 983

(17A) Order of remand determining only a part of the case.

35.-C.P.C.Ss.109, 2 and Sch. I, O. 45-Practice-Appeal to the King in-Council—Order of remand —Cardinal point—Order, final and interlocutory.

An order of remand, which determines only a part of the case and leaves other matters still to be determined is not a 'final order' within the meaning of s 109, Civ. Pro. Code. Final and interlocutory orders distinguished. 17 All 112; L R 3 C P C 67; L R, (1891); 1 Q B D 734 Ref.

Baij Nath Dass v Sohan Bibi. 6 A L J 786=6 M L T 94=3 Ind Cas 967=31 All 545.

(17B) Order rejecting application for amendment of decree

36.—C.P.C.Ss. 109,110; O.20 r.6,S.152 (1882 Ss. 595, 596, 20)—Charter Act, Cl. 39—Order under S. 202, C P C.—"Order made in its final appellate jurisdiction."

An order by the High Court rejecting an application for amendment of its own decree in appeal, is not an order *made on appeal* and no appeal lies to the Privy Council. *Quaere.*—Whether such an order is one passed on appeal by the High Court in its final appellate jurisdiction and whether it is "final" 6 W R Misc. Ref 102. 10 W R F B 1 fol: 21 W R 205 not fol. **Sunder Koer v Chandishwa Prasad Singh. 30 Cal 679=30 I A 20**

Notes.—*Fol:* 32 Bom 108=9 Bom L R 566.

(17C) Order deciding competency of land acquisition judge to review portions of award.

37.-C.P.C.Ss. 109,115—High Courts Act (24 & 25 Vict., C. 104), S. 15—Letters Patent, S. 39—"Final order passed on appeal," meaning of—Order for discovery—Order deciding competency of land acquisition Judge to review certain portions of award—Final order—Privy Council appeal, whether lies.

An order passed by the High Court, in the exercise of its revisional jurisdiction under S 115 of the Civ. Pro. Code, or of its power of superintendance under S. 15 of the Charter Act, is "an order made or passed on appeal" within the meaning of S. 100 of the Civ. Pro Code and S. 30 of the Letters Patent.

The term "final order" in S. 109 of the Civ. Pro. Code and S. 39 of the Letters Patent, denotes an order which finally decides any matter directly at issue in the case in respect of the rights of the parties. If the order decides in effect finally the cardinal point in the suit, and, therefore, is an order which can never, while the decision stands, be questioned again in the suit, it is "final," notwithstanding that there may be subordinate inquiries to be made.

In a land acquisition case, the High Court, on the application of the parties, ordered, under S. 115 of the C. P. C., that the Judge had no jurisdiction to review, at the instance of the Secretary of State, the award of the Collector in so far as it was not challenged by the claimants, and also, that he had no jurisdiction to make an order for discovery,

Held, that the order of the High Courts was not a "final order" within the meaning of S. 109 of the C. P. C, or S. 39 of the Letters Patent; for although it determines only a question of law which affects one part alone of the case, it leaves other matters still to be determined.

An application for leave to appeal to the Privy Council against the order was, therefore, refused. (21 W R 263, relied upon; 30 Cal 679, Dist.) **Secretary of State for India v British Indian Steam Navigation Co. 9 Ind Cas 183=13 C L J 90.**

(b) SUBSTANTIAL QUESTIONS OF LAW.

(1) Power of Indian Legislature.

38.—Substantial Question of Law—Indian Legislature, power of—Act VI of 1874, S. 5—

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1 Cases in which appeal lies or not-*Contd.*

Letters Patent, 1865, cl. 39—24 & 25 Vict c 104 S. 9-24 & 25 vict c.67 (Indian Councils Act), S. 29.

The provision in S. 5 of Act VI of 1874, that where there are concurrent decisions on facts, the case must in order to give a right of appeal to the Privy Council, involve some substantial question of law, is not *ultra vires* of the power of Indian Legislature as being a curtailment of the jurisdiction given to the High Courts by Letters Patent, 1865, cl. 39, S. 22 of 24 & 25 Vict, c. 67, must be read with Ss. 9 and 11 of 24 & 25 Vict. c. 104. By the express words of s. 9. all previously existing powers were reserved to the High Courts, provided the Letters Patent did not interfere with them, and as to these powers the Governor General in Council is expressly empowered to legislate. Even if, therefore, the power to admit an appeal to the Privy Council were confirmed by the Letters Patent under the authority of 24 & 25 Vict, c. 104, it was, not being a new power, subject to the legislative control of the Governor-General in Council. The *ratio decidendi*. 24 B L R; 106, dissented from.

Feda Hossein. 1 Cal 431.

Notes.—*Appr*: 3 Cal 63 F B. *Ref.* 20 Bom 699.

(1A) A question of construction of document.

39.-C P C S 110: O 44 r 2 (1882 Ss 596 and 598) -" Substantial question of law," construction of a document.

Held, that the words "substantial question of law" in S 596, do not include a question of the construction of a document. (11 C W N CCXVIII Fol:) **Udairaj Singh v Raja Bhagwan Bakhsh 10 O C 308.**

(2) Questions of Law arising on evidence.

40.—Question of law based on evidence-Act VI of 1874 S 5--Substantial question of law—the substantial question of law which, by s 5 Act VI of 1874, the appeal to the Privy Council must in value, in order to allow an appeal in a case where the decision of the lower Court is affirmed in the decree appealed from, is not limited to a quistion of law arising out of the facts as found by the courts from whose decisions it is desired to appeal. A question of law arising on the evidence taken in a case is, without reference to the finding of the lower courts, sufficient to fonnd an appeal. **Moran v Mittu Bibee 2 Cal 228.**

Notes —*Con*: 23 All 94; Ref: 20 Bom 699.

41.—C P C S 110 (1882Ss 596) Appeal to His Majesty in Council—"Substantial question of law" what is a question of fact—Leave to appeal refused.

The main question at issue in a suit for partition of moveable and immoveable property being whether the family was or was not joint in title and interest, the defendants, on being asked what they would call evidence to prove, set down a series of facts which they alleged that they could prove, and which, they contended, indicated that the family was at the time of suit joint as to property as well as in other respects. The plaintiff admitted the facts so alleged, and the parties. therefore, summoned no witness on either side. Some documentary evidence, however, was put in, mainly consisting of the will of the late head of the family.

Held, that the finding on these data as to what was the status of the family was a finding of fact merely and could involve no " substantial question of law" within the meaning of Section 596 of the Code of Civil Procedure. **Parsotam Rao Tantia v Janki Bai 3 M L T 16= 1908 W N 7.**

(3) Form of judgment.

42.—S 633 C P C.—Judgment—Rules framed by High Court.

The intention of Legislature as expressed in s 633 of the Code of Civil Procedure, was that the High Court might frame rules as to how its judgments should be given, whether orally or in writing or according to any mode which might appear to it best in the interests of justice. The section does not merely give the High Court power to direct that judgments shall be recorded in a particular book, or with a particular seal, Rule 9 of the rules made under s 633, in March, 1885, is therefore not *ultra vires* of the Court and it modifies the provisions of s 574 in their application to judgments of the High Court, With reference to the terms of Rule 9, it is not necessary, in a case where the High Court substantially adopts the whole judgment of the Court below, to

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**1 Cases in which appeal lies or not-*Contd*

go through the formality of re-stating the point at issue, the decicion upon each point, and the reasons for the decision.

Per EDGE, C. J.—Apart from rule 9, it never was intended that s 574 of the Code should apply to cases where the High Court, having heard the judgment of the Court below and arguments thereon comes to the conclusion that both the judgment and the reasons which it gives are completely satisfactory and such as the High Court itself would have given. Assuming the provisions of s 574 to be applicable, a judgment of the High Court stating merely that the appeal must be dismissed with costs and the judgment of the first Court affirmed and that it was unnecessary to say more than that the Court agreed with the Judge's reasons, is a substantial compliance with those provisions. The judgment of the High Court in a first appeal was as follows: " This appeal must, in my opinion, be dismissed with costs, and the judgment of the first Court affirmed, and I do not think it necessary to say more than that we agree with the Judge's reasons." The appellant applied for leave to appeal to Her Majesty in Council on the ground that the requirements of s 574 of the Code of Civil Procedure had not been complied with. *Held* by the Full Bench that objection involved no substantial question of law, and that the application for leave to appeal must therefore be rejected. **Sundar Bibi v Bisheshar Nath 9 All 93=6 W N 302.**

(4) Concurrence of two Courts on facts.

43.—Concurrent opinions of two Courts on facts—"Affirming" judgment of the lower Court Civil Procedure Code (Act XIV of 1882) s 596—question of law—case decided on facts.

In a case which involved issues both of law and of facts the Subordinate Judge, being of opinion that two issues of facts were sufficient to dispose of the case without going into other issues, decided both the issues against the plaintiff. The High Court found on those two issues in favour of the plaintiff but raised a further question of fact on the evidence and decided that against him, coming finally to the same conclusion as the subordinate judge though disagreeing with him in all his findings or in the reasons on which they were based:—*Held*, on an application for leave to appeal to the Privy Council, that High Court did not "affirm" the judgment of the lower Court

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1 Cases in which appeal lies or not-*Contd.*

within the meaning of s 596 of Civil Procedure Code. It was further Held—that even assuming the judgment of the lower Court was affirmed by the High Court that there were substantial questions of law in the case which entitled the plaintiff to appeal, notwithstanding that such questions might be immaterial to the decision of the case.

Ashghar Reza v. Hyder Reza 16 Calc 287.
Gopinath Birbar v Goluck Chunder Bose 16 Calc 292.

Notes: Dist 21 Cal 523; 20 All 367; Ref. 10 Bom 699,

44.—Where the Appellants before the Judicial Committee failed to show any miscarriage of justice or the voilation of any principle of law or procedure, their Lordships refused to interfere with the concurrent findings of two Courts on pure questions of fact, although they thought the case to be one of great difficulty.

Rani Srimati v Khajendra Narain Singh 9 C W N 74=31 I A 127.

45.—Substantial question of law

The expression "involve some substantial question of law" as used in s 596 of the Code of Civil Procedure must be construed with reference to the practice of the Privy Council not to interfere with concurrent findings of facts of the Courts below, and this being so, it cannot be said that a question which arises only if the concurrent findings of fact of the Courts in India are disregarded, a question which can never arise as long as the Privy Council maintains the concurrent findings of fact, is a substantial question of law which the appeal to the privy Council involves. (2 Cal 225) (16 Cal 292 Note) (20 Bom 695) referred to. **Banke Lal v Jagat Narain 23 All 94=21 W N 8.**

46.—Civil Procedure Code 1882. Section 596-Appeal to Privy Council—Concurrent findings on facts-Substantial question of law-Procedure.

On an application for leave to appeal to the Privy Council whereupon question of fact the decision of the Chief Court was concurrent with that of the Court of first instance and upon the facts as found no substantial question of law was involved, *held*, that under the last clause of Sec-

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1 Cases in which appeal lies or not-*Contd.*

tion 596, Civil Procedure Code, the plaintiff was not entitled to appeal and therefore leave to appeal should not be given. 28 Calc 190, 23 Calc 918, 20 Bom 699, cited 16 Cal 287;16 Cal 292,dissented from. **Likal v Sharif-ul Hassan Khan 48 P R 1904.**

(5) Confirmation of decree of Lower Court.

47.—Civil Procedure Code (1882), s 596—— Substantial question of law—Per Jardine J.-

Where the High Court in appeal has confirmed the decree of the lower Court and has taken substantially the same view of the facts and whereupon the facts as found by both Courts, no question of law arises, leave fo appeal to the Privy Council should be refused. Per Ranade, J.— There is a distinction between the confirmation of a decree and the affirmation of the decision and findings of the Courts of first instance by the High Court. The substantial question of law referred to in s 596 of the Code of Civil Procedure (Act XIV of 1882) need not directly arise out of the concurrent findings of fact, but it is enough if it is involved in those findings, and can, if the appeal is allowed, be raised in the course of the argument. **Vishwambhar Pandit 20 Bom 699=P J 1895, 283.**

47A –Permission of appeal to Privy Council —Amendment of decree by way of amplification of its wording—Affirmation—Insufficient time given to produce evidence—Foreclosure proceedings-Defective notice–Substantial question of law-Civ Pro Code (Act XIV of 1882), s. 596.

Held, that, where on appeal, the decree of the first Court has been so far amended as to include therein expressly, plaintiff's rights in the *Shamlat Deh* and *Shamlat Patti* with other appurtenant rights as claimed, but has otherwise been confirmed on all points, the decree has been practically affirmed within the meaning of the last clause of s. 596, Civ Pro Code—the addition made is simply an amplification of its wording and does not amount to a variation so as to give right of appeal to his Majesty in Council. *Held*, also, that none of the following defects is fatal to the foreclosure proceedings and constitutes a substantial question of law under s. 596, Civ Pro Code, that the notice was bound to state the actual area claimed and not merely the 1½ Biswas' share

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1 Cases in which appeal lies or not *Contd.*

actually entered in the mortgage-deed and that as there were two deeds of mortgage, two separate notices were required, notwithstanding the fact that the second deed was one of further charge only. *Held*, further, that a vague assertion to the effect that sufficient opportunity was not given for producing witnesses cannot be treated as a substantial question of law. **Diwan Abdul Hakim v Harilal. 62 P W R 1908.**

(6) Rejection of Application to take Additional Evidence on Appeal.

48—Application rejected—Civil Procedure Code (1882) ss 568, 596.

The rejection of an application under s. 568 to take conditional evidence on appeal, is not one involving any "substantial question of law" within the meaning of s. 596 so as to give the right to an appeal to the Privy Council.

Prem Chand Moonshee. Upendra Mohan Ghose v Gopal Chandra Ghose. 21 Cal 484

Notes:—Ref: 28 Bom 4.

(7) Non-production of succession certificate at the proper time.

49—Succession Certificate Act (VII of 1889), s. 4—Order granting application for execution of decree.

The representative of a decree-holder applied for execution of a decree without producing before the Court a certificate of succession as required by Act No VII of 1889, s. 4. The Court to which the application was made granted execution. The judgment-debtor appealed to the High Court, by which the order of the lower Court was sustained upon production before it (the High Court) of the necessary certificate of succession. *Held* that an objection that the said application for execution was improperly granted by reason of the non-production of the succession certificate before the lower Court did not raise a "substantial question of law" within the meaning of s. 596 of the Code of Civil Procedure, so as to warn the Hight Court in granting leave to appeal to Her Majesty in Council. **Shuja Ali Khan v Ram Kuar. 20 All 118.**

(8) Malicious prosecution Suit for.

50—Malicious prosecution- - Difference betwe-

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1 Cases in which appeal lies or not- *Contd.*

en trial in England by jury and in India without one—Concerrent judgments on facts.

In a suit for malicious prosecution, the only question involved is a question of fact. In England the jury finds the facts and the Judge has to draw the inference therefrom, while in India the judge has to do both the things when the case is tried without a jury. There was accordingly no substantial question of law in the case, and the High Court granted the certificate allowing the appeal under a misapprehension. **Mody v Queen Insurance Co. 4 C W N 781.**

Notes:—Ref: 6 C W N 159. Appl: 24 Mad 549.

(9) Question of General interest or of public or private importance

51—C.P.C.S. 109;O 44 r 3 (1882 Ss.595 and 600) —Suit below Rs. 10,000 ' otherwise a fit one for ' —Question of general interest or public importance.

Under s. 600, in order to grant leave to appeal to the P C in a suit below Rs. 10000 the mere fact that the question involved is a substantial question of law is not sufficient. It must in addition, be a question of general interest or of great public or private importance, or the like.

Bhagwan Parshad v Thakur Rudr Partab Narain Singh. 5 O C 168

(10) Questions affecting financial and Commercial position of Companies.

51—C.P.C. O 45 r 1(1882) S 594—Appeal—Privy Council-Certificate to appeal—High Court-Indian Companies Act (VI of 1882)-Memorandnm of Association Act (XII of 1895).

The term decree in S. 594 of the Civil Procedure Code, 1882, includes an order passed by the High Court under the memorandum of Association Act, 1895 or under the Companies Act, 1882,

The High Court granted leave to appeal to the Privy Council on the grounds that the questions involved might seriously affect the financial and commercial position of the Company in question and that it was of importance to Indian Companies generally that their rights should be precisely defined in relation to the point that arose in the case.

Bombay Burma Trading Co v Dorabji, 5 Bom L R 348=27 Bom 415.

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(C) CONCURRENT JUDGMENTS ON FACTS.

(1) Finding of facts not concurrent but in effect the same.

53—Concurrent Judgments on facts.-Finding of facts not concurrent though the same in effect —Civil Procedure Code (1882) ss. 596, 600.

Where there is no point of law involved in a case the mere fact that the finding of the Appellate Court does not in terms coincide with the finding of the Original Court is not sufficient, where the findings of fact of the two Courts are the same in effect, to give a right of appeal to the Privy Council, notwithstanding that the value of the suit is more than Rs 10,000, 16 Calc; 287, distinguished. **Thompson v Calcutta Tramways Company. 21 Cal 523.**

54-C.P.C. S. 110 (1882 S. 596)-Decision Interpretation—Decree affirming the decision of the Court immediately below.

The natural, obvious and *prima facie* meaning of the word, "decision" is the decision of the suit by the Court : and in S. 596 of the Civil Procedure Code the term bears the same meaning.

A decree is to be regarded as affirming the decision of the Court immediately below when the appellate Court confirms the order passed: the fact that the reasons given by the appellate Court are not the same in respect of some matter of fact makes no difierence. **Tassaduq v Manickchand. 5 Bom L R 100=25 All 109= 30 I A 35 P C**

Notes:—Dist: 31 Cal 57 P C.

(2) Concurrence of two Courts in deciding fact.

55—Where the decree of an appellate Court has approved the decision of the Court immediately below it, upon the issue of fact, and no substantial question of law is involved, no appeal is open under s. 596 of the Code of Civil Procedure and leave should be refused. **Kuar Nirbhai Das v Rani Kuar. 16 All 274 P C.**

56—C.P.C. S. 110 (1882 s. 596)-Appeal to His Majesty in Council—Leave to appeal-Concurrent finding of fact—Leave.

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1 Cases in which appeal lies or not-*Contd.*

Where there are concurrent findings of the lower Court and of the High Court upon questions of fact and no question of law arises, a certificate granting leave to appeal to His Majesty in Council should not be granted. (23 Cal 198 P C Fol.)

Sukalbatti Mandurani v. Bubulal Mundar. 5 C W N 455=28 Cal 190.

Notes:—Fol: 59 P R 1905=177 P L R 1905 Cited 48 P R 1904.

57—Leave to appeal to the Privy Council—Substantial question of Law—Orders passed under Section 588 (16).

Held, where the Chief Court in appeal has confirmed the order of the lower Court, and has taken substantially the same view of the facts, and from the facts as found no substantial question of law arises, leave to appeal to the Privy Council should be refused. *Held* also, that an appeal may lie to the Privy Council in certain cases from an order passed under Section 588 (16). **Mussammat Surasuti v Eshri Pershad. 61 P R 1900.**

57A—Concurrent judgments on facts.

The Privy Council will not interfere with the concurrent judgments of Original and Appellate Courts, upon matters of fact, in the absence of any contravention of law or procedure, unless very definite and explicit grounds for that interference are assigned. **Moung Sha Huyeen v Moung Pannyo. 28 Cal 1 P C= 27 I A 166=4 C W N 808=2 Bom L R 985 =7 Sar 786.**

Notes.—Diss: 5 C W N 692.

58—Malice and want of reasonable and probable cause—Question of fact or law—Privy Council Appeal—Leave—Concurrent findings:—According to English law, it is for the judge and not for the jury to determine what is reasonable and probable cause in an action for malicious prosecution. The jury finds the facts. The judge draws the proper inference from the findings of the jury. In that sense the question is a question of law. But where the case is tried without a jury there is really nothing but a question of fact, and a question of fact to be determined by one and the same person. Consequently where both the Courts in india found reasonable and probable cause, their Lordships held that leave should not have been granted on the concurrent finding.

Pestonji M. Modi v. Queen Insurance Company 25 Bom 332 P C= 2 Bom L R 939=4 C W N 781.

Notes.—Ref: 28 Cal 591; 6 C W N 159; 24 Mad 549; 30 Bom 37; 7 Bom L R 655: 9 Bom L R 1134.

(3) Original Court's decision on fact affirmed by the first Appellate Court.

59—Decision on fact—Appellate Court affirming the decision on the Final Court—Civil Procedure Code, (1882) S. 596.

The Appellate side of the High Court had affirmed the decision of the Original side of the High Court. The judgment depended on the fact viz., whether the defendant was a major at the time when he executed the first of the two mortgages, for the foreclosure whereof the suit was brought. No question of law, either as to the construction of documents or any other point, was raised. *Held* that the present appeal cannot be entertained. 16 All 274.

Tulsi Pershad Bhakt v Benayek Misser. 23 Cal 918=L R 23 I A 102

Notes—Fol; 28 Cal 190.

(4) Appeal from judgment of judicial Commissioner sitting alone.

60—Appeal from judgment of Judicial Commissioner sitting alone—Case in which an appeal, heard by the Additional Judicial Commissioner of Oudh sitting alone, was remanded to the Court of the Judicial Commissioner to be tried by the Judicial Commissioner and the Additional Judicial Commissioner sitting together.

Ganga Baksh Singh v Babu Dalip Singh, 24 All 13=5 C W N 781.

61—C.P.C.S. 110 (1882 S. 596)—Last clause—Affirms—Privy Council, leave to appeal to—Decree of affirmance or refusal—Valuation.—

In a Land Acquisition case the applicant claimed a sum of Rs. 77,000 odd as the value of the land taken; the Collector assessed the value at Rs. 22,287 the Judge on reference to him upheld the Collector's award. The applicant then preferred an appeal to the High Court valuing

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1 Cases in which appeal lies or not-*Contd.*

the appeal at Rs. 49,000 odd being the difference between the Collector's award and the amount claimed. The High Court partially decreed the appeal by giving the petitioner an additional sum of about Rs. 7,000. The appellant then applied for leave to the Privy Council:—*Held*, that the decree of the High Court was properly a decree of affirmance of the first Court's decree as regards the subject matter of the proposed appeal, and as there was no question of law the application ought to be refused. **Raja Sree Nath Roy Bahadur v. Secretary of State for India, 8 C W N 294**

(5) No right of appeal when two Courts differ only as to costs.

62—C. P. C. S 110 (1882 S. 596).

Held, that the last clause of s. 596, Civ. Pro. Code relates to the subject matter of the suit and therefore there is no right of appeal when the two Courts differ only as to costs. 8 C W N 294 Diss. **Thakur Baldeo Bakhsh v. Thakur Lalji, 10 O C 65.**

(6) Divergent reasons for decision which are concurrent.

63—Privy Council—Leave to appeal—Decisions concurrent—Reasons for decisions divergent—Substantial question of law—C. P. C. (Act VI of 1908), S. 110.

Where the decrees are concurrent, but the reasons for the decisions are divergent, leave to appeal to His Majesty in Council cannot be granted, unless the applicant shows that some substantial question of law is involved in the appeal. (25 All 109; 30 I A 35, Ref:) **Banga Chandra Dhar v. Pukai Behari, 13 C L J 501.**

(7) Variation in judgment, however slight, whether gives right of appeal.

64—Application for leave to appeal to His Majesty in Council-Decision of High Court, varying the decision of the lower Court — Right to appeal as a matter of right—Variation in judgment, however slight, whether gives right of appeal

Where the decree of a lower Court is not wholly affirmed by the judgment of a High Court but is varied only in one particular, the person against whom such variation is made is entitled as of right to a certificate of appeal to His Majesty in Council. 8 C W N 294, 62 P W R 1908, not Fol: 10 O C 65, Fol: **Narpat Singh v. Kalka Bux Singh, 9 Ind Cas 1040.**

(8) Provisions of C. P. C. allowing appeal in special cases

65—C. P. C. S. 109 (1882 s. 595).

Sections 595 and 600 of the Code of Civil Procedure permit an appeal to the Privy Council if the High Court certifies that the case is fit for appeal "otherwise", *i. e.*, when not meeting the conditions of s. 596. This provision is intended to meet special cases, such, for example as those in which the point in dispute is not measurable by money, though it may be of great public or private importance. **Banarsi v. Kashi Krishn, 3 Bom L R 154=5 C W N 193=11 M L J 56 =23 All 227=28 I A 11 P C.**

Notes:—Appr: 5 O C 168; Ref: 33 All 415; 24 All 236=A W N (1902), 46; 31 Cal 305=8 C W N 325.

(9) Differing decisions of questions of fact.

65*A*—Civ. Pro Code (Act XIV of 1882), S 568—Fresh evidence, admission of, by appeal Court, with assent or without objection—Regularity, if may be questioned on further appeal—Question of fact, differing decisions on—Materials not same in both Courts — Interference on appeal by Privy Council—Practice.—

Where the Appellate Court, with the assent of both sides, examined three witnesses and also admitted documentary evidence, and there was nothing to show that the admission was objected to at the time.

Held, that it was not open to a party, on appeal to the Privy Council, to take exception to the regularity of this procedure.

Where, on a pure question of fact, viz., the genuineness of a Will, two Courts in India differed, but the materials before them were not, owing to the admission of fresh evidence by the Appeal Court, entirely the same, the Judicial Committee could not reverse the appellate judgment, unless satisfied that it was wrong. Not being so satisfied, they dismissed the appeal. **Jagarnath Pershad v. Hanuman Pershad, 13 C W N 830 (P C)=10 C L J 74= 6 M L T 7=11 Bom L R 861=36 Cal 833 =3 Ind Cas 465=19 M L J 435= 36 I A 221 (P C).**

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1 Cases in which appeal lies or not *Contd*,

(d) VALUATION OF APPEAL.

(1) Suit for possession and mesne profits.

66—Where a plaintiff sued for possession of property with wasilat, and did not (it being under the rules unnecessary for him to do so) include the wasilat in the valuation of the suit; and the suit was valued at Rs. 5,815, but with the wasilat would have been valued at over Rs.10,000 —*Held*, that, on appeal from a decree in favour of the plaintiff, there was matter in dispute in excess of Rs. 10,000. **Anonymous, 1 Ind Jur O S 58.**

Gooroo Dass Roy v. Gholam Mowlah, Marsh 24: 1 Hay 103.

66*A*—Value of suit for purpose of appeal to Her Majesty in Council—Certificate for leave to appeal to Her Majesty in Council—Question of misjoinder of parties and causes of action not sufficient ground for granting.—

The plaintiff instituted 19 suits of a cognate character against certain persons. The value of each suit was below Rs. 10,000 but the aggregate value of all was above that amount. One of these suits was decided against the plaintiff on the ground of multifariousness consisting in misjoinder of parties and causes of action. The plaintiff applied for leave to appeal to Her Majesty in Council. *Held*, that the decree in respect of which the certificate was prayed for did not involve directly or indirectly a claim to property of the value of Rs. 10,000, and that the question of misjoinder of parties and causes of action was not of such importance or difficulty as to justify the Court in certifying that the case was a fit one for appeal to Her Majesty in Council.

Abu Jafar v. Parbhu Nath 1 O. C. Sup Vol 18.

(2) Amount of decree with interest up to the date of decree.

67—C P C S. 110 (1882 s. 596)-Subject-matter in first Court Rs. 10,000 or over and appeal to Privy Council—Same sum or over—'And', meaning—Cumulative.

For leave to appeal to be given under s. 596 C P C not merely should the subject-matter of appeal to Privy Council be Rs. 10,000 in value or over, but the value in the first Court should also be Rs. 10,000 or over. 'And' does not mean 'or'. In an appeal to the Privy Council against the decision of a High Court reversing a decree of the Court below, the value of the suit for the purpose of the appeal to the Privy Council is the amount of the decree with interest up to the date of the decree and further interest though ascertainable according to the decree is no part of the value of the suit. **Motichand v. Ganga Pershad Singh, 4 Bom L R 159= 6 C W N 362=24 All 174=29 I A 40 P C =1901 W N 19.**

Notes.—Ref: 31 Cal 305; 10 C L J 336.

(3) Value of suit for damages for libel.

68-C P C S. 110 (1882 S. 596)—Privy Council appeal-Leave-Value-Libel suit-Practice-Inquiry:

The plaintiff in a suit for damages for libel cannot ensure an appeal to the Privy Council by merely placing his damages at a sufficiently high figure. Leave to appeal from an appellate judgment of the High Court dismissing, on the ground of privilege, a suit for damages for libel was refused in the view that on the finding of the Court of first instance and not reversed by the appellate Court, the plaintiff had sustained no substantial damage. Where there is a contest as to the true value of the matter in dispute, it has been the invariable practice, a practice sanctioned by the Judicial Committee, to ascertain by evidence and enquiry what the true value is.

Rai Amrita Nath Mitter Bahadur v. Abhoy Chandra Ghosh, 9 C W N 370.

(4) Appealable value in cases of apportionment of compensation money.

69-C P C S. 110 (1882 S. 596)-Land Acquisition Act—Reference to Civil Court of question of apportionment of compensation money—Decision if res-judicata on question of title to other properties—Decree of High Court affirming decision—Leave to appeal to the Privy Council — Appealable value—Amount indirectly involved.

A decision of the Court with respect to the apportionment of compensation money, upon a reference under the Land Acquisition Act should not be treated as *res-judicata* affecting other parts of the claimant's property held under the same title. 7 Cal 406 followed: 20 Mad 269 ref. to: 12 Cal 484 dist. When less than ten thousand rupees of compensation money was apportioned by the land acquisition Judge and his decision

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was affirmed on appeal by the High Court:—*Held*, on an application for a certificate for leave to appeal to His Majesty in Council that the case could not be regarded as indirectly involving a larger amount because other properties not acquired were held under the same title.

Rai Bhara Dirgaj Deo Bahadur v. Kali Charan Singh. 11 C W N 525.

(5) Subject-matter of value less thsn Rs. 10,000.

70—C P C S. 110 (1882 s. 596)-Privy Council—Leave to appeal—High Court's jurisdiction—Subject-matter of value less than Rs. 10,000—Practice.

Section 596 of the Code of Civil Procedure does not give the High Court jurisdiction to grant leave to appeal to His Majesty in Council in case where any less value than Rs. 10,000 is directly or indirectly involved. **Radha Krishn v Krishna Chand. 3 Bom L R 469= 5 C W N 689=23 All 415 P C. =28 I A 182.**

(6) Appeal as to portion of property.

71—Portion under Rs. 10,000.

An appeal to the Privy Council involving a question of demand respecting property which on the whole is of the value of more than Rs. 10,000 is admissible, although the portion of the property to which the appeal relates is below that value.

Onooroop Chunder Mukerjee v Pertab Chunder Paul. 6 W R Mis 4

Notes.—Ap: 10 C W N 564=2 C L J 257.

71A—Letters Patent, cl 39.

The High Court refused, under s. 39 of the Charter, to open so wide a door to appeal as to allow it in a case involving less than Rs. 10,000, only because the whole property which would be reduced in value in the event of the appeal proving successful was worth not less than Rs. 10,000. **Reednath Sahoo v Gopee Sahoo. 19 W R 191.**

Notes:—Ref. 6 Bom L R 403.

(7) Decree involving directly or indirectly some claim or question to or respecting property worth Rs. 10,000 or upwards.

72-C P C S. 110 (1882 s. 596)-Amount or value of the subject matter of the suit, meaning of—Decree involving directly or indirectly some claim or question to or respecting property.

In a suit for partition, the value of the subject matter of the suit, for the purposes of valuation under section 596 of the Code of Civil Procedure for appealing to His Majesty in Council is the value of the whole estate which it is sought to partition and merely that of the particular share which one of the parties may claim.

In such a case, the amount or value of the matter in dispute on appeal to His Majesty in Council is the value of the entire estate and not merely that of the appellant's share therein.

When, therefore, in a suit for partition, the value of the entire estate is ten thousand rupees or upwards, although that of the appellant's share may be valued less, the decree for partition does not involve, directly or indirectly, some claim or question to or respecting property of the amount of value of ten thousand rupees or upwards, within the meaning of the third paragraph of section 596 of the Code of Civil Procedure.

Under such circumstances where the decree appealed from is in reversal of the decree of the Court below, the case is a fit one for appeal to His Majesty in Council and a certificate should be granted accordingly. **Bhagwat Sahai v Pashupati Nath Bose. 3 C L J 257= 10 C W N 564.**

(8) Valuation of appeal in several suits dealt with in the same judgment.

73-C P C S. 110 (1882 s 596)-Several suit dealt with in the same judgment—Aggregate value exceeds Rs. 10,000—S. 596, Civ. Pro. Code.

Where, although, if each case be taken separately, the value is below Rs. 10,000, yet, if taken collectively, the aggregate reaches that amount, and the cases are all dependent upon the same judgment, the case falls within S, 596 of the Code, and leave to appeal to the Privey Council should be granted in each of the cases.

Deo Narain Singh v Guni Singh. 34 Cal 400

(9) Valuation of appeal in three similar but consolidated suits,

74—S. 109 (1882 s 595)—Privy Council, leave

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to appeal to—Order refusing to vary or discharge report of Registrar——Belchambers Rules and Orders, No 617—Substantial question of law—Valuation of appeal in three similar but consolidated suits:

Where a Court under R R 615 and 617 of Belchambers Rules and Orders (2nd ed.) merely refused to re-open a Registar's report: *Held*, that such decision is not a final decree within the meaning of S. 595, and that it does not impose any pecuniary liability on applicant. Where an application for leave to appeal to the Privy Council is made in three separate suits which are not consolidated, though the questions to be decided are the same in all of them, it is necessary to show that in each of the suits the amount or value of the matter in dispute in the appeal to the Privy Councils is Rs. 10,000 or upwars.

The Royal Insurance Company v Akhoy Coomar Dutt. 6 C W N 41

Notes.—Ref: 75 P R 1904=137 P L R 1904.

(10) Undervaluation of suit omission to object to.

75—Where a defendant, having, the means of proving the real value of property, made no objection to the plaintiff's under-valuation, and also in special appeal knowingly undervalued the property by valuing the subject matter at Rs, 675—*Held* that she could not be heard to represent the real value of the property to be over Rs. 10,000 for the purpose of securing admission for an appeal to Her Majesty in Council

Bhuggobutty Debia. 14 W R 62

Notes:—7 B L R Appx 30. Ref: 19 W R 191,

(11) Decision to govern other similar suits by same party.

76—Subject-matter of suit below appealable value—Practice—Leave to appeal.

Leave to appeal to the Privy Council granted where the appeal, though valued at less than Rs. 10,000, involved indirectly questions respecting property of the value of Rs. 10,000, inasmuch as the judgment of the High Court would govern the decision in other suits which the plaintiff intended to bring on precisely the same grounds, and in respect of which precisely the same questions would arise as had arisen in the suit sought to be appealed **Ananda Chandra Bose v Broughton. 9 B L R 423.**

Appeal to Privy Council-*Contd.*

1 Cases in which appeal lies or not—*Contd*

(12) Conflicting claims to waters of flowing stream.

77—Court Fees Act, 1870, s. 7.

In ascertaining whether or not there ought to be an appeal to the Privy Council, the High Court has only to look at the value of the question at issue in the litigation. In a case of conflicting claims, with regard to the waters of a flowing stream the matter at issue so far as regarded the applicant, having been to have her lands irrigated in the way she claimed, the value of that matter, according to s 7 of the Court Fees Act, VII of 1870, was held to be the extent to which her interests would be deteriorated if that right could not be established. **Ajnas Kooer v Luteefa. 18 W R 21.**

Notes.—Ref: 2 Bom 219; 6 Bom L R 403.

(13) Valuation of appeal in a suit for damages.

78-79—C P C S. 110 (1882 s. 596)-Refusal by High Court to grant leave to appeal to Privy Council—Application to Privy Council for special leave-Value of the matter for appeal within S.596.

In a suit for damages for Rs. 30,000, on the original side of the High Court, no assessment of the amount of damages having been made by the Court, an appeal was preferred before the appellate side of the Court. The appeal was dismissed and an application for leave to appeal to the Privy Council, was made, which was refused by the High Court, on the ground of the petitioner's failure to establish the value of the matter in dispute, for the appeal, to be Rs. 10,000 or upwards. On an application to the P C, special leave was granted on the ground that the value was above Rs. 10,000. **Ikramul Huq v Wilkie, 33 Cal 893 P C.**

(14) Proof of real value of property in suit whether stamp duty has been paid on loss amount.

80—Where the suit was one in which the stamp originally paid was upon an amount very much less than Rs. 10,000, and the whole course of the litigation and the stamps paid

Appeal to Privy Council-*Contd.*

1 Cases in which appeal lies or not—*Contd*

throughout had reference to that valuation, though the property was really of the value of Rs. 10,000, the Court, upon the strength of a former decision in the Privy Council Department, refused the application for leave to appeal to Her Majesty in Council. *Quære*—Can the mere payment of a stamp calculated on an undervaluation with the reference to the rule in Act XXVI of 1867, schedule II, art II note (a) be treated as of itself a fraud which, *ipso, facto*, deprives a party of his right of appeal? **Lekhraj Roy v Kanhya Singh.** **18 W R 494.**

Notes.—Affirm: 3 Cal 210 P C.

80 A—Privy Council—Leave to appeal—Appealable value-Right of party to prove value of subject-matter contrary to valuation in plaint or memo of appeal—Mesne profits pending suit if to be added. The valuation made in conformity with the Stamp Law does not prevent a party from obtaining leave to appeal, by proving that the real value of the subject matter does not fall short of the appealable amount. But a defendant, who had previously adopted the value given in the plaint for the purpose of an appeal preferred by him, should not be allowed to contest that valuation on the principle that a party cannot both approbate and reprobate.

In a suit for recovery of possession of immoveable property with mesne profits, the subject-matter to be valued would include mesne profits claimable from the institution of the suit to the date of the delivery of possession or until the expiration of three years from the date of the decree with interest. **Kumar Basanta Kumar Roy v The Secretary of State for India in Council** **14 C W N 872=6 Ind Cas 792.**

81—On a petition to the Privy Council in the same case for leave to appeal, it was held that a party who, in observance of the rules of valuation prescribed by the Stamp Law of the country in which he sues, has paid stamp duty upon a sum lower than the appealable amount, is not thereby precluded from obtaining leave from the Courts of that country to appeal to Her Majesty in Council, if he can show that the value of the property in dispute does reach the appealable amount.

Lekhraj Roy v. Kanhya Singh. **L R 1, I A 317**

Appeal to Privy Council-*Contd.*

1 Cases in which appeal lies or not—*Contd*

Notes.—See 3 Cal 210.

(15) Decree indirectly involving question of title to property over Rs. 10000.

82—Three different plaintiffs, claiming through the same original title to be the owners of a certain mehal sued the same defandant in separate suits for possession and for the mesne profits of their respective shares. The defence raised being the same in each case, the suits were heard together, the result being that in both the lower Courts and in the High Court the plaintiffs obtained a decree for their claims. The aggregate value of the three suits amounted to more than Rs 10,000, though the value of each suit was under that sum. The defendant applied to be allowed to appeal in each case to Her Majesty in Council. *Held* that he was entitled to have each of the three cases admitted under the second clause of s. 596 of Act X of 1877 as the decree in each case involved indirectly a question of title to property of the amount or value of Rs 10,000. **Ashanulla v. Karoonamoyi Chowdhry & Rohini Chowdhrani v. Kishen Gobind Das** **4 C L R 125**

Notes.—Ref 33 Cal 927=3 C L J 67=34 Cal 400.

83—C P C Ss 109, 110 (1882 Ss 595 cl (c) and 596) –Privy Council, application for leave to appeal to - Valuation of suit, questions indirectly in issue as regards—Appeal to Privy Council, fit case for.

A was a co sharer of 4 annas in a taluka. C was under decree entitled to receive Rs 70 per mensem from the taluka. Upon the death of C, A instituted a suit against C's son alleging that the charge by C's decree was for his life only and valued the suit at Rs 3,000, being the value of a one-fourth share of the allowance. C's son pleaded that the allowance was heritable, *Held*, that the decree of the Court involved indirectly a question between the parties the annuitant and one of the co-sharers in the taluka respecting property above Rs 10,000 in value viz whether the allowance of Rs 840 per annum was heritable or ceased on the death of C. *Held*, therefore that a certificate should be granted that, as regards value and nature, the case fulfilled the requirements of s. 596, Civil Procedure Code. *Held*, futher that considering the circumstances of the case, it was not a fit one for appeal to Her Majesty in Council under s. 595 cl (c). **Aziz-un-nissa v Tassadduk Husain.** **4 O C 234**

Appeal to Privy Council-*Contd.*

1 Cases in which appeal lies or not—*Contd*

83 A—Privy Council—Application for leave to appeal—Appealable value—Decision indirectly involving amount. Defendants who were cosharers of the plaintiff in the Zemindari, having purchased certain holdings from the tenants, the plaintiff sued them for their share of the rent due from one such holding amounting to Rs. 230. The High Court, reversing the decree of the lower Court dismissed the suit on the ground that,as there was no contract of tenancy between the parties there was no relation of landlord and tenant between them. The plaintiff in applying for leave to appeal to the Privy Council, proved that there were other holdings similarly purchased by the defendants, and that the decision of the High Court would have the effect of depriving him of rents of all such holdings amounting to Rs. 800 a year which capitalized. came up to over Rs. 10,000.

Held, that the decision indirectly involved a claim or question to or respecting property of the value of Rs.10,000 or upwards, and leave ought to be granted **Srinath Pal Chowdhury v. Grindra Chandra Pal Chowdhury. 14 C W N 651=6 Ind Cas 598.**

84—Valuation of appeal—Right to include claim for mesne profits in ascertaining value of appeal—S 596 Pro Code.

In an action for ejectment, on the termination of certain leases, the property was valued at Rs. 5460 but in addition, the plaintiff claimed *mesne* profits. He obtained a decree for possession and *mesne* profits in the Court of first instance, and in execution-proceedings he put in a claim for *mesne* profits for over Rs 30,000. Nothing,however, was done as regards this claim, as there was an appeal, and the execution-proceedings were stayed pending the appeal, which was ultimately successful. On plaintiff's application for a certificate that the case is a fit one for appeal to Privy Council, *held*, that the plaintiff is entitled to take into account the claim for *mesne* profits, with a view to ascertaining whether the value of the matter in dispute reaches the statutory amount of Rs. 10.000. (a) and that the certificate must be granted as the decree involved directly or indirectly, some claim or question to, or respecting property of the value of Rs. 10,000 or upwards, within the

Appeal to Privy Council-*Contd.*

1 Cases in which appeal lies or not—*Contd*

meaning of S. 596, Civ. Pro Code. **Dalgleish v. Damodar Narain Chowdhury, 33 Cal 1286.**

(16) Concurrent decision on facts.

85.—Act VI of 1874, S. 5—

An application for leave to appeal to the Privy Council was refused as the two Courts concurred on the decisions of facts, the right of appeal from a decision of the Appellate side of the High Court, simply because the subject matter of the suit was above Rs 10,000 is taken away by Act VI of 1874, Sec 5.

Feda Hossein. 1 Cal 431.

Notes—Appr: 3 Cal 63 F B. Ref: 20 Bom 699.

86.—C. P. C, S. 109; O 44 r 3 (1882) Sec. 595, Cl. c. Section 600)—Privy Council, leave to appeal to.

Where the amount or value of the suit and of the matter in appeal to the Privy Council was more than Rs. 10,000, and the decree of the High Court appealed from afirmed the decision of the Court immediately below the High Court which passed the decree, and a certificate is given for leave to appeal to the Privy Council stating that the case was otherwise a fit one for His Majesty in council, such a certificate is correct in form and satisfies the provisions of the law. Such certificate is given pursuant to S. 595, Cl (c) and the latter alternative of Section 600, C P C L R 30 I A 35 dist.

Webb v Macpherson. 13 M L J 389= 5 Bom L R 838=8 C W N 41= 30 I A 238=31 Cal 57: P C.

Notes :—Ap: 29 Mad 305. Fol : 31 Cal 505 P C Ref: 8 C W N 225; 14 M L J 105 ; 27 Mad 435 ; *6* Bom L R 557 ; 33 Cal 410=10 C W N 276=4 C L J 102 ; 30 All 172 F *B* =(1908) W N 71= 5 A L J 243.

(17) Appeal in two suits together over appealable value.

87.—Appeal in two suits together over appealable value—Civil Procdure Code (Act 1877) Sec. 596.—

Appeal to Privy Council-*Contd.*

1 Cases in which appeal lies or not—*Contd*

A and B purchased the same properties deriving their titles from different persons. The value of the properties with mesne profits was over Rs 10,000. B granted two patni leases of the properties to different persons. Hence A was obliged to bring two suits for the recovery of the properties, and each suit had a subject matter less than Rs. 10,000. *Held*, that an appeal would lie to the Privy Council. **Joogul Kishore v Jotendra Mohun Tagore. 8 Calc, 210.**

Notes—Ref: *34* Cal 400.

(18) Question of Law in suit under appealable value.

88-89.—Civil Procedure Code (*1882*) Ss. 595, *596*, 600.

In one of six suits, directed to be heard together the subject matter of which separately was under the appealable value, leave was granted to appeal to the Privy Council. The suit in which the leave was granted involved an important question of law, which did not arise in the other five. However it contained some questions of law which were common to all the suits. The counsel agreed to have the suit heard upon the same evidence, and concluded by the same judgment , five of such suits being appealable as of right, and the aggregate amount in the six suits being considerably more than the appealable value **Byjnath v Graham. 11 Calc 740.**

Notes.—Ref: 34 Cal 400.

(19) Appealable Value—Suit for restitution of conjugal rights.

90.—Value for the purpose of Appeal—No money value can be attached for the purposes of jurisdiction to a suit for the restitution of conjugal rights, 13 Cal, 232, followed, *Held*, therefore, that no appeal lay to Her Majesty in Council, although the suit was valued at Rs 25,000, and that valuation had been relied upon by the defendant, who had appealed to the High Court from the decision of the first Court which had gone against him. **Mowla Newaz v Sajidunnissa Bibi. 18 Cal 378.**

Notes:—Dist : 28 All 545 F B=3 A L J 266

Appeal to Privy Council-*Contd.*

1 Cases in which appeal lies or not—*Contd*

=(1906) W N 99. Ref : 8 C W N 705; 31 Cal 849 , 11 C W N 458; 34 Cal 352 ; 5 C L J 400.

(20) Value of the subject matter of the suit.

91.—Market –Value of the Matter in dispute —Civil Procedure Code Section 596 Madras Civil Courts Act (Madras Act III of 1873) Sec 14.

Sec. 596 of Civil Procedure Code under which the Market-value of the subject matter of the suit is the test for an appeal to the Privy Council is not controlled by Madras Act III of 1873.

Pichayee v Sivagami. 15 Mad 237.

Notes:—Ref : 31 Cal 301.

(21) Consolidation of suits for the purpose of pecuniary valuation.

92.—Privy Council—Leave to appeal—Consolidation for pecuniary value—C P C (Act V of 1908), O 45, R 4.

Where the fundamental question in the cases, which goes to the root of the matter, is common to all the suits, and the cases are tried together and decided by the same judgment, the suit will be consolidated for the purpose of pecuniary valuation under O 45, R 4 of the Code, though a substantial question of law arises in some of the suits only, and not in the others. 8 Cal 210 Ref.

Banga Chandra Dhar v Jagat Kishore Acharyya Chowdhury. 13 C L J 503.

(22) Value of subject matter in foreclosure Suits.

93 —Privy Council—Leave to appeal—Subject—matter of suit—Value—Forceclosure suit—Principal sum secured less than Rs. 10,000—*C* P C (V of 1908) S. 110.

In a suit to enforce a mortgage security, where the proceedings are entirely *in rem* and the mortgagor is not sought to be made personally liable, the value of the subject-matter in dispute is the amount claimed, when such amount falls short of the value of the mortgaged property, while it is the value of the mortgaged property, when the amount due under the mortgage ex-

Appeal to Privy Council-*Contd.*

1 Cases in which appeal lies or not—*Contd*

ceeds the value of the property.

Benoy Lal Roy Chowdhury v Kamalapati Banerjee. 13 C L J 505.

(23) Determining value of the matter in dispute in appeal.

94.—S 110 (1882 S 596)—Leave to appeal to His Majesty in Council—Value of the matter in dispute in appeal—Decree involving some claim or question to, or respecting property of the prescribed value

To determine the value prescribed by sec 596 of the Civil Procedure Code, the decree is to be looked at as it affects the interests of the party prejudiced by it. Where the detriment to the party seeking relief is estimated at less than Rs. 10,000, the value of the matter in dispute in appeal is not of the prescribed value, the decree itself does not involve any claim or question to or respecting property of the prescribed value, and the case does not fulfil the requirements of S. 596 of the Code. **De Silva v De Silva. 6 Bom L R 403.**

(24) Order dealing with apportionment of compensation money.

95.—S. 110 (1882 s. 596)—Value of the subject-matter—Involving indirectly.

An order which deals only with the apportionment of compensation money with regard to a single piece of land cannot be said to involve indirectly the question as to the amount of compensation to the claimant in respect of other properties held by the claimant under the same title. **Dirgaj Deo v Kali Charan Singh. 31 Cal 466= 11 C W N 525**

(25) Question whether receiver should or should not be appointed.

96—Privy Council—Leave to appeal—'Final Order'—Receiver, order appointing—Fit case—Certificate—C. P. C. (Act V of 1908), S. 109, cls. 1 & 3.

A 'final order' within the meaning of cl. (a) of S. 109 of the C. P. C., 1908, means an order which finally decides any matter directly at issue in the case in respect of the rights of the parties. An order appointing a Receiver is not an order of this description.

S. 109, cl. (c) of the C. P. C., 1908, covers special cases, such, for example, as those in which the point in dispute is not measurable by money, though it may be of great public or private importance. To certify that a case is of that kind, though it is left entirely in the discretion of the Court, is a judicial process which cannot be performed without special exercise of that discretion, evinced by a fitting certificate.

Where the question in controversy was whether a Receiver should or should not be appointed in respect of the subject-matter of the litigation, and Courts took divergent views upon the matter, certificate as to the fitness of the case for appeal to His Majesty in Council was refused. 13 C L J 90, Ref: **Mahomed Musaji Saleji v Ahmed Musaji Saleji. 13 C L J 507.**

(26) Application for appointment of Receiver.

97—Receiver, appointment of Civ. Pro. Code (Act V of 1908), O. XL, r. 1, O. XLV, r.13 (d)—Privy Council appeal—Application for the appointment of Receiver after leave to appeal to Privy Council is granted.

O. XLV, r. 13, applies where an application for appointment of a Receiver is made after leave is granted to appeal to the Privy Council. The principles, however, on which a Receiver would be appointed, must and shall be the same as mentioned in O. XL.

A Receiver ought not to be appointed, where no risk of loss is shown by the applicant. **Mi Shwe Ma v. Mi Mi. 12 Ind Cas 198.**

(27) Value of property affected by decree.

98—"Involve directly or indirectly."

In an application for leave to appeal to Her Majesty in Council the value of the property ostensibly affected by the decree sought to be appealed was below Rs. 10,000, but it appeared that the suit in appeal in which the said decree had been passed was connected with another suit relating to the same property in which a decree had been passed which was the subject of another similar application, and that the aggregate value of the two decrees was much

Appeal to Privy Council-*Contd.*

1 Cases in which appeal lies or not—*Contd*

above Rs. 10,000, and that it could not be known which of such decrees could affect which specific portion of the property in question. *Held* that under the above circumstances the application under consideration should be granted under the last paragraph of s. 596 of the Code of Civil Procedure. **Khwaja Muhammad Yusuf. 18 All 196, 16 W N 39.**

99—Cl. 39—Appeal to the Privy Council—Remand—Account taken under Order of Privy Council by an Appellate Bench—Order a final decree of a Division Court—'Division Court,' meaning of—Civil Procedure Code (Act XIV of 1882); Ss. 595, 596. Where the Privy Council remanded a case to the High Court directing accounts to be taken on a certain footing, an order made by a Bench of two Judges sitting on the appellate side, upon taking accounts as directed, was a final decree of a Division Court from which an appeal did not lie to the High Court under S. 15 of the Letters Patent. An appeal, therefore, lay from it to the Privy Council under S. 39 of the Letters Patent, when the amount in dispute exceeded Rs 10,000. The expression 'Division Court' does not apply only to a Division Court sitting on the original side *Semble*:—The case did not fall within Ss. 595 and 596 of the Civil Procedure Code. **Guru Prasanna Lahiri v. Jotindra Mohan Lahiri. 9 C W N 566=32 Cal 963.**

100.—C. P. C. S. 110 (1882 S. 596)—Decree involving indirectly some question respecting property of the value of ten thousand rupees or upwards.

Where, as in S, 596, it is laid down that, in order that an appeal may lie to His Majesty in Council, the decree to be appealed from must involve, directly or indirectly, some claim or question to or respecting property of ten thousand rupees in value or upwards, the reference is to suits in existence It is not enough that the question decided by such decree is a question of title which may possibly affect the title of persons who are not parties to the decree to property not the subject-matter of the suit in which the decree was passed, and concerning the title to which property there is no litigation pending. 23 All 415; 23 All 227: 1 Moo I A 363 and 7 I A 548 ref. to.

Hanuman Prasad v Bhagwati Prasad 1902 A W N 46=24 All 236.

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1 Cases in which appeal lies or not—*Contd*

Notes.—Ref: 6 Bom L R 403.

(27A) Increase in value of the subject-matter of suit after institution thereof.

100A.—Privy Council Appeal—Value of subject-matter of suit in first Court—Possible increase in quantity of land by alluvion—Increase of value after institution of suit—Civ, Pro. Code (Act V of 1908), s 110, O. XLV, r. 5.

In estimating the value of the subject-matter of an appeal to the Privy Council, only the lands which existed when the suit was instituted are to be taken into consideration, and not also the lands which possibly may be formed by alluvion in the course of future years. The amount or value of the subject-matter in dispute on appeal is dependent on the amount or value of the subject matter in the Court of first instance, and the High Court will not take into account the increase in the value of the lands in suit in the interval between the institution of the suit and the filing of the application for leave to appeal to the Privy Council. **Administrator-General of Bengal v Ashutosh Burdhan Roy. 5 Ind Cas 645.**

(28) Burma Courts Act (XI of 1889) S. 40.

101.-Burma Civil Courts Act (XVII of 1875) S. 49—Probate and Administration Act (V of 1881), Ss. 3 and 86—Code of Civil Procedure (1882) Ss. 595 and 614.

There is no appeal to the High Court from a final decree passed by the Recorder of Rangoon in the exercise of Original Civil Jurisdiction, where the suit is above ten thousand rupees. But such an appeal would lie to Her Majesty in Council. A decree in a suit for grant of probate of a will, passed by the Recorder of Rangoon, is a final decree passed by him in the exercise of Original Civil Jurisdiction. **Essof Hasshim Dooply v Fatima Bibi alias Mah Poh. 24 Cal 30=1 C W N 8.**

(29) Order in execution of decree.

102.—An appeal lies to Her Majesty in Council from an order passed by the High Court in a case of execution of decree in which the amount involved exceeds Rs. 10,000.

Velaety Begum v Rughonath Persad. B L R Sup Vol 747=2 Ind Jur N S 263=8 W R 147.

Appeal to Privy Council-*Contd.*

1 Cases in which appeal lies or not—*Contd*

103.—Execution of decree of Privy Council.

An appeal will lie as of right from the order of a single Judge of the High Court as to execution of a decree of the Privy Council, where the property is over Rs. 10,000.

Leelanand Sing v Luckimpur Singh Bahadur 5 B L R 605.

Leelanand Sing v Luckmessur Singh. 14 W R P C 23.

(30) Final order passed on appeal by the High Court.

104.—(Act X of 1877).

An order passed on appeal by a High Court determining a question mentioned in s. 244 of Act X of 1877 is a final "decree" within the meaning of s, 595 of that Act. *Held*, therefore, where such an order involved a claim or question relating to property of the value of upwards of ten thousand rupees, and reversed the decisions of the lower Courts, that notwithstanding the value of the subject-matter of the suit in which the decree was made in the Court of first instance was less than that amount, such order was appealable to Her Majesty in Council. **Ram Kirpal v Rup Kuar. 3 All 633=1 W N 32**

(31) Leave to appeal where appealable value is below Rs. 10000.

104 A.—C. P. C. 1882, ss. 595, 596 (ss. 109, 110, Civ. Pro. Code., 1908)—Appeal below Rs. 10,000—Certificate of fitness—Documents to be looked at—Form of certificate—Judicial discretion.

If anything of less value than Rs. 10,000 is directly or indirectly involved, it will not give the Court jurisdiction to grant leave to appeal to the Privy Council. The mere existence of a substantial question of Law is not sufficient to give the Court jurisdiction where the amount involved is less than Rs. 10,000. (23 All 227=27 I A 11=5 C W N 193, P. C., Ref.) (Ref. 24 All 236=A W N 1902, 46.) In considering under what section of the Civ. Pro. Code, the certificate of fitness was given by the Court, it is the certificate itself and not the order for the certificate which has to be looked at. In granting a certificate under s. 600, Civ. Pro. Code, the Court must exercise its judicial discretion upon the matter. Unless the

Appeal to Privy Council-*Contd.*

1 Cases in which appeal lies or not—*Concld.*

certificate upon which the leave to appeal is based, is in such a form as to justify that leave, the Court must find that leave was not properly given and the appeal must be dismissed.

Radha Krishn Das v. Krishn Chand. 5 C W N 689 P C=28 I A 182=23 All 415.

2 PRACTICE AND PROCEDURE.

(a) Leave to appeal.

(1) Petition of appeal.

105.—Act VI of 1874, ss. 5, 7, and 9 Practice.

The petition of appeal to the Privy Council should distinctly state what the substantial question of law is that it is proposed to submit to the Privy Council. Petitions on the Original Side should be signed by council and on the Appellate Side by counsel or a pleader. **Ali Abkar v. Abdul Latif Shusbu. 12 B H C 8.**

(2) Point in dispute being of considerable importance.

106.—S. 110 (1882 S. 596)—Privy Council—Leave to appeal.

The High Court granted leave to appeal to the Privy Council, where the case involved a question of law and the point in dispute though not measurable by money, was of considerable importance e. g. the extent of the control acquired by one who has built a Parsi fire-temple.

Navroji v Kharsedji. 6 Bom L R 286.

(3) Certificate granted in connected cases.

107.—Ss. 109, 110—Certificate granted in connected cases.

Some of several connected appeals satisfied the requiremtnts of s. 110 and certificates were granted. One of them, however, did not satisfy the requirements of the section but involved the same question as did the others.

Held, that, the certificate should be granted, in latter case also. **Makund Sarup v Richard Ross Skinner 5 Ind Cas 583.**

(4) Stating grounds for refusing leave to appeal.

108.—O. 45 r. 6 (1882—S. 601)—Refusal certificate—Leave to appeal to Privy Council—Reasons for refusal.

It would be convenient if the High Court

Appeal to Privy Council-*Contd.*

2 Practice and Procedure—*Contd.*

when it refuses leave to appeal to the King in Council gives the grounds of refusal.

Venganath Swaroopathil Valia Nambidi v Cherakunnath Nambiyathan Venganat Swaroopathil. **4 C L J 305= 8 Bom L R 374=10 C W N 545= 16 M L J 160=33 I A 67 P C= 29 Mad 194.**

109.—*S.* 110 (1882 s. 506)—" Value of subject matter "–Value at variance with the value fixed for Court fees—Perpetual Injunction.

The fact that the value of a suit for perpetual injunceion fixed for the purposes of Court fees is very low, does not debar the plaintiff from showing the real value of the subject matter when he applies for a certificate for leave to appeal to the Privy Council. **Hari Mohan Misser v Surendra Narain Singh.** **31 Cal 301**

(5) Power of High Court to stay proceedings in suit following preliminary decree for partition.

110—C P C O. XLV r. 13—Preliminary decree for partition—Appeal to Privy Council—High Court, if may stay further proceeding.

The High Court has no power to stay proceedings in a suit following a preliminary decree for partition, against which it has granted leave to appeal to the Privy Council. The Privy Council which has *seizin* of the appeal can alone do so.

Lalitessur Singh v Bhabessur Singh. **13 C W N 690=9 C L J 561=6 M L T 11= 1 Ind Cas 812.**

(6) Appeal presented without security bond.

111—Rule of 7th December 1858—

The High Court has no autority to receive a petition of appeal to England tendered without the usual security bond duly registered, as provided by the 8th Rule of the 7th December 1858.

Pershad Sein v. Rajendra Kishore **7 W R 338.**

Notes—B L R Sup 662=2 I J N S 229. Ex: 8 W R 64; 167; 428 F B; 10 *B* H C R 235; 31 Cal 186; 10 W R 22; 17 W R 104; 12 All 1 F B.

(7) Appeal in forma pauperis.

112—An application to appeal to the Privy Council *in forma pauperis* may be made to the High Court on unstamped paper, and accompanied by a certificate of counsel that there is a reasonable ground of appeal ; the usual security for costs being given, and the costs of translation deposited.

Jowad Ali. **8 W R 4.**

Notes—Dist: 14 W R 184.

(8) Order of High Court allowing a party to sue in forma pauperis.

113—C P C Ss. 109, 115 (1882 ss. 595, 622)—Leave to appeal to the Privy Council–Letters Patent s. 30—Order of the High Court under s. 622 C P C. allowing a party to sue in forma pauperis-Power of High Court to grant certificate.

An order passed by the High Court under s. 622 C P C. deciding that a certain party should be allowed to sue in forma pauperis is not a final decree passed in an appeal within the meaning of s. 595 C P C. nor is it a final judgment made on appeal within the meaning of sec. 39 of the Letters Patent of *1865*. **Babu Sakan Singh v Gopal Chandra Neogi.** **8 C W N 296.**

114.—Effect of, on right to appeal to Privy Council without leave.

Quære—Whether the leave given by the Courts in India to a party to sue *in forma pauperis* would enable him to prosecute the appeal to the Privy Council without obtaining the leave of the Privy Council. **Munni Ram Awasty v. Sheo Churn Awasty.** **7 W R P C 29= 4 Moore's I A 114.**

Notes:—Ap: 22 W R 220. Con: 16 W R 257. Ref: 9 W R 290. Fol: 12 W R 194.

(9) Ground for delay in proceeding.

115.—Ground for refusing to admit petition of appeal.

An application for permission to appeal to the Privy Council was presented on the last day of the six months allowed for such appeals, and with it was deposited, not the sum which had been estimated as the cost of translating, printing, and translating the record, but the estimate less the charges of printing; nothing being deposited as the cost of transcription. The petition was accordingly refused. *Held* that the peti-

Appeal to Privy Council-*Contd.*

2 Practice and Procedure—*Contd.*

tioner had no right to amend the estimate made by the clerk of the Privy Council Department, still less to amend it in the way he did; and that the plea of oversight was not sufficient to excuse him for non-compliance with the rules of Court or to admit his application beyond the prescribed time. **Gour Surn Dass. 19 W R 305.**

(10) Grounds for granting leave to appeal.

116—S. 110 (1882 S. 596)——Appeal-Privy Council—High Court—Leave to appeal.

It is not competent to a High Court to grant leave to appeal to the Privy Council, upon the ground that "there seems to be a point of law:" this is contrary to the provisions of the Civil Procedure Code, 1882. **Karuppanan v. Shrinivasan. 4 Bom L R 248=6 C W N 241=25 Mad 215=29 I A 38 P C.**

(11) Application to High Court for leave to appeal.

117.—S. 110—Leave to appeal-Privy Council—Amount, value and nature of appeal—Putting the appellant on terms—Procedure.

Where only a small amount is at issue in an appeal, the High Court, not having any power to put the Appellant on terms, will not certify a case to be a fit one for appeal to His Majesty in Council. 4 M I A 353 Ref.

But the application for such leave to the High Court is a proper step to be taken by the Appellant. 29 I A 40; 6 C W N 362 (P C). **L O Clarke v Brajendra Kissore Roy Chowdhuri. 13 C W N 1127.**

(12) Leave to appeal, when may be refused.

118.—S. 600—Privy Council, leave to appeal—Suit filed in 1906—New Code.

In a suit filed by the respondent, the applicant pleaded *inter alia* that a Civil Court had no jurisdiction to entertain a suit under S. 41 (b) of the Lower Burma Town and Village Lands Act. The first Court dismissed the suit on the preliminary point. On appeal a Full Bench held that the particular section was *ultra vires* of the Legislative Council of Lieutenant-Governor of Burma. The case was remanded to the first Court to be heard on its merits. The applicant asked for leave to appeal to the Privy Council on the point decided by the Full Bench.

Held, that no leave could be granted under S. 600 of the C. P. C., 1882, inas much as the respondent's suit may be dismissed, in which case the granting of the certificate might put him to needless expense:

Held, also, that the suit having been filed in 1906, the provisions of the New Code of 1908 did not apply. 5 B L R 148; 3 Bur L T 54; 5 Ind Case 980, App. **The Secretary of State for India in Council v. John Moment. 8 Ind Cas 1189.**

119—Practice—Delay in presenting appeal to High Court—' Sufficient cause '—S. 5, Limitation Act.

Where the High Court refused to admit an appeal, on the ground that it was out of time, and there was no sufficient cause for not presenting it in time the Judicial Committee held that they could not interfere, unless they were satisfied that the refusal was wrong; and that the delay which had occurred since the rejection of the appeal by the High Court and which was not accounted for militated against any interference.

Ram Narain Joshi v Parmeswar Narain Mahta. 30 Cal 309=30 I A 20 P C.

Notes:—Ref: 31 Cal 216=5 C L J 380; Ex: 32 Bom 108=9 Bom L R 566=5 N L R 25.

(13) Leave to appeal against act of Governor-General of India.

120—See case under:—(15) Act of State, Special leave not granted.

(14) Dismissing appeal as incompetent.

121.—Non-expression of opinion by the Lower Court as to appeal ability—Privy Council practice.

Where a statute confers on the Provincial Courts the power of allowing an appeal to the Privy Council, the Provincial Court is bound to exercise its judgment and consider whether any particular case is appealable or not before it grants leave. Where the lower court had carefully avoided expressing any opinion on the question of competency of the appeal and had granted leave, leaving the question of competency open,

Appeal to Privy Council-*Contd.*

2 Practice and Procedure—*Contd.*

their Lordships dismissed the appeal as incompetent. **E. W. Gillet Company, Limited v. Lumsden.** **(1905) 15 M L J 461= 10 C W N 7.**

(15) Act of State, special leave not granted.

121A.—Special leave to appeal——Appeal—Political Act of State—Order passed by the Governor-General of India in Council.

Their Lordships of the Privy Council declined to grant leave to appeal against an act of Governor-General of India removing the appellant from the Government of the State of Panna, inasmuch as it was clearly a Political Act—an Act of State—done by the Viceroy in Council in the interest of the State of Panna, and the inhabitants of Panna, and for the peace and good Government of India generally. **Maharajah Madhava Singh.** **6 Bom L R 763= 8 C W N 841=1 A L J 691= 32 Cal 1=31 I A 239 P C.**

(16) Granting special leave, effect of.

121B.—Privy Council appeal—Special leave, High Court, jurisdiction of—Receiver, application to appoint Civ. Pro. Code (Act V of 1908), ss.109, 112 and O. XLV, r. 13.

Where, after refusal by the High Court to grant leave to appeal to His Majesty in Council, special leave has been granted by the Judicial Committee, the High Court has no power to entertain an application for appointment of a Reciever of the property in dispute under r. 13 of O. XLV, Civ. Pro. Code of 1908 The changes introduced in the Code of 1908 do not in this matter affect the law as it stood under the Code of 1882. 27 Cal 1, Appl. **Tega Singh v Bichitru Singh.** **10 C L J 326=1 Ind Cas 452.**

(17) Leave to appeal granted under a misconception of the case.

121C.—Leave to appeal to Privy Council——Misconception of ground—Practice.

Where the Judicial Committee finds that special leave to appeal to that Board has been granted under a misconception of the case or of the ground of appeal, they will dismiss the appeal without hearing it on the merits.

Rambal Singh v Balbhaddar Singh. **25 All 1=29 I A 203, P C.**

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2 Practice and Procedure—*Contd.*

(18) Special leave to appeal when valuation is under Rs. 1,0000,

121D.—Ss.109, 110 (1882 Ss.595, 596)—Leave to appeal to Privy Council—Certificate—Valuation.

Except where special leave is granted, no leave to appeal to the Privy Council should be granted unless the subject-matter of the suit is more than Rs. 10,000 in value. The fact that the appeal involves a point of law does not justify leave being given where the value involved is less than Rs.10,000. Where special leave is asked for the Court must exercise its judicial discretion in granting it. 28 I A 182; 3 Bom L R 467.

Radha Krishna Das v. Rai Krishna Chand. **5 C W N 689=23 All 415. P C.**

(b) TIME FOR APPEALING.

(1) Calculation of period of Limitation.

122.—In calculating the period of six months allowed for appealing to the Privy Council, the date on which the decree was pronounced or dated should be excluded. **Ramanoogra Narain.** **13 W R, P C 17.**

(2) Power of Supreme Court to grant leave after expiration of time.

123.—The Supreme Court at Madras admitted an appeal to the Privy Council after the expiration of six months from an original decree. *Held* that the Court was not authorized to grant such leave to appeal by the Madras Charter of 1800. **East India Company v. Syed Ally.** **7 Moore's I A 555.**

(3) Closing of court invacation.

124.—Privy Council Rules.

The High Court has no power to allow an appeal to Her Majesty in Council when the petition is not presented within six calendar months from the date of the decree complained of When the six months expired during the Durga Pooja vacation and the petition of appeal was presented on the first day, the Court resumed its sittings,—*Held* that the petition was too late, and leave could not be given to appeal. **Tamvaco v. Skinner.** **1 B L R O C 39.**

Notes:—See 14 W R Cr I.

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125.—If the period within which an appeal is required by law to be filed expires while the High Court is closed for the vacation, parties are allowed to file their petitioners of appeal on the first open day after the vacation. **Luchmun Chunder Singh v. Kaleechurn Singh 12 W R 293.**

126.—Time for appealing—Civil Procedure Code, s. 599—Limitation Act, s 12, Sch. II, Art. 177—Period of limitation for admission of an appeal to Privy Council.

On a petition for leave to appeal to the Privy Council presented on the 8th April, it appeared that the period of six months from the date of the decree to be appealed against had expired on the 23rd of March, if the time occupied by the petitioner in getting a copy of the decree was to be computed in that period. *Held* that the petition was barred by limitation. *Per Curiam.*—It is not at all clear that the word " ordinarily " in s. 599 of the Code of Civil Procedure does not refer to the circumstances referred to in the second paragraph of that section, viz., when the last day happens to be one on which the Court is closed.

Lakshmanan v Peryasami. 10 Mad 373.

(4) Review, Pendency of application for.

127—When an application to review a judgment is rejected by the High Court, the six months allowed for appeal to Her Majesty in Council run from the date of the judgment and not from that of the order rejecting the review. **Soudaminee Dossee v Dheraj Mahatab Chand. B L R Sup Vol 585 : 6 W R Mis 102.**

(5) Date of decree.

128—Vice-Admiralty Court of Bengal—Date of decree rule 35 of Vice-Admiralty rules.

The words "after the date of the decree" mean after the date when the decree is pronounced by the Admiralty or Vice-Admiralty Court, and not the date where the decree is reduced to writing and signed. According to law laid down in the Vice-Admiralty Courts, if the parties appear in proceedings before the Registrar was empowered to assess the damages in accordance with the decree of the High Court as a Court of Admiralty Jurisdiction, then they are prevented from having appeal as of right. **The Owners of the Ship "Brenhilda" v The British India Steam Navigation Company 7 Cal 547.**

Notes:—8 I A 159. Ref , 17 Cal 66.

(6) Deposit of costs of appeal.

129—Act VI of 1874, Ss. 8 and 11, cl. (b)—Limitation Act, (1871) S. 5—closing of the Court—Power of High Court to enlarge time.

The petitioners obtained a certificate to appeal against decree passed on the 4th May. It was granted on the 1st September. Accordingly the period of depositing the amount for translation of the record expired on the 4th November, under s. 11, cl (b) of the Act VI of 1874. Though the Court re-opened after the vacation on the 23rd October, still the Benches did not commence sittings till the 16th November, the petitioner brought in the money on the last mentioned date, but the sum was refused as being too late. Held, that it was rightly refused and that the Court had no power to grant permission to deposit it after the expiry of the time prescribed. **Lalla Gopee Chand. 2 Cal 128.**

130—Act VI of 1874—S, 11—Power to enlarge time—Practice.

The provisions of S. 11 are not absolutely mandatory. The Court has a discretion and it can modify them; and so when the period for making a deposit expires on a day when the Court is closed, it is a reasonable exercise of that discretion to allow the deposit to be made on the day the Court re-opens. **Soorjmukhi Koer 2 Cal 272**

Notes:—Appr 10 Cal 557 P C; Dist 7 All 79 F B.

(7) Dismissal of appeal for default in deposit of security and in transcribing record.

131—Act VI of 1874, Ss. 11, 14 and 15

When sufficient amount of money was not deposited to defray the costs of transcribing the record and no security was deposited for the costs of the respondents, the appellant was served with a notice to show cause why the proceedings should not be stayed, and on his not appearing to

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2 Practice and Procedure—*Contd.*

show cause, the appeal was struck off the file.

Thakoor Kapilnath Sahai v The Government. **1 Cal 142.**

Notes—Ref 10 C L J 332.

(7A) Application for leave to deposit security after time.

132—Security given after time—(Act X of 1877).

Certain persons, desirous of appealing to Her Majesty in Council from a decree of the High Court, applied for and obtained the certificate required by s. 600 of Act X of 1877. Two days after the time allowed by s. 602, they applied to the High Court for leave to deposit certain bonds giving security for the payment of the costs of the respondents, and to deposit the amount required to defray the expenses of translation &c. *Held* that, looking at the terms of s. 602 of Act X of 1877, and following the undeviating practice of the Court, the application, being two days beyond time, must be refused. **Narain Singh v Rustam Khan.** **1 W N 76**
Deotadin v Gyadin. **2 W N 55**

133—Failure to give security—Power to enlarge time—Act VI of 1874, ss. 5 and 11.

An intending appellant to the Privy Council, who held a certificate under Act VI of 1874, s. 5 having failed to give the requisite security and deposit within the six weeks prescribed by s. 11, an order was passed to strike off his application to appeal. As, however, the defendant in the Court below, who would have been respondent in the appeal, had filed an appeal under the Letters Patent, s. 15, against the grant of the certificate, the applicant contended that the six weeks would not begin to run until such appeal was finally disposed of *Held* that there was no ground for this contention, as the appeal did not operate as a stay of proceedings, nor remove the record to any other Court *Held* that the Court had no jurisdiction to enlarge the time specified in s. 11.
Funeendro Deb Roy Kut v Jogendro Deb. **23 W R 220**

(8) Deposit of security.

134—S. 602 C P C.—Time for giving security—Extension.

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The time allowed by s. 602 of the Code of Civil Procedure for giving the security and making the deposit required by that section may be extended. **Fazlunnisa Begum v Mulo.** **6 All 250, 4 W N 71.**

Notes.—Dist . 7 All 79 F B , 15 All 14.

135—C P.C.O. 45,r, 7-Appeal to Privy Council.

Property, whether sufficient for extension of time allowed for the deposit of security for Respondent's costs. Time allowed under O. 45, r. 7 for the deposit of security for Respondent's costs in the appeal may be enlarged for "cogent reasons," and property is a sufficient reason for extension of time, where the sum of money required is large and diligence of the petitioner is shown by his having paid in three-fourths of the money required within the time originally allowed. 10 Cal 557 (P C) Fol and 14 Mad 391, dissented from. **Bagga v Salihon. 44 P R 1910 =70 P W R 1910=6 Ind Cas 723= 118 P L R 1910.**

(8A) Extension of time for depositing estimated costs.

136—O. 45. r. 7 (1882) C. P. C. (Act XIV) of (1882 S. 602)-Privy Council-Appeal by special leave —Practice—time for depositing estimated costs—Extension.

Although S. 602 of the Code only applies to a case, where a certificate of leave to appeal to the Privy Council has been granted by the High Court, it has been the invariable practice of the Calcutta High Court to treat that section as applying to cases, where special leave has been granted by the Privy Council.

The High Court has power to extend the time as provided by S. 602 of the Code, for depositing the estimated cost of translating transcribing, indexing and transmitting to the Privy Council the record of a case under appeal, but it ought not to do so without some cogent reason. 10 Cal 557 Fol. **Roy Jotindra Nath v Rai Prasanna Kumar.** **11 C W N 1104**

137—C P.C.O. 45 r 7 (1882 s. 602)—Power of Court to extend time for giving security. Appeal to Privy Council.

The words of S. 602, C. P. C. though at first sight may appear to be mandatory, yet are merely directory. The

Appeal to Privy Council-*Contd.*

2 Practice and Procedure—*Contd.*

Court admitting the appeal (the Chief Court), therefore, can, for sufficient cause, extend the period prescribed by that section for the filing of security and for making the specified deposit. (10 Cal 537 Ref.) **Kidar Nath v Mathu Mal.**

87 P R 1908=153 P W R 1908= 27 P L R 1909

138—Security in appeal—extension of time for—Civil Procedure Code, (1882) s. 602.

The provision in s. 602 relating to time is only directory ; though it is not departed from without any cogent reason still the Court, against whose decree the appeal is preferred, has the power to extend the time. Where sufficient reason had been shown for the expiry of the period provided by the Section, *held* that the Court had rightly exercised discretion in extending the time. 2 Cal 272 approved.

Burjore v Bhagana. **10 Cal 557 : L R 11 I A 7**

Notes—Dist· 7 All 79 F B ; 15 All 14. Ref: 14 Mad 391 ; 11 C W N 1104 F B.

138A—Privy Council appeal—Security-bond, extension of time to file—Power of High Court —Sufficient reasons for delay—Computation of time—Date of decree, meaning of — Civ. Pro. Code (Act V of 1908), O. XLV, r. 7.—

The High Court has power to extend the time for depositing costs in Court, but it ought not to do so without some cogent reasons. (11 C W N 1104, 10 Cal 557, 14 Mad 391, Fol:). Where a petition for filing security-bond out of time stated that the delay was caused by a misapprehension of the appellants about the date of re-opening of the High Court, and that, none of the appellant's men being present in Calcutta on that date, the bond was not filed, *held*,—that these were not reasons over which the applicant had no control, and that the delay was not due to a mistake which would be regarded as not unreasonable or caused by negligence; that they were therefore not cogent reasons such as to justify the extension of time. "Date of decree" in O. XLV, r. 7, Civ. Pro. Code, means the date on which the decree is pronounced, and not that on which it is signed. (7 Cal 547, Fol:) **Harendra Lal Roy Chowdhury v. Sm. Hari Dasi Debi, 14 C W N 420=5 Ind Cas 844.**

Appeal to Privy Council-*Contd.*

2 Practice and Procedure—*Contd.*

(9) Enlargement of time for making deposit of costs of appeal.

139—Enlargement of time for depositing cost of appeal.

The time, for the making of a deposit required by Civil Procedure Code, S. 602 may be extented, but not without cogent reasons: See L R 11, I A 7; 10 Cal 557. The cogent reasons must be such as would lead the Court to believe that the party was diligent in due time to be prepared to lodge the deposit within the limited period, and that he was prevented from making his deposit not owing to absence or difficulty of getting funds, but owing to some circumstances accidental or otherwise over which he had no control, or owing to mistake which the Court would consider not unreasonable or caused by negligence. **Rangasayi v. Mahalakshmamma, 14 Mad 391. Venkatachalam v. Mahalakshmamma, 14 Mad 392 note.**

(10) Security for costs of Respondents.

140—Civil Procedure Code (Act XIV of 1882) Ss 603 and 610—Right of surety to dispute validity of security-bond notwithstanding admission of appeal.—

A surety is not precluded from questioning the validity of the security bond in execution proceedings, inasmuch as he was not a party to the order of the High Court, notwithstanding the admission of an appeal to Her Majesty in Council under S. 603. **Girindra Nath Mukerjee v. Bijoy Gopal Mukerjee, 26 Cal 246= 3 C W N 84.**

Notes:—Fol. 27 Cal 190; 32 Cal 494=9 C W N 372=1 C L J 118. Ref: 32 Cal 729= 9 C W N 697; 31 Mad 215=18 M L J 219, 33 Cal 861=4 C L J 41. Rel: 9 C W N 1001; 33 Cal 985=4 C L J 219; 27 Bom 91. Diss: 26 All 69. Not Fol: 6 A L J 737.

140A—Security for costs in Privy Council appeal — Government Promissory Note — High Court Rules, Appellate Side, Part II, Chap IV Rule XX. The market value of Government Securities given as security for respondent's costs in an appeal to Privy Council must be Rs. 4,000 on the date of their deposit. **Chutterput Singh v. Moharaj Bahadur, 9 C L J 559.**

Appeal to Privy Council-*Contd.*

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Appeal to Privy Council — Security for respondent's costs, sufficiency of —See Rules of High Courts and Supreme Courts—Calcutta.

13 C W N 629=9 C L J 560=36 Cal 653=2 Ind Cas 844.

(11) Appeal struck off for want of prosecution.

141—Civil Procedure Code (1882), Ss. 598, 599 & 600:–B obtained a decree against A on the 19th May 1885. On the 8th September, 1885, A filed his petition of appeal to Her Majesty in Council. On the 11th September A's attorney received from the Registrar, the usual draft notice, calling upon B to show cause why the case was not a fit and proper one for appeal to Her Majesty in Council, for approval. It was never returned and no further steps were taken to prosecute the appeal. On the 1st April, 1886, B applied to have the appeal struck off for want of prosecution. *Held*, that he was entitled to the order. **Moorarjee Poonja v. Visranjee Visenjee, 12 Cal 658.**

(12) Delay in transmission of appeal.

142—Power of High Court.—

Until a petition of appeal to the Privy Council presented to the High Court has been admitted and allowed, a party has no right of appeal to the Privy Council. If the petition is allowed to remain on the file of the Court, and is not prosecuted within a reasonable time, the Court has power to order its removal from the file.

Gobardhan Barmono v. Mano Bibi, 3 B L R O C 126=S C on appeal, 5 B L R 76=14 W R O C 34.

Notes:—See 14 W R O C 341.

(13) Appeal admitted after time.

143—Power to reject appeal.—

In a case where the period within which an application for leave to appeal to England expired during the Dusserah vacation, and the application was presented on the first day of the Court sitting after the vacation, when, though notice was served under the rules,—no cause being shown to the contrary,—the appeal was admitted and the applicant allowed to incur large costs for translation and transcription, and the record was nearly ready for transmission.—*Held*, that the plea of limitation could not at this stage be heard in bar to the admission of the appeal, and that the High Court was bound to allow it to go on, subject to the orders of the Privy Council.

Raj Kishen Singh v. Huro Soonduree Dassee, 15 W R 255.

(14) Power of High Court to consolidate appeals or admit time expired appeals.

144—The High Court has no power to consolidate appeals to the Privy Council or to admit appeals to the Privy Council in cases in which the time for filing an appeal has expired: such consolidation or admission cannot be made without the permission of the Privy Council.

Pran Nath Roy Chowdhry v. Kasheenath Chowdhry, 2 W R Mis 26.

See Mahomed Mudsur v. Ram Lal Roy, 6 W R Mis 50.

(15) Power of High Court to restore appeal.

145—Power of High Court to restore appeal.–After an appeal to Her Majesty in Council has been dismissed for default, or for any reason removed from the file of the High Court, under the law or under the rules of the Court, it is in the discretion of the High Court to restore the appeal after the period of six months allowed for preferring such appeals has expired.

Radha Binode Misser, B L R Sup Vol 730.

Radha Binode Misser v. Kripamoyee Debia, 7 W R 531.

Contra, Bolakun, 6 W R Mis 121.

146—Appeals struck off for default in making deposit.—The High Court has no authority to restore appeals to Her Majesty in Council, dismissed or struck off the file for default in making deposit. **Sreekant Roy, 7 W R 74.**

(C) MISCELLANEOUS CASES.

(1) Papers forwarded with record.

147—Papers forwarded with record–Review.–

Where an application for review was rejected and no appeal to the Privy Council was filed against the order of rejection, papers filed with the application for review will not be forwarded with the record to the Privy Council on the appeal of the case. **Fukeeruddeen Mahomed Ahsan Chowdhry v. Najumunissa Chowdhrain, 2 B L R A C 264=11 W R 145.**

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2 Practice and Procedure—*Contd.*

(1 A) Amendment of the decree under appeal.

148—Appeal Practice—Dismissal of the appeal-Amendment of the decree under appeal—Absence of petition of appeal by the respondents.—

Their Lordships dismissed the appeal, but amended the decree appealed against, by providing for interest subsequent to the decree, in accordance with the prayer in the petition for special leave to appeal presented by the respondents, who did not lodge their petition of appeal as required under the Judicial Committee Rules, 1908.

Kasim Ahmed Jewa v. Narain Chetty, 12 Bom L R 646 (P C)=12 C L J 231=20 M L J 630=37 Cal 623=8 M L T 229.

(2) Translation of account books and papers.

149—Costs—Where it was impossible to say whether certain account-books and papers were material or relevant, or even were part of the evidence in the case, the High Court declined to put the appellant in an appeal to England to the expense of translating and transcribing them, but gave the respondent the option of translating them at his own expense, with a view to their being sent to England as an appendix to the record, leaving it to the Privy Council, in the event of the respondent being successful, to make any order they pleased as to the costs of translation. **Raj Coomar Baboo Deo Nund Singh. 7 W R 90.**

Notes—Ref 7 B H C R 153.

(3) Evidence.

150—Record of appeal to the Privy Council.

An application for a certificate that a limited meaning should be placed upon endorsements made by the Bench clerk on certain exhibits printed in the paper book of a suit which had gone on appeal to the Privy Council, the Court left the matter to be dealt with by their Lordships of the Judicial Committee, at the same time forwarding its own order to the Privy Council. **Rattan Koer v. Chotay Narain Singh. 21 Cal 476**

(4) Translation of deeds.

151—Razeenamas and safeenamas, as well as security bonds, connected with appeals to England need not be in English. **Mahomed Turkee Chowdhry v Luchmeput Singh Doogur. 7 W R 291.**

(5) Appeal pendency of, effect of

152—Legal disability—Right to sue—

The pendency of an appeal to England does not put the party who, subject to that appeal, is the owner of an estate under a legal disability to bring a suit in that character against third parties. **Prahlad Sen v Rajendra Kishore Singh. 2 B L R P C 111; 12 W R P C 6**

Notes—See 13 M I A 275.

(6) Agreement not to appeal.

153—Application to stay proceedings—

Where an appeal is preferred contrary to an agreement not to appeal, application to stay the proceedings should be made before the case is prepared for hearing. **Amir Ali v Inderjit Koer. 9 B L R 460**

Notes—See 14 M I A 203.

(7) Finality of order passed by Privy Council after hearing appeal.

154—Re-hearing, grounds for.

Order passed by the Judicial Committee of the Privy Council after hearing an appeal is final, and an application for a re-hearing will not be granted except upon the ground that the applicant has by some accident, without blame or default on his own part, not been heard, and the order has inadvertently been made as if he had been heard (I M I A 117) (L *R* 2 P C 274) approved. **Pertab Narain Singh v Subhao Kooer. 4 Cal 184=5 I A 171.**

(8) Interpretation of decree operating as resjudicata.

155—S. 109 (c) O XLV. r 3—Privy Council Appeal—Case fit for appeal

In 1902 a decree received a certain interpretation by the Court. In a subsequent proceeding the High Court decided that the interpretation operated as *res judicata*.

Appeal to Privy Council-*Contd.*

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Held that it was not a fit case for appeal to His Majesty in Council. **Kunj Behari Lal v Collector of Shahjehanpur. 8 Ind Cas 485**

(9) Raising fresh point on appeal to Privy Council.

156—Privy Council—Practice—Fresh point—Not to be raised.

It is not usual to allow a point to be raised on appeal to the Privy Council, which has not been discussed in the Court below, and upon which their Lordships have not got the assistance of that Court. **Jit Singh v Maharaj Singh, 10 M L T 551=(1912) 1 M W N 29 (P C).**

(10) Jurisdiction of High Court to add parties after admission of appeal by Privy Council.

157—Appeal to Privy Council against preliminary order of High Court—Admission of appeal by Privy Council—Addition of parties, application to High Court—Jurisdiction of High Court.

The High Court, in its original jurisdiction, having dismissed a suit for accounts, an appeal was laid before a Divisional Bench, with the result that the Appellate Court, in reversal of the decree of the Court of first instance, passed a preliminary decree and remanded the case. An appeal was preferred to the Privy Council against this appellate order and the same was admitted by the Privy Council. On an application by the assignee-trustees of one of the plaintiffs made to the appellate Bench of the High Court, to be added as parties,

Held, that as the appeal against the preliminary decree had been admitted by the Privy Council, the High Court had no jurisdiction to make the order prayed for. **Singaravelu Pillay v Murugesa Pillay 12 Ind Cas 69.**

(11) Delay in bringing appeal to a hearing.

158—Costs of appeal—Appeal to Privy Council Where there has been great and unexplained delay after special leave to appeal has been granted, in bringing the appeal to a hearing, the Judcial Committee, in reversing the decree appealed against, refused the successful appellant his costs, **Pattabhiramier v Venkata Row Naikan. 7 B L R 136 P C=13 M I A 560 =15 W R 35**

Appeal to Privy Council-*Contd.*

2 Practice and Procedure—*Contd.*

(12) Statement of reasons by the Judicial Committee.

158 A—Privy Council—Practice—Decision on facts—Genuineness of Will—Onus on Appellant —Failure to discharge—Statement of reasons by the Judcial Committe. Where a Division Bench of High Court, after a prolonged and elaborate enquiry, arrived at the conclusion that it could not believe the evidence of the principal witnesses called before it in support of a will propounded by the appellant before the Privy Council.

Held,—that the onus was on the appellant who invited Judges who had not heard or seen the witnesses to overrule the decision of Judges who had to show that the dscision was erroneous.

That in this case that onus had not been discharged. Having regard to the intricacy of the case and the elaborate arguments presented, the Judicial Committee thought it desirable to state in outline the salient features of the evidence and the reasons for their conclusion, although it might have sufficed if they had only said that the appellant had not succeeded in discharging the onus that lay on him. **Nogendra Nath Mitter v Kumudini Dasi 13 C W N 782 P C=5 M L T 384=3 Ind Cas 997.**

(13) Appeal on a ground not subjected to the consideration of the High Court.

158 B—Question of fact—ground not taken in Court of appeal. Where a question of fact has been decided against an applicant in the Court of first instance, but the case has been decided in his favour upon other grounds, and, upon appeal the decision is reversed by the High Court which is not invited by the respondent to consider the point decided against him in the first Court, the Judicial Committee will not entertain an appeal on a ground which has not been subject to the consideration of the High Court. **Dhanukdhari Singh v Mahabir Pershad Singh. 6 C L J 11=11 C W N 739 (P C)= 9 Bom L R 651=2 M L T 193= 17 M L J 353=14 Bur L R 1= 34 Cal 709.**

(14) Objection that appeal had become incompetent.

158 C—Privy Council appeal—Objection that

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2 Practice and procedure—*Concld.*

appeal had become incompetent—Final admission—Record, transmission of—Practice.—

After an appeal to His Majesty in council had been admitted, but before the transmission of transcript record to England, it was objected by the respondent that he had attained the status of a Sovereign Prince, so that the suit could not be continued against him in any Municipal Court, and he prayed that the appeal may be declared to have abated. *Held*, that, although the High Court retained jurisdiction over the appeal for interlocutory matters, it would not make the order for abatement, but would transmit the petition with a report upon the truth or otherwise of the allegations made therein, to be dealt with by the Judicial Committee upon the hearing of the appeal. **Samarendra Chandra Deb v Biredra Kishore. 10 C L J 330=4 Ind Cas 456.**

3 STAY OF EXECUTION PENDING APPEAL.

(1) Stay of execution before appeal admitted-Practice.

159—Civil Procedure Code (1882), ss. 603 and 608.—

Where a petition for leave to appeal to the Privy Council from a decree of the High Court has been presented, the High Court may grant a stay of execution of its decree, although the appeal has not yet been admitted under s. 603 of the Civil Procedure Code (Act XIV of 1882).

Janbai v Sale Mahomed Jafferbhoy. 19 Bom 10.

Notes.—Diss. 5 C W N 562.

160—S. 608—Appeal to Her Majesty in Council—Application for stay of execution of decree appealed against.—

The High Court has no power under s. 608, Civil Procedure Code, to stay execution of a decree in respect of which an appeal to Her Majesty in Council has not been admitted (All W N 1890)

Nand Lall v Mussammat Chatter Kuar. Oudh S C 273.

160 A—Appeal to Her Majesty in Council—Application for stay of execution before admission of appeal—Civ. Pro. Code, s. 608—

Under s. 608 of the Civ. Pro. Code, the High

Appeal to Privy Council-*Contd.*

3 Stay of execution pending appeal—*Contd.*

Court has no power to stay the execution of a decree in respect of which leave to appeal to Her Majesty in Council has been asked for, and a certificate granted to the petitioner, but the appeal has not yet been admitted. *Per Mahmood* J—An order for stay of execution would not be passed under s. 608, even though, at that time, the appeal had been admitted, if at the time when the application for stay was made, it had not been admitted. **Kumar Lal v Rani. A W N 1890, 92.**

161—*C P C* O.45 r 13 (1882 S.608)—Stay of execution—Privy Council appeal not admitted. An application for stay of execution under S. 608 *C P C* cannot be granted before an appeal to the Privy Council is finally admitted under S. 603 C P C. **S M Bibi Jarao Kumari v Gopi Chand Bothra. 5 C W N 562.**

(1A) Application for stay of proceedings to be made to the Court in India.

162—Stay of proceedings pending appeal—Practice—Application to be made in India first—Conditional order for stay. Applications for stay of proceedings pending an appeal to the Judicial Committee ought always to be made, in the first instance, at any rate, to the Court in India, which has ample power to deal with the matter according to the circumstances of the particular case, and has knowledge of details which the Judicial Committee cannot possess on an interlocutory application. Application was granted in the special circumstances of this case, on the Appellant giving an undertaking for expediting the hearing of the appeal; and leave was given to the Respondent to apply to the Court in India for the appointment of a Receiver or for payment by the appellant of a reasonable amount in Court or any other relief as he may be advised. Appellant to pay the costs of the application in any event. **Vasudeva Modelier v Shadagopa Modelier (P C) 8 Bom L R 497 =4 C L J 101=10 C W N 945= 16 M L J 299=29 Mad 379=33 I A 132 =I M L T 204.**

163—C P C Order XLV Rule 13—Privy Council Appeal—Stay of execution, application for—Appeal not admitted-Jurisdiction.

Stay of execution of a decree pending appeal to the Privy Council could be granted only after

Appeal to Privy Council-*Contd.*

3 Stay of execution pending appeal—*Contd.*

the grant of a certificate for the admission of the appeal. 5 C W N 562. Fol. 19 Bom 10 Not Fol.

Venkata Reddy v Obala Reddy. 6 M L T 309.

(2) Security against party in possession.

164—Beng Reg XVI of 1797, s. 4—

Within six months after decree and prior to the admission of an appeal therefrom to England, the Sudder Court, on an *ex-parte* application without notice, issued an execution order putting the decree-holder in possession. This was done without calling for security as provided by s. 4, Bengal Regulation XVI of 1797. The appellant on the admission of the appeal, applied to the Sudder Court for security from the party in possession pending the appeal, but that Court held that, as the decree-holder was in possession under an execution order which could not be appealed from, they had no power to interfere. On petition, the Judicial Committee, under the circumstances and on affidavit of waste, made an order declaring that it was competent to the Sudder Court to require security to be given for protection of the property pending the appeal, notwithstanding execution of the decree had issued, and gave permission to the appellant to apply to the Sudder Court with an intimation of that opinion. **Jariutool Butool v Heseinee Begum. 10 Moore's I A 196.**

165—Beng Reg XVI of 1797, s. 4—

The plaintiff obtained a decree for possession of a Zamindari, which was reversed on appeal by the High Court. The plaintiff then appealed to the Privy Council Uunder such circumstances, the High Court has no pawer, under s. 4, Regulation XVI of 1797, to order security to be taken from the defendant (respondent) in the appeal to the Privy Council for the due performance of such orders as the Privy Council may pass in the appeal, or to suspend the decree reversing the decision of the first Court. **Nilkisen Thakoor v Beerchunder Thakoor Gossain. 2 W R Mis 23.**

Notes:—Appr. 6 W R Mis. 111.

166—The High Court cannot interfere to require security from a party who has formally been put in possession of the property in dispute in execution of a decree, where execution was taken out before an appeal to the Privy Council was preferred and admitted. **Huro Soonduree Debia v Stevenson. 5 W R Mis 13.**

Notes—Diss. 12 W R 255. Ref. 33 Cal 927 = 3 C L J 67.

(3) Security.

167—Security–Failure to furnish security—Beng. Reg. XVI of 1797, s. 4—

In the case of an appeal to the Privy Council, the Court has no power, on failure of both parties to furnish security as required by s. 4, Regulation XVI of 1797, to attach any property held by the appellant beyond that decree.

Khoroo Lall v Kant Lall. 5 W R Mis 37.

168—Beng. Reg. XVI of 1797 s. 4.—

When an appeal to the Privy Council has been admitted, all that the High Court can do is to proceed, under s. 4, Regulation XVI of 1797, to stay the execution of the decree, on the appellant giving security for the due performance of the decree of the Privy Council. But the Court cannot continue an attachment of money made under Regulation II of 1806 during the pendency of the suit in the Zillah Court, after the decree of the Zillah Court has been reversed by the High Court on appeal. **Ramnath Chowdhry 6 W R Mis 17.**

169—In the case of an appeal to the Privy Council, security to the extent of the whole sum decreed need not always be taken from the decree-holder. When security is taken for less than the full amount decreed, the decree-holder should be restrained from issuing process of execution with a view to realizing any sum in excess of the amount for which security is given. **Molka v Sumput Koonwar. 6 W R Mis 62.**

Notes—Ref. 11 W R 204.

170—The Zillah Court decreed a suit in plaintiff's favour.

On appeal the High Court reversed the judgment, and remanded the case, making no order as to the costs of the appeal. Against such remand an appeal was preferred to Her Majesty in Council. The Zillah Court, however, proceeded with the case, and eventually dismissed the whole suit, and the defendant applied to execute the decree for his costs. *Held* that, in such circumsta-

Appeal to Privy Council-*Contd.*

3 Stay of execution pending appeal—*Contd.*

nces, the High Court was not competent, under s. 4, Regulation XVI of 1797 (the last mentioned decree not having been appealed to it), to suspend execution of decree, or to direct the [illegible] curity. **Onooroop Chunder Mookerjee. 6 W R Mis 45.**

171—When an appellant to the Privy Council applies to the High Court to stay execution of the decree on giving security, and action is taken by the Court on such application, a Principal Sud der Ameen has no authority, without the direction of the High Court, to make an order on an application to execute the decree, though the judgment-debtor should have failed to give security. **Debee Pershad v Umurth Nath Chowdhry. 8 W R 275.**

(3A) Power of High Court to stay execution when appeal admitted by special leave.

172—Practice—Appeal admitted by special leave—Power of the High Court to stay execution—Civ. Pro. Code (V of 1908), Sch,1 O. XLV R. 13.

Where an appeal is admitted by special leave of His Majesty in Council, the High Court has power to stay execution of the decree appealed against. **Nityamoni Dasi v Madhu Sudan Sen. 8 A L J 449 (P C)=13 C L J 529=13 Bom L R 419.**

173—Power of High Court.

The High Court can, on cause shewn, require security from a decree-holder who has been put in possession in execution of decree against which an appeal has been preferred to the Privy Council, and is still pending. It is not imperative on the High Court, under such circumstances, to take security from the decree-holder in possession, unless it be shewn that the party in possession is making waste, or is so embarrassed by debt that the estates are likely to be seized by creditors in satisfaction of their claims, or unless some other good cause be given. **Sooraj Monee Deyee v Suddanund Mehapattur. 12 W R 296.**

Notes:—Fol: 19 Mad 140; 33 Cal 927=3 C L J 67.

174—Widow's interest.

A judgment-debtor who had been permitted to retain possession of disputed property pending an appeal to England, on furnishing security for mesne profits and costs, deceased, and the widow offered her life-interest in his estate as security. *Held* that her interest was only temporary, it could not be accepted as competent security. **Phool Koer *alias* Kanaya Koer v Dabee Persaud. 12 W R 187.**

Notes;—Con. 4 All 532; Ref: 6 C L J 462.

175—Beng Reg XVI of 1797, s. 4.

When an appeal is preferred to Her Majesty in Council from a decree of the High Court, the security to be taken from the decree-holder must be regulated by s. 4, Regulation XVI of 1797, the practice being to calculate for an amount sufficient to meet the mesne profits which are to go to his hands from the date of his obtaining possession to the probable date of the eventual execution of the decree of the Privy Council, which period is generally taken to be three years. **Ameeroonissa Khatoon v Dunne. 14 W R 361.**

176—Beng Reg XVI of 1797, s. 4.

Application for decree-holder pending decision of appeal to the Privy Council to give security refused; Ainslie, J., following the Full Bench ruling in Sup, Vol. 605: 6 W R Mis. 111; and Paul, J. (whilst declining to follow that ruling), considering the application premature, because merely put on the file of the High Court without the appeal being submitted. **Burra Lall v The Court of Wards. 16 W R 289.**

Notes:—Fol: 5 C L R 33; Ref: 10 W R 99.

177—Sufficiency of security.

The High Court having ordered a judgment-debtor, pending an appeal to the Privy Council, to furnish security within two months, he put in a petition in the Zillah Court on the last day allowed by the order, tendering a darpatni mehal as security, and on the day following gave an unregistered security bond. The Judge rejected the bond. *Held* that the bond was not required to be registered until the security had been accepted; and that the Judge should have directed an investigation into the goodness and sufficiency or otherwise of the property tendered. **Dunne v Ameeroonissa Khatoon. 13 W R 41.**

Notes: Con: 15 W R 356

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3 Stay of execution pending appeal—*Contd.*

178—The decree-holder (respondent to England) was required immediately to elect between furnishing security and drawing the sum deposited by the appellant on account of wasilat and costs, and (upon her failure to do so) allowing the the appellant to obtain a refund of the deposit upon giving the like security. A party, who seeks to obtain security after the decree has been executed, must shew special circumstances (e.g ,waste or improper dealing with the property) before the Court can grant such an order. **Juggoo Lall Oopadhya v Jankee Bibee. 17 W R 521.**

Notes:—Fol: 33 Cal 927=3 C L J 67.

179—Beng Reg XVI of 1797, s. 4.

In a suit in which an appeal to the Privy Council from a decree of the High Court has been admitted and is still pending, the Court of original jurisdiction, which made the decree first appealed from, has jurisdiction to issue execution. Although, as a general rule, the High Court will take security, under s.4, Regulation XVI of 1797, before allowing execution of a decree while there is an appeal to the Privy Council pending, yet the Court may, under certain circumstances, allow execution without taking security. Where the lower Court is informed that there has been an appeal to Her Majesty in Council from the decree which it is asked to execute. the lower Court should, in the exercise of its discretion, allow time to the parties to apply to the High Court to stay execution or to require security from the party left in possession, before issuing execution, unless it should see danger of the property being made away within the interval. Loch, J., differed. **Wise v Rajkrishna Roy. B L R Sup. Vol 541=6 W R Mis 84.**

180—Beng Reg XVI of 1797, s. 4.

The plaintiff obtained a decree for possession of part of a zamindari in the Court below, and in execution obtained possession on giving security. On appeal by the defendants to the High Court, the decree was reversed and restitution ordered. Plaintiff then appealed to the Privy Council, and applied to the High Court to be left in possession upon his former security. *Held* that s. 4, Regulation XVI of 1797, did not apply, and the plaintiff was not entitled either to keep possession or to require the defendants to give security; but the defendants were entitled to restitution of the property without security, whether the judgment of the High Court ordered restitution or not: but that it was within the discretion of the Court to call upon the defendants to give security for costs, if any, awarded by the decree of reversal. **Rajkissen Singh. B L R Sup Vol 605; 6 W R Mis 111**

Notes:—Ref: B L R Sup 985.

181—Beng. Reg. XVI of 1797, s. 4.

The plaintiffs, in execution of a decree, which had been affirmed by the High Court on appeal, obtained possession of the land decreed, and realized their costs. The defendant afterwards filed an appeal to the Privy Council against the decree of the High Court. After admission of the appeal, he applied that the plaintiffs might be called upon to furnish security. *Held* that under s. 4, Regulation XVI of 1797, the application could not be entertained. **Joynarain Pattur v Russick Mohun Banerjee. B L R Sup Vol 744=8 W R 144.**

(4) Order for security to be furnished by respondent in Privy Council.

182—Order made after decree appealed against—Liability for mesne profits of persons giving security—Civil Procedure Code, s. 608-Revocation of surety—Contract Act (IX of 1872), s. 130-Construction of security bond.

The present plaintiff purchased land brought to sale in execution of a decree, and was put in possession. The sale was set aside by the High Court, and the purchaser was ousted. He preferred an appeal to the Privy Council, and the High Court directed that security be given for the mesne profits and the due delivery of the property without waste in the event of the appeal being successful. The present defendants furnished security, and executed a document under which the plaintiff, who had succeeded in the Privy Council, now sued to enforce his rights. It appeared that after the date of the instrument above mentioned, a payment was made from the income of the property in satisfaction of a decree obtained by the zamindar against the present plaintiff for arrears of poruppu previously accrued due. *Held* (1) that the order of the High Court requiring security to be furnished was not *ultra vires*, and that the instrument above mentioned was enforceable; (2)

Appeal to Privy Council-*Contd.*

3 Stay of execution pending appeal—*Contd.*

that the defendants, who had given no personal guarantee, were not competent to put an end to the security under the provisions of the Contract Act relating to revocation of a surety ; (3) that on the right construction of the instrument the period for the profits of which the defendants were chargeable was that between the date of the instrument and the date of the decision of the Privy Council ; (4) that the defendants should be credited with the amount paid in satisfaction of the decree for poruppu. **Narayanan Chetti v Arunachellam Chetti. 19 Mad 140.**

Notes—Fol: 33 Cal 927=3 C L J 67.

(5) Security by party in possession.

183—Mad. Reg. VIII of 1818.

After an appeal had been asserted from a decree of the Sudder Court at Madras, the appellant applied to that Court, under s. 4, Regulation VIII of 1818, and the Circular Order of the 21st September 1826, for an order calling on the respondents who had been in possession of the estates in dispute before the institution of the suit, to give security as prescribed by that Regulation. The Sudder Court refused the application as not being within the provisions of the Regulation. On petition, the Judicial Committee declined to interfere, as there was no allegation of waste by the respondents in the petition. *Quære*—Whether there was any jurisdiction in the Judicial Committee, under s. 4 of Madras Regulation VIII of 1818, to call for security from the respondent when put in possession. **Nagalutchmee Ummal v. Gopoo Nadaraja Chetty. 6 Moore's I A 309.**

(6) Procedure where decree-holder attempts to execute it.

184.—Procedure where decree-holder attempts to execute it.

Procedure where there is an order of Court to stay the execution of a decree obtained by a party who has appealed to the Privy Council from another decree against himself, if the holder of the decree which is appealed against attempts to execute it. **Dwarkanath Roy v Woomasoonduree Dasee. 14 W R 329.**

(7) Power of Civil Courts in mofussil.

185.—A Civil Court in the mofussil has no

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3 Stay of execution pending appeal—*Contd.*

power to stay execution in cases where an appeal has been made to the Privy Council against a decree of the High Court. **Muttealaummal v. Chellayammal 5 M H C 98.**

(8) Restoration of property pending appeal.

186.—The Court has power, under s. 608, Civil Procedure Code, to stay execution of a decree of the High Court in a suit subsequently appealed to Her Majesty in Council. *Quære*—Whether the Court has power to order restitution of possession of property already taken in execution of its own decrée pending an appeal to the Privy Council. **Ashanulla v. Karoonamoyi Chowdhry; Rohini Chowdhrani v Kishen Gobind Dass. 4 C L R 125.**

Notes.—Ref: 33 Cal 927=3 C L J 67=34 Cal 400.

(9) Security for performance of order to be made by Privy Council.

187—Security for performance of order to be made by Her Majesty in Council—Civil Procedure Code, 1882, s.608—Refusal of order staying execution where decree was not yet appealed to the Privy Council, but leave to appeal from interlocutory orders in execution granted—Intimation to Court below.

A party to a suit in an Appellate Court, who had obtained leave to appeal from its decree to Her Majesty in Council, petitioned for the order of the latter staying execution of interlocutory orders made in execution of such decree, and directing payment by the petition to the opposite party of large sums without security taken for their repayment in the event of the decree being reversed. This accompanied a petition for special leave to appeal against those orders. The latter was granted; but it not being competent to the Judicial Committee to make any order as to the stay of execution, an intimation was made by it to the Court below that it appeared to be the reasonable course that the opposite party should not, pending the appeal, be put into possession of the large sums in dispute. That intimation being made, the petitioner might apply to the Court below for the due security of all

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3 Stay of execution pending appeal—*Concld.*

money paid into the treasury in obedience to the decree. (10 M I A 322) (10 M I A 196), referred to.

Indar Kumari v. Jaipal Kumari. 14 Cal 290=14 I A 1.

4. EFFECT OF PRIVY COUNCIL DECREE OR ORDER.

(1) Effect of order of Privy Council dismissing suit on power of High Court to make Orders in suit.

186—Petition to amend the order in Council—Receiver's liability to account—Rights as between the Administrator-General and executors transferring estate to him and the petitioner interested in the estate—Act II of 1874, s. 31.

A Court appointing a receiver has powers incidental to its jurisdiction to order him to account, although the suit in which he was thus appointed may be no longer pending. The estate is in the hands of the Court, the receiver being its officer, and though the court of Appeal dismisses the suit, the state of things cannot change. The Court of first instance, in such cases may permit parties interested to intervene on questions as to the accounts, and may deal with costs and other matters. A plaintiff interested in the estate brought a suit on the alleged illegality of its transfer by the executors named in the will of a Hindu testator to the Administrator-General (Act II of 1874 S. 31) Decrees were in favour of the plaintiffs by the High Court in both its original and Appellate jurisdiction. The transfer was however held to be valid by the Judicial Committee and the suit brought against the Administrator-General and the executors as co-defendants, was dismissed. Held, on the plaintiff's petition for such modification of the order dismissing the suit as would maintain what had been ordered below relating to the accounts thereby enabling the High Court to bring matters in dispute to an end, that there were no grounds for the amendment. Their Lordships opened that the High Court would not be deprived of any jurisdiction in that respect by the dismissal of the suit. If it should be necessary to the carrying out of the transfer that the Administrator-General should take proceedings, he could do so. It was within its power to make orders upon the Court's receiver and either the receiver or the executor could be called to further account without the petitioner being met by the defence of prior adjudication of

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4 Effect of Privy Council decree or order—*Concld.*

the matter (s. 13 of the Code of Civil Procedure).

Prem Lall Mullick. Administrator General of Bengal v Premlall Mullick. 22 Cal 1011 =L R 22 I A 203

(2) Restoration of property alienated pending appeal to the Privy Council.

189—C. P. C. O. 45 r 15 (1882 S. 610). Execution of decree—Privy Council—Restoration of property alienated pending appeal to the Privy Council—Procedure.

Pending an appeal to His Majesty in Council certain property forming part of the subject-matter of the suit in which such appeal had been preferred was sold by auction in execution of a money decree against the plaintiff who held the decree of the High Court under appeal. The defendant's appeal to the Privy Council was decreed. *Held*, that the successful appellant was entitled to recover the property sold as above mentioned by means of an application under S. 244 read with S 610. C P C, and this right was not affected by the fact that the auction purchasers were not parties to the decree of the Privy Council. 29 All 447 foll; 19 All 136 and 20 All 136 distinguished.

Garurdhuj Prasad Singh v Baiju Mal 1906 A W N 43=28 All 337=3 A L J 110.

Appearance.

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(2) Civil Procedure Code (1908) O 9 rr 3, 98, 99 (1859 s. 110).

(3) Civil Procedure Code(1908) O 9 rr 8.9.

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1 GENERAL DUTY OF APPELLATE COURTS (1-25).

(1) High Court practice of.

1.—Appeal on questions of fact—Credibility of witnesses.

The High Court, sitting in appeal on questions of fact, was guided by the same rules as those of the Privy Council when they sat upon motions for a rule for new trials from the Supreme Court. The High Court, sitting in appeal, will not disturb a judgment upon a question as to the credibility of witnesses, unless it be manifestly clear, from the probabilities attached to certain circumstances in the case, that the Court was wrong in the conclusion drawn from such evidence. The High Court, sitting in appeal, will look upon the decree of a Judge as to facts in the same light as the verdict of a jury ; and, though some of the reasons given for the conclusion arrived at be erroneous, the High Court in appeal will not say that the Decree is against the weight of evidence, if sufficient reason for such decree still remain.

Heeralall Chuckerbutty v Mohesh Chundar Ghosaul.
1 Hyde 105.

See also:—"Special or Second Appeal."

1A.—S. 7, Cl, 3—Revocation of certificate by District Judge—Functions of appellate Court—Judicial discretion—Exercise by appellate Court—Error of law—High Court's power of interference—Revision—S 115, Civ. Pro. Code.

The functions and powers of a Court of appeal invested with plenary jurisdiction to decide a question which the Court of First Instance had to decide, is the same as those of the Court of First Instance itself.

Held, that the District Judge, who, in appeal, was not prepared to hold the will proved on the evidence on record, had power to exercise the discretion vested by S. 7, cl. (3), Succession Certificate Act, and to revoke the grant of the certificate, on the ground that the question was an intricate one.

Even if the District Judge had committed an error either of law or of fact in considering the question to be intricate, the High Court has no power to interfere with his order in revision under Section 115, Civ. Pro. Code, 1908.

Y. S. Ramakrishna Aiyar v Nagammal.
10 M L T 164.

Appellate Court *Contd.*

1 General duty of Appellate Courts-*Contd.*

(1A) Elements of appellate Court.

1B.—S. 109, cl. (a)—'Order passed on appeal'—'Final order'—Application to sue in *forma pauperis*—'Order of reversal'—Elements of appellate Court—Petition disclosing no cause of action.

An order passed by the High Court in the exercise of its revisional jurisdiction, reversing that of the Court of first instance allowing the applicant to sue in *forma pauperis*, is an order passed on appeal within the meaning of clause *(a)* of S. 109 of the Code of Civil Procedure, 1908.

Two essential elements are to be considered in deciding whether an order is passed on appeal within the meaning of clause *(a)* of S.109 of the Code, namely, (1) whether there exists the relation of superior and inferior Court ; and (2) whether there exists the power, on the part of the superior tribunal, to review, affirm, modify or reverse the decision of the inferior tribunal.

An order of the High Court based on the ground that the allegations in an application to sue in *forma pauperis* do not disclose any cause of action, is a 'final order' within the meaning of clause (a) of S. 109 of the Code.

The term 'final order' denotes an order which finally decides any matter directly at issue in the case in respect of the rights of the parties. If the order decides in effect finally the cardinal point in the suit, if it decides an issue which goes to the foundation of the suit and therefore is an order which could never, while the decision stands, be questioned again in the suit, it is a 'final order' within the meaning of S.109 of the Code, notwithstanding that there may be subordinate enquiries to be made.

Whether the character of finality can be rightly claimed in respect of an order, should be determined with reference to the precise relation in which it stands to the proceeding before the Court. (13 C L J 90, Fol.; 10 C L J 336, Fol.) **Harish Chandra Acharjee v. Nawab Bahadur of Moorshidabad.**
13 C L J 688.

Appellate Court-*Contd.*

1 General Duty of Appellate Courts-*Contd.*

(2) Privy Council practice of.

2.—Appeal on question of fact

The rule of the Privy Council not to disturb a judgment of a Court in India upon a question of fact, unless it is clear from the probabilities of the case that the judgment is wrong, however necessary as regards a Court of Appeal far removed from India, would hardly be extended as one equally necessary and applicable with the same strictness to a Court of Appeal in India.

Saroda Soondery v. Tincowry Nundy. 1 Hyde, 223.

See also cases under.
Privy Council (Practice).

(3) Question of fact, ground for disturbing finding on.

3.—*Held*, on examination of the evidence, that the lower Appellate Court ought not to have disturbed the distinct finding of the lower Court, as it had, upon what appeared to be mere conjecture. **Lal Mahomed Bipari v Shoila Bewa. 11 C L R 104.**

Notes:—Ap: 7 All 649 F B.

4.—When Appellate Court should reverse finding on facts.

Unless an Appellate Court can say that the finding of the Lower Court is entirely against the evidence, it should support that Court's finding.—P. R. (28 of 1873,). But in P. R. (7 of 1874,) the Chief Court *held*, that in regular appeal the Appellate Court is as much judge of the facts as the original Court, and is bound to give its judgment on the facts by reference to the recorded evidence independently of the decision of the Court of first instance : and that consequently it may reverse such decision, although there is no glaring mistake of the effect of the evidence in the Court below. **Heera Singh v. Sobha. P R 11 of 1870.**

(4) Jurisdiction where appeal is barred.

5-6.—When an appeal is barred by law an Appellate Court cannot interfere in any matter legitimately arising out of the case, unless there is want of jurisdiction. **Kurum Chund Koleeah v. Huree Mohun Ghose. 2 W R, Mis. 45.**

Appellate Court-*Contd.*

1 General Duty of Appellate Courts-*Contd*

(5) Presumption of correctness of judgment appealed from.

7.—Duty of Judge.

A Judge of appeal is not in the position of an arbitrator who has to look at the evidence on both sides and determine which is preferable. He has to deal with the decision of a properly constituted Court, which, if not shown to be erroneous, ought to be affirmed. **Shetabdee Biswas v. Molamdee Mundul. 25 W R 30.**

(5A) Contents of judgment in appeal.

7A.—Judgment in appeal—Contents of.

In disposing of an appeal, the lower Courts of appeal should record a judgment that must be in conformity with the provisions of S. 574 of the Civil Procedure Code, 1882, and must contain not only its decision on the points for determination but also its reasons for that decision. **Gundappa v. Lobosa. 1 Bom L R 490.**

7B.—Reversal of Judgment by the Appellate Court— Reasons for the decision.

A Court of appeal cannot reverse the judgment of the lower Court on mere suspicion of its incorrectness, without positively satisfying itself that the decision is wrong. **Govindan Nair v Cheruli Achan. 9 M L J 126.**

(5B) Dismissing appeal without recording judgment in the required manner.

8.—The Lower Appellate Court, without stating the points for determination and the decision thereupon, recorded its opinion that the case had been equitably decided by the first Court and dismissed the appeal. *Held*, that the judgment did not confirm to the provisions of Act VIII of 1859, Section 359. **Malik Oujal Khan v Sultan Mahomed P R 49 of 1873.**

(6) Presumption as to facts found by lower Court.

9.—The Subordinate Judge found certain facts proved, but, finding the gift relied on by plaintiff not proved, rejected his claim.

In appeal the Assistant Judge, considering

Appellate Court-*Contd.*

1 General Duty of Appellate Courts-*Contd*

that defendants were bound by the former finding, drew the conclusion from those facts that the gift was proved. *Held* that, as the decree was in their favour, defendants were not bound to appeal, and that the Assistant Judge ought to have dealt with the evidence himself.

Bhagoji v Bapuji. **P J (1888) 80 = 13 Bom 75.**

Notes:—Ref: 5 Bom L R 956; 973; 6 Bom L R 983.

(7) Credibility of witnesses.

10—In cases turning on the credibility of witnesses, the Appellate Court gives great weight to the decision of the Courts below. **Womesh Chunder Roy v Deendayal Poramanick 2 Hay 12.**

10A.—Judgment upon finding of facts.

An appellate Court should, in every case take into consideration the advantage the Court of first instance has had in seeing the witnesses and observing their manner of giving evidence, but it is bound to exercise its own judgment upon the evidence. (L B R 1872—1892, 314 and 418, Ref.)

N L C N Chakappa Chetty v Maung Shwe Pa. L B R 1893-1900, 64.

11.—Where credit has been given to witnesses by the Court of first instance before which they have been examined, the Appellate Court is not at liberty to say that it disbelieves them without stating reasons. **Hoymo Dassee v. Sreekissen Nundy. 14 W R 58.**

12.—Dealing with documentary evidence.

Where a Munsif pronounces an opinion as to the authenticity of certain documents, the lower Appellate Court must assume that he did his duty and looked into each and every one of them before pronouncing such opinion. On a question of simple credit to be given to a witness, an Appellate Court, having before it merely written depositions, is not authorised to set aside the opinion of the Court of first instance which heard the witness and recorded that his demeanour was not satisfactory. **Gopee Nath Mookerjee v. Boddhumunt Mal. 25 W R 26.**

See Nobin Chunder Pooshalee v Rungo Chunder Chatterjee. 25 W R 363.

Appellate Court-*Contd.*

1 General Duty of Appellate Courts-*Contd.*

(8) Method of dealing with questions of fact in appeal.

13.—In dealing with questions of fact which turn entirely upon evidence given on the trial, the High Court ought not merely to consider whether the lower Court has come to the same conclusion as that to which it should have come if it had originally heard the witnesses, but, before reversing the decision, it ought to be satisfied that the Court was clearly wrong.

Octum v. Mullick Gholam Hossein. 2 Hay 359.

(9) Point taken in appeal but not argued by pleader.

14.—Where a point is taken on appeal, the Appellate Court should consider and decide it, although the vakil may omit to argue it.

Dada Valad Valli v. Bavasha Valad Kasam 6 B H C 9.

Notes:—Ref: 6 Bom 371.

(10) Duty of Judge to hear comments on evidence.

15.—It is the duty of the Judge of an Appellate Court to allow the parties or their pleaders to submit the evidence to him at the hearing in open Court, and to make upon the evidence so submitted every comment, and found upon it every argument they may think necessary.

Lalla Juggeshur Sahoy v Gopal Lall, 15 W R 54.

15A.—C P C O 41, rr 31, 11 (1882 Ss. 574, 551) —Procedure—Appeal summarily dismissed-Court not bound to record a full judgment. *Held*, that the provisions of S. 574, C.P.C. are not applicable in their entirety to the case of an appeal dismissed under S.551 of the Code. 25 Cal 97. diss. from.

Samin Hasan v Piran. 1908 A W N 115 = 5 A L J 300 = 30 All 319.

15B.—C P C O XLV, r 11—Appeal Court—Dismissal of Appeal.

It is obligatory on the appellate Court to write a judgment when dismissing an appeal under O. XLV, r. 11 of the Code.

Tanaji Dagde v. Shankar Sakharam. 13 Bom L R 1002.

Appellate Court–*Contd.*

1 General Duty of Appellate Courts–*Contd.*

(11) Duty of Appellate Court to direct examination of witnesses before reversing decree.

16.—In this case the Munsif examined four of the defendant's witnesses and released the others as unnecessary. He dismissed the plaintiff's claim. In appeal the Subordinate Judge disbelieving these witnesses reversed the judgment of the lower Court and gave the plaintiffs a decree. *Held* that the Subordinate before reversing the judgment of the lower Court should have caused the other witnesses to be examined. The case must have been regarded as one in which the Court had refused to examine the witnesses tendered by the party. **Khuda Bakhsh v Imam Ali Shah 7 W N 61=9 All 339**

Notes:—Fol 22 *Bom* 253.

(11A) Functions of Appellate Court.

17.—Appellate Court—Functions of—No appeal by plaintiff against dismissal of suit against one defendant—Appeal by another defendant against whom decree was passed:—

The plaintiff having obtained a decree against one of two defendants acquiesced in that decree, but the defendant judgment-debtor appealed, making the other defendant also a party to his appeal, with the result that the plaintiff's suit was dismissed. *Held*, that it was not open to the plaintiff in second appeal to contend that the Court below should have made a decree against that defendant with regard to whom he had acquiesced in the dismissal of his suit.

Lohre v Deo Hans 1908 A W N 4=30 All 48.

(12) Duty of Appellate Court to call the remaining witnesses before reversing the decree of first Court.

18.—Dismissal of case in first Court without hearing all the witnesses.—

The Subordinate Judge, having heard all the witnesses for the plaintiff and some of the witnesses for the defendant, intimated that he did not consider it necessary for the defendant to call any more evidence. He then dismissed the suit. On appeal by the plaintiff, the Judge, upon the recorded evidence, reversed the decree, and allowed the plaintiff's claim. The defendant appealed

Appellate Court–*Contd.*

1 General Duty of Appellate Courts–*Contd.*

to the High Court, contending that the lower Court ought not to have found against him without allowing him an opportunity to call the witnesses whose evidence had been dispensed with by the Subordinate Judge, *Held* (reversing the decree of the lower Appellate Court and remanding the case) that the lower Appellate Court ought not to have reversed the decree of the first Court without allowing the defendant to give the evidence which the first Court declined to take.

Arjun Ramchandra Shetkarpe v Shankar Vishram Shenvi Ghuraye 22 Bom 253.

18A.—Necessity for first appellate Court to examine grounds stated by first Court:—

A mere general and sweeping statement of opinion is not a sufficient disposal of an appeal pending before a Court of first appeal. It is the duty of the Court to deal with the matter of examining the grounds stated by the first Court, and, if it differed in its conclusion, showing that those grounds were not supported by evidence or that they were insufficient in themselves, or that they were overbalanced by other considerations arising out of the proved or admitted circumstances of the case. Ref: 2 N L R 87.

Raja Seth Gokuldas v Mt Jankee 9 C P L R 142.

19.—Duty of,—Event happening after the passing of order.

A Court of appeal is not only competent, but may, under certain circumstances, be bound to take cognizance of an event which has happened since the order questioned on appeal, was passed by the Subordinate Court. 27 Cal 810 Dist; 31 Cal 499 Ref; **Hazari Mull v Janaki Prosad 6 C L J 92.**

Notes:—Fol; 6 C L J 602, 6 C L J 102.

20—A and B were two rival pre-emptors. A's suit was dismissed on the sole ground that it was barred by s 13 Civil, Procedure Code. He preferred an appeal to the lower appellate Court In the meantime *B*'s suit was decreed and it was declared that he had a preferential right to A. The lower appellate Court therefore dismissed the appeal on the ground that B having a preferential right nothing remained of the appeal to be decided. *Held* that the lower appellate Court was wrong. It should have given an alternative de-

Appellate Court-*Contd.*

1 General Duty of Appellate Courts-*Contd.*

cree. W N 1884 p 119 referred to. **Lekhraj Singh v Sripal Diat** **5 W N 329.**

21.—Decree dismissing a suit, when can be set aside by.

A decree dismissing a suit should not be set aside, unless the Court of appeal is in a position to decree the plaintiff's claim in whole or in part or to direct the lower Court to take action of some kind. **Kaung Hla v Ka Ti** **5 L B R 11= 1 Ind Cas 357.**

22.—Appellate Court, duty of, in framing decree:—

Appellate Courts should so frame their decree, while affirming the decree of the lower Court, as to leave no doubt as to whether it is intended to extend the time granted by the original decree for fulfilling the conditions precedent, imposed by the original decree 11 All 316, 11 Bom 172, 13 Cal 13, 15 Mad 170, 25 Cal 311, 18 All 294, 15 Bom 370, 23 All 152 Ref. **Ramasamy Kone v Sundra Kone** **17 M L J 495.**

23.—Decision on all issues of fact. Where a case is thoroughly investigated by the first Court, it is the duty of the lower Appellate Court to decide all relevant issues of fact, so that the High Court in second appeal may have before it materials which will enable it to dispose of the case without a remand. **Dasappa v Subhannacharya** **6 Bom L R 726**

24.—Dismissal of appeal without calling for record:—

The Appellate Court is not bound to look at the files of the case before dismissing an appeal without notice to the respondent, under S 7, Act IX of 1873. **Ram Dass v Lachman Dass** **P R 48 of 1876.**

24A.—C P C Act X of 1877, Sections 551, 574-Duty of Appellate Court.—

An Appellate Court is bound in a case disposed of under Section 551 of the Civil Procedure Code, as in other cases, to pass a judgment determining the questions raised by the appeal, and stating its reasons for the conclusions arrived at, in accordance with Section 574 of the same Code. (P R 100 of 1879,) followed. **Badruddin v Fatteh Muhammad** **P R 24 of 1881.**

Appellate Court-*Contd.*

1 General Duty of Appellate Courts-*Contd.*

24B.—Court should raise proper issues.

The lower Courts of appeal should always raise points for determination, as required by the Civil Procedure Code, in every appeal before it is argued, because they narrow the points in controversy and leave little or no room for complaint in second appeal. **Govind Dattu v Yesuji Khandoji** **10 Bom L R 492.**

24C.—Defective Judgment of Appellate Court Act X of 1877 S 574—Duty of Appellate Court to give reasons for its finding.

Where the lower Appellate Court, after disposing of the plea of want of jurisdiction on the part of the first Court, raised in the first ground of appeal to his Court, merely remarked "that it appears from the judgment of the lower Court that plaintiffs had a superior right to the defendants to succeed to the land in dispute, and that the lower Court having recorded judgment after conducting enquiry, he saw no reason to interfere with the order of that Court" and it appeared from the appeal filed in the lower Appellate court that the appellant attacked the judgment of the first Court as not having disposed of certain points which were urged by him in his original plea and which raised questions of fact upon the determination of which the rights of the parties depended, which points were passed over by the lower Appellate Court without the slightest discussion in his judgment, *held*, that the said judgment, did not fulfil the requirements of s 574 of the Civil Procrdure Code.

It is incumbent upon a first appeal for the presiding Judge to give his own reasons for arriving at the conclusion he does, and it is not sufficient to record what the first Court has found and to add in a general way that the Court sees no reason to differ from that finding.

Man Singh v Bhup Singh **P R 91 of 1882**

See to the same effect **Pir Wali Shah v Sultan.** **P R 91 of 1882.**

Notes:—Ref 23 P R 1886.

24D.—Findings on all issues.

As a general rule it is desirable for the lower Appellate Court to find on all material issues of fact rather than to dispose of the case on some point of law. For, the High Court in second appeal cannot deal with the facts, an omission often

Appellate Court-*Contd.*

1 General Duty of Appellate Courts-*Contd.*

leads to a needless prolongation of the litigation by its becoming necessary to remand the suit for further findings when the High Court takes a different view of the point of law on which the case has been decided in the lower appellate Court. **Apaji v. Nilkantha. 3 Bom L R 667.**

Notes:—Not Fol: 35 Cal 683=12 C W N 628; Diss: 9 C L J 1.

24E—Issues — Court should raise issues in appeal.—

The Courts should in appeal raise points for determination which will clear up the pleadings and *focus* the attention of the Court and of the parties on the specific and rival contention of the latter. **Mahsuf v Davlat 7 Bom L R 174.**

25—Section 359, Civil Procedure Code- Quaery.

Whether the Chief Court will necessarily set aside a Judgment defective under Section *359*, Civil Procedure Code; but the Court will do so where it is not satisfied that the Commissioner considered the case with sufficient care.—**Jey Gobind v Ram Pershad P R 6 of 1870.**

(13) Duty of Appellate Court to hear arguments on grounds not taken in lower Appellate Court.

25 A—S 162—Guardian and minor—Compromise of suit by guardian ad litem—Sanction of Court not given—Suit by minor impeaching compromise—Voidable transaction—Burden of proof —Further Appeal—Ground not urged in the Lower Appellate Court.

The Chief Court should not refuse to hear arguments as to a ground not taken in the Lower Appellate Court when to pass it over would not be inequitable.

The guardian *ad litem* of minor defendants, who was their mother, compromised the suit on their behalf without obtaining sanction of the Court. In execution proceedings another compromise was made and sanction of Court was not obtained. Houses belonging to the minors were sold in execution of decree, and the auction purchasers sold them to a certain person who sold one of them to another person. The transferees acted in good faith.

The plaintiffs, minors, brought the present

Appellate Court-*Contd.*

1 General Duty of Appellate Courts-*Contd.*

suit for recovery of the houses, on the ground that the compromise was not valid and the decree was a nullity and incapable of execution. The Court granted a decree on the ground that,sanction of the Court not having been obtained, the plaintiffs were not bound by the decree.

Held, that want of such sanction only rendered the decree voidable at the instance of the minors, but they could only avoid it in case of its being found that their interests were prejudiced by the compromise. The Chief Court remanded the case for re-decision after enquiry into the issue as to whether the compromise was not for the benefit of the minors.

The burden of proof was placed on the plaintiffs, as they sought relief from the Courts, and it was for them to show that in equity they were entitled to relief and because *prima facie* there was no reason to suppose that the mother was in collusion with the former plaintiff, or had any reason to admit a claim which was not really due or in any way to act prejudicially to her son's interests. (3 C W N 375, 20 All 98; 3o Mad 295; 8 C L J 31; 3 P R 1905=87 P L R 1905; 25 Bom 337; 37 P R 1895; 17 P R *1899*, 28 All 585 (PC) Ref. **Dalo Mal v Sundar 134 P L R 1911**

25 B—Appeal on merits—Duty of appellate Court to form judgment on facts and give reasons.

When the Legislature gives an appeal on the merits of a case, it is the duty of the appellate Court to form its own judgment upon the facts and to give its own reasons for its findings. The addition of a new maker to joint and several promissory note, after taking issue, is a material alteration which makes it void. **U. Pa v Mya Myaing L B R 1893-1900, 343 (8 E & B 83 Eol)**

(14) Duty of appellate Court to extend time for payment of purchase-money.

25C—Suit for pre-emption-Appeal by purchaser for enhancement of purchase money—Duty of-to extend time for payment of purchase money when confirming decree of first Court-See Pre-emption purchase money. **48 P R 1906 F B=104 P L R 1906.**

Appellate Court-*Contd.*

1 General Duty of Appellate Courts-*Contd.*

(15) Duty of inferior Court to await decision of Superior Court in analogous cases.

25D—S.115 (1882 s. 622)—Charter Act s.15—Analogous appeals in superior and inferior Courts—Duty of inferior Court to await decision of Superior Court.—

The High Court has powers either under s. 622 Civ P C, or if not, under s. 15 of the Charter Act to interfere in cases where the lower Courts have not acted correctly in accordance with law.

Where a plaintiff failed to secure the production of an important document from the records of another Court though he took all reasonable steps for that purpose and the suit was disposed of by both the Courts of first instance and the Appellate Court without reference to that document the High Court in revision set aside the judgments of both the Courts.

When appeals preferred in analogous cases are pending some in an inferior and others in a superior Appellate Court, the inferior Court of Appeal would exercise a wise discretion to await the decision of the Superior Appellate Court. **Mohant Gobind Ramanuja Das v Lakhun Parida 11 C W N 112=8 C L J 43.**

(16) Remanding case for giving plaintiff an opportunity of producing his evidence.

25 E—Practice—First Court stopping plaintiff's evidence-Appellate Court Procedure of—When it thinks evidence insufficient-Remand. A Munsif treating a case as undefended stopped the plaintiff from producing all the available evidence.

The Judge in appeal treating the evidence as insufficient dismissed the suit. *Held*, that the proper course was to remand the case to the first court, in order that it may give the plaintiff an opportunity of producing his evidence. (A W N 1905 p 266 fol) **Pabitra Kunwar v Maharaja of Benares 5 A L J 468=A W N (1908) 140=30 All 367.**

Appellate Court—Functions of-Plaint, Defective prayer in—Substantial justice See—

8 C W N 489=14 M L J 196=31 Cal 614 P C.

Appellate Court—Exercise of powers in various cases special cases-appeal. See Court fees Act s. 28.

Appellate Court-*Contd.*

1 General Duty of Appellate Courts-*Concld.*

2 EXERCISE OF POWERS IN VARIOUS CASES.

(a) General Cases.

(1) Discretion, exercise of

26—Discretion capriciously exercised—Error of law.—

The discretion vested in a Court of Justice must be exercised in a sound and reasonable manner, and a capricious and unreasonable exercise of discretion on the part of a Court of first instance is an error in law which it is the duty of an Appellate Court to correct. **Pendse v Malse. 3 B H C 94**

Notes—Dist 10 B H C R 405; Ref 6 Bom 304.

27—Power of Court to dispense with.—

An appellate Court cannot dispense with the presentation of a copy of the decree appealed against in connection with a memorandum of appeal. Where therefore no such copy of the decree is presented within the period of limitation prescribed for the appeal, the appeal will be barred. **Gulab Devi v Shankar Lal 12 W N 47**

28—A District Judge having refused to restore to the file an appeal dismissed in the absence of the Appellant's pleader, held that on appeal to the High Court, this Court is bound to weigh the facts and arrive at its own independent conclusion. **Kirani Ahmadulla Saheb v Subhabhat P J (1883) 345=8 Bom 28.**

Notes—Ref 19 Bom 790

29—Interference with discretion exercised by lower Court.

Courts of appeal should not lightly interfere with a discretion deliberately exercised by a lower Court. **Ramchandra v Balmukund 6 Bom L R 780=29 Bom 71.**

30—Functions of—Interference with exercise of discretion by lower Court.

An appellate Court ought to be extremely chary of interfering in matters dependent upon the exercise of the judicial discretion of the Court

Appellate Court-*Contd.*

2 Exercise of powers in various cases-*Contd*

below but it can interfere, and sometimes has to interfere, if it thinks the facts warrant such interference. **Mussamat Birj Coomaree v Ramrick Dass 5 C W N 781**

Notes.—Ref: 29 Cal 286; 6 C L J 298 F B; 11 C W N 1030 F B; 8 C W N 572; 31 Cal 722 F B; 9 C W N 123; 3 C L J 29; 34 Cal 1037 F B Dist: 31 Cal 1084; 9 C W N 133; 33 Cal 1323=10 C W N 986; Fol. 33 Cal 927=3 C L J 67.

31—The power given in Section 7 Act IX of 1873, of confirming a decision upon the perusal of the judgment appealed against and the memorandum of appeal, and hearing the appellant is one which should be sparingly and cautiously exercised, especially in cases where interests in land are concerned But the exercise of the discretion otherwise than in accordance with these views, is not an error which can be corrected by the Chief Court in special appeal. **Ahmed Khan v Behram P R 91 of 1877.**

32—Costs—Miscarriage or mistake.

An Appellate Court will not interfere with the discretion of a lower Court as to costs, unless satisfied that there has been some miscarriage or mistake. **Luchmun Ram Unoj v Watson W R 1864. 146**

Desaji Lakhmaji v Bhavanidas Norotamdas 8 B H C 100

Keshavram Krishna Joshi v Bhavanji bin Babaji 8 B H C 142

Kappusvamiayyan v. Nannuvayyan I M H C R 74

33—Functions of—Damages suit for-Measure—Interference with discretion of lower Court.

It is not usual for appellate Courts to interfere in a suit for damages with the discretion of the lower Court regarding the amount of damages, especially when no question of principle is involved. **Corporation of Calcutta v Shyama Charan Pal 9 C W N 217=32 Cal 277**

34—Costs—Action on contract—Verdict for less than Rs. 1,000-Certificate under Act XXVI of 1864 s. 9.

Where, in an action in the High Court founded on contract a verdict was found for the plaintiff for a sum less than Rs. 1,000, and the Judge who tried the case awarded costs without certifying under s.9 Act XXVI of 1864, that the action was fit to be brought in the High Court,—*Held* that the Court might supply the omission on appeal. **Nobocoomar Dass v. Kewata Mug 10 B L R 358**

Kewata Mug v. Nobocoomar Doss 19 W R 207.

Appellate Court-*Contd.*

2 Exercise of Powers in various cases-*Contd*

35—Where Appellate Court has exercised its discretion in a reasonable manner in refusing to admit an appeal presented after the ordinary period of limitation, the High Court would not interfere with the order. **Rauchodji Jivanji v. Lalu Haribhai. P J (1882) 102=6 Bom 304**

Notes.—Ref 23 Bom 513, 31 Bom 33; 8 Bom L R 858.

(1 A) Reversing findings based on pre-possessions and preconceived theories.

35 A—Will—Probate—Court of first instance—Evidence of witnesses—Findings of that Court—Based on prepossessions and preconceived theories—Appellate Court's duty—Onus of proof of will and testamentary capacity—Duty of person propounding will to discharge such onus.

Where, in a particular case, the questions at issue depend entirely on the proper appreciation of evidence of the witnesses examined in the case, it is an obvious duty of the appellate tribunal not to disturb the conclusion of the Court of trial, unless it is satisfied that the Judge of first instance, who had the witnesses before him, has, in dealing with the evidence, adopted an erroneous procedure and has decided against clear weight of evidence.

But where the Court of first instance approached the evidence in support of a will with strong prepossessions against its authenticity based on what he considers to be suspicious circumstances connected with its appearance and the tenor of its contents, and rejected that evidence mainly on certain preconceived theories of his own as regards the credibility of witnesses belonging to a certain class, and had also shown himself too prone to listen to reckless charges and insinuations of corruption.

Appellate Court-*Contd.*

2 Exercise of Powers in various cases-*Contd*

Held, that ahe procedure of the Judge at the trial was wrong and that, in the circumstances, the appellate Court should not attach much weight to his opinion of the evidence in the case.

The *onus* is on the person propounding the will to satisfy the Court as to its authenticity and validity. The evidence must be sufficient and reliable to prove that the document is the last will and testament of the deceased, and that, at the time he made it, was possessed of testamentary capacity, or in other words, was of sound disposing mind. **S R M Rama Sami Chetti alias Chinniah Chetty v Karuthalachi 11 M L T 38.**

(1-B) Refusal to admit plea of limitation

36—Limitation.

Limitation is a matter of jurisdiction and the defence that the remedy is barred by lapse of time may be taken at any stage. But to establish this bar defendant cannot ordinarily bring forward in appeal new facts which are not already disclosed on the record. Accordingly, if the defendant, instead of proving that the period of limitation has been exceeded, submits the case to arbitration, he must be held to have voluntarily prevented the question of limitation from being raised when the fact does not appear on the record and it cannot be raised by the suggestion of facts not already disclosed. **Gopai Dass v. Ruthee Ram P R 92 of 1867**

Notes—See also (P R 32 of 1872). But *held* per Smith J in (P R 59 of *1878*) that the plea of limitation is not a question of jurisdiction within the meaning of S. 622, Act X of 1877.

(2) Question of Limitation.

37—C P C Order 41, r.33-Scope of—Dismissal of claim without objection by defendant in respect of portion decreed.

The words of Order 41, rule 33 of the Code are very wide, but care and judicial discretion must be used by the appellate Court in the exercise of the powers conferred by the rule. In a proper case the Court, of course, is quite entitled and should not hesitate to exercise them. It is not easy, nor perhaps expedient, to lay down any hard and fast rule. One principle, however, may be safely stated;

Appellate Court-*Contd.*

2 Exercise of Powers in various cases-*Contd*

the Courts in the exercise of powers conferred by Order 41, rule 33, should not lose sight of the other provisions of the Code itself, nor of the Court Fees Act nor of the Law of limitation. In particular they should bear in mind the case stated by way of illustration at the foot of the rule.

In a case in which there is no sufficient reason for a respondent neglecting either to appeal or to file objections under Order 41, rule 22, against that portion of decree which is against him, the Court should hesitate before allowing him to object at the hearing of the appeal filed by the appellant. The object of rule 33 is manifestly to enable the Court to do complete justice between the parties to the appeal—where for example it is essential in order to grant relief to an appellant that some relief should at the same time be granted to the respondent also, the Court may grant relief to the respondent, although he has not filed an appeal or preferred an objection Of such cases the illustration to the rule is a type.

Hence where a plaintiff sued the defendant for rent of a holding and claimed Rs. 294-7-0 and the defendant pleaded that the claims had been discharged but the Assistant Collector gave the plaintiff a decree for Rs. 96-11 11, and the plaintiff appealed against the decree in so far as it dismissed his claim, and the defendant neither filed a cross-appeal, nor objections as provided by Order 41, rule 22 of the Code and the District Judge, on return of findings on certain issues remitted by him to the Assistant Collector, dismissed by him to the Assistant Collector, dismissed the claim of the plaintff *in toto* held by the Full Bench, the dismissal by the Judge of the plaintiff's suit in its entirety was not a proper exercise by him of the powers conferred by Order 41, Rule 33. (1901) L. R 11 Ch. Div. 671, Ref.

Rangam Lal v Jhandu 8 A L J 1111 (F B).

37A—S. 154 and O. XLI, r 33-appellate Court power of —Making decree in favour of party not made party in lower Appellate Court—Right of appeal, saving of, when new Code came into force —Pending cases—Procedure.

Under rule 33 of Order XLI of the C. P. C., 1908, the High Court is competent to make a decree in favour of a party in a second appeal, although such party was not made a party in the appeal before the lower Appellate Court.

Appellate Court-*Contd.*

2 Exercise of Powers in various cases-*Contd*

When the new C. P. C. came into force, it applied, so far as procedure is concerned, to all cases which were then pending or to be instituted.

S. 154 of the Code means that nothing shall *prejudicially* affect any present right of appeal. It can have no bearing on the powers of an Appellate Court in dealing with appeals before it.

Abdul Aziz v Shaikh Momin 9 Ind Cas 815.

37B.—Appeal.—B sued M and T for money due on a bond, and on the 27th April 1877 obained a decree against T, the suit against M being dismissed T applied for a review of judgment, and B also made a similar application. On the 25th May 1877 T's application was granted, and on the 16th July 1877 B's was rejected On the 29th June 1878, the Court re-heard the suit against T, and dismissed it. B appealed, making T and M respondents,and impugning in his memorandum of appeal the decree of the 27th April 1877 as well as that of the 29th June 1878. The Appellate Court, assuming that the appeal was one from the decree of the 27th April 1877, preferred beyond time, admitted it after time, and after hearing the case on its merits, gave a decree against M, and dismissed the suit as regards T. *Held* that the Appellate Court erred in assuming that the appeal was from the decree of the 27th April 1877, and that it was at liberty to admit it beyond time, the appeal being from the decree of the 29th June 1878, that decree being the one which had brought B before that Court as an appellant ; and that the appellate Court was not competent, on an appeal from the decree of the 29th June 1878,to re-consider the merits of the case against M, the appeal from the decree of the 27th April 1877 being barred by limitation, and that decree and the decree of the 29th June 1878 being separate and distinct, and not appealable in one memorandum of appeal from the latter decree.

Moti Bibi v Bikanu. 2 All 772.

38.—Plaintiff sued defendant upon an account stated, and the matter was referred under the Procedure Code to arbitration. The arbitrators made an award in favour of plaintiff, which was followed by decree in the original Court The Lower appellate Court set aside the award and dismissed the suit as being barred by limitation. *Held*, that the parties having referred the whole matter with the question of limitation to arbitration, and no objection on the ground of limitation being apparent on the face of the award, the decree following the award was final.

Shama v Azim P R 2 of 1875.

(3) Power to go into question of limitation.

39.—Section 566.—If there is no appeal as to part of a claim, the appeal Court cannot go into the question of limitation in respect of it.

Shirekali v Sanna. 1892 P J 8.

(4) Allowing plea of limitation raised at a late stage.

40.—C P C O 41, r 2 ; S 100 (1882 Ss 542, 584) Limitation Act S 4—Special Bench—Jurisdiction —Full Bench decision other than that referred for consideration, if binding——Limitation, plea of, not set out in memorandum of appeal from apellate decree—Appellate Court, if bound to entertain plea—Discretion—Civil.

The Special Bench gave effect to the plea of limitation, although it was never raised in either of the Courts below, nor even in the memorandum of appeal to the High Court, and was taken for the first time before the Special Bench, the majority being of opinion that the point arose on the face of the plaint, and there was no question of fact to be enquired into to enable the Court to dispose of it.

Held, by the majority, that the provisions of Sec. 4 of the Limitation Act are mandatory and ought to be given effect to, even though the point of limitation is taken at a late stage of the case in the Court of second appeal.

Per Woodroffe, J.—S 4 of the Limitation Act is controlled by the provisions of S 542 of the C P C. The illustrations to S 4 cannot affect the precise provisions of the other statutes. It is therefore in the discretion of the appellate Court to allow or disallow a plea of Limitation not set out in the grounds of appeal.

Per Mookerjee J.—Sec 542 of the C P C does not control and is not controlled by the provisions of sec 4 of the Limitation Act. An appellant is not entitled, without the leave of the Court, to urge or be heard in support of a ground

Appellate Court-*Contd.*

2 Exercise of Powers in various cases-*Contd*

of limitation not set out in his memorandum of appeal. When the bar of limitation is patent on the face of the proceedings, and does not need to be developed by a fresh investigation into evidence, the Appellate Court may grant such leave. In such circumstances, it may, also, of its own motion, consider such a ground and rest its decision thereon, provided the opposite party has been given an opportunity to be heard on the point. (14 Cal 730 Appl. (20 Cal 93, Ref : 11 C W N 956, Ref). **Bala Ram v Mangta Das.**

11 C W N 959 (F B)=6 C L J 237=34 Cal 941.

Notes:—Ref: 7 C L J 152.

(5) Questioning discretion to excuse delay in presenting appeal.

41 —Sec. 5—Delay in appeal—Dismissal of Curnam —Suit—Reference to Revenue Court—Proceedings in Revenue Courts—Appeal—Delay —Discretion to excuse——Duty of Appellate Court.—

A zemindari kurnam, dismissed by the zemindar in 1893, applied for redress to the Revenue authorities in 1894. Having been referred to a civil suit, he filed this suit for a declaration of his right to the office and for recovery of its emoluments in the Distrdict Munsif's Court of Satur. On January 29th, 1898, the Munsif dismissed the suit as he was of opinion that Act II of 1894 ousted the jurisdiction of Civil Courts. The plaintiff obained a copy of the judgment on February 18th, and moved the Deputy Collector on March 5th. The petition having been rejected on June 13, he appealed to the Collector on July 25, copy of the order rejecting his petition having been furnished to him on the 14th. This appeal was rejected on the 25th November. A copy of this order he obtained on December 7, and the records were returned to him on the 28th. Now he preferred an appeal to the District Court against the order of the Munsif, dated Janury 29, 1898, on the 4th January 1899. The Subordinate Judge of Tinevelly who heard the appeal excused the delay on the ground that the appellant was misled by the District Munsif and had lost time by trying to follow his advice. But he did not consider the delay between November 25, 1898, and January 4, 1899, in filing the appeal. *Held*, by Benson and

Appellate Court-*Contd.*

2 Exercise of Powers in various cases- *Contd*

Boddam JJ, that the suit being one for satisfaction of wrongful dismissal under S 11 of Regulation XXV of 1802, was triable by a District Munsif and not by a Subordinate Judge. S 7 of Regulation XXIX of 1802 has no application to such a suit. 23 Mad 340 distinguished. Per Benson J.—Act II of of 1894 was not applicable to such a suit as the same came into force only in 1897 as regards this zemindari. *Held*, by the Court (Benson J, dissenting) that the delay was inexcusable and the appeal was barred by limitation. An appellate tribunal should not interfere with the discretion of the lower Court where it has been exercised judicially after a consideration of all the facts. But where, as in this case facts having a material bearing on the exercise of a discretion have not been considered, the exercise of discretion is judicially unsound and should be corrected.

Ramasami Kichilappa Naick v Ramanujam Pillai. 25 Mad 166.

(6) Power of Appellate Court to pass decree against defendant where plaintiff does not appeal.

42.—Appellate Court—Powers of—Suit dismissed against one of two defendants—To make a decree against him upon appeal by the other defendant where plaintiff does not appeal.

When a suit has been dismissed against one of two defendants by the Court of first instance and the defeated plaintiff has not appealed against that part of the decree, the addition of the defendant against whom the suit has been dismissed to the array of parties does not in an appeal by the defendant against whom the decree has been passed, empower the appellate Court to pass against him a decree which the Court of first instance declined to pass, and in the decision of which Court the plaintiff chose to acquiesce (2 All 487), (5 All 266), followed. (8 C W N 466, F B), not followed, **Farzan Ali Khan v. Bismillah Begam. 27 All 23=24 W N 155=1 A L J 358.**

Notes:—Fol: 4 A L J 472=30 All 48=A W N (1908) 4=3 M L T 176; Ref: 3 N L R 85; 12 O C 260.

43 —An Appellate Court can *ipso motu* raise the question of limitation for the first time, where it appears on the face of the plaint that the suit

Appellate Court-*Contd.*

2 Exercise of Powers in various cases *Contd*

is barred Mozaffur Ally v. Girish Chandra Das. 1 B L R A C 25=10 W R 71

(7) Limits of Appellate Court's power of remand

44 – Civil Procedure Code (Act XIV of 1882). S 562–Remand–Limits of Appellate Court's power of remand.

To justify a remand by an Appellate Court under Section 562 of the Civil Procedure Code, it is necessary that the lower Court should have decided the case on a preliminary point, and not on the merits, and the exclusion of evidence of fact would not be enough of itself to justify a remand under this section unless the point decided was preliminary to a trial of the case on the merits

Muhammad v Fatteh Muhammad P R 46 of 1885,

(8) Competency of appellate Court to hear objections filed after time

45.—A Court of appeal is not competent to deal with matters raised in a memorandum of objection filed by a respondent after the time prescribed by s 561 of the Code of Civil Procedure for filing such objections has expired.

Lekhraj v Hamid Khan. 14 W N 2

(9) Putting novel construction on a lease

46 —Where the Judge put a construction on a lease which was not put on it by the defendant either in his written statement or in the issues, nor even in his objections on appeal after decision of the Sub-Judge, *held*, that he was not justified in doing so. Rangrav v Mallapa 1890 P J 68

(10) Passing decree against a defendant on appeal by another defendant

47 —Appellate Court powers of dismissal against 2nd defendant no appeal therefrom by the —plaintiff—Decree passed against 1st defendant on the appeal by 2nd defendant.

It is wrong to pass a decree in appeal against a defendant on an appeal by another defendant when the plaintiff preferred no appeal or memorandum of objections. 28 Mad 229 Ref Hari Kameyya v Ayyagari Somayya. 8 M L T 221

Appellate Court-*Contd.*

2 Exercise of Powers in various cases-*Contd*

(11) Power of Appellate Court to grant stay of execution.

48 —Stay of execution—Appeal—Contempt of Court.

A party against whom a decree has been made which specifies a time for its performance is not, merely by reason of his failure to carry out the orders of the Court, guilty of such contempt so as to disentitle him to protection from the Appellate Court If the appeal is lodged with diligence and application is made for stay of execution, and it is proved that material injury is likely to result from execution of the decree, the appellate Court will grant stay on terms though the party may be constructively guilty of contempt of Court Dharmapal v. Mohunt Krista Dayal. 10 C L J 631.

(12) Power of Appellate Court to deal with portion of decree not appealed against

49 —Power of Court to deal with portion of decree not appealed against.

An appellate Court is not competent in its decree to deal with any portion of the decree of the first Court which is not before it either by way of appeal or by way of objection under s 561 of the Code of Civil Procedure (11 All 35) 9 Cal 630 referred to Tirath Raj v Kunj Behari 13 W N 144.

(13) Power of Chief Court to pass order as to the Lower Appellate Court's proceedings.

50 —*Held*, per, Campbell, J, that where a Subordinate Court, in a case where no further appeal lay to the Chief Court, hears an appeal which by law would not lie from the original Court, the Chief Court, under Section 35 of Act XXIII of 1861, can pass an order only as to the Lower Appellate Court's proceedings, but cannot interfere with the proceedings of the Original Court Peer Buksh v. Jumal. P R 80 of 1870,

(14) Power to make order staying proceedings in a lower Court.

51.—Functions of—Power to stay, proceedings—Guardian and Wards Act, appeal under,

Appellate Court-*Contd.*

2 Exercise of powers in various cases-*Contd*

Per *Curiam* —An appellate court having seized of an appeal has power to make an order staying proceedings in a lower Court pending the hearing of the appeal to that Court The power to stay proceedings is ancillary to the power of the appellate Court to reverse the order of the inferior Court 5 C W N 781, 31 Cal 722 ref to

Penchaman Singh Roy v Dwarka Nath Roy 3 C L J 29

Notes —Fol: 10 C L J 91, 33 Cal 927=3 C L J 67, 33 Cal 1094=10 C W N 719=4 C L J 306 Ref 36 Cal 193 38 Bom 469, 5 C L J 611, 11 C W N 1030 F B, 6 C L J 398 F B, 34 Cal 1037 F B, 10 Bom L R 1111.

(15) Jurisdiction to consider propriety of part of decree not appealed against.

52 —When a plaintiff appealed in respect of a portion of his claim which had been dismissed by the Court of first instance and the defendants did not file any objection as to that part of the plaintiff's claim which had been decreed, *held* that the Court of the appeal had no jurisdiction to consider the propriety of the decree so far as it was in the plaintiff's favour **Baldeo Singh v Keola, 19 W N 125**

(16) Appellate Court's power to deal with finding of fact by Commissioner

53—See No 53 A

(17) Appellate Court not competent to add to its judgment by further findings on the remaining issues.

53A —Findings on issues raised Further findings.

Where a Court of appeal raises several issues in an appeal before it, and records findings on only some of them, it is not open to it, subsequently to add to its judgment further findings, on the remaining issues, although they may lead to the same conclusions as previously arrived at

Shidaya v. Shivaya 4 Bom L R 129

(B) SPECIAL CASES

(1) Analogous Cases

54 —Joinder of causes—Cases in which evidence is similar

A number of cases having been instituted against the same defendant, and relating to the same matter, the plaintiff in one of them applied to both the lower Courts to have them all tried

Appellate Court-*Contd.*

2 Exercise of powers in various cases-*Contd*

together, pointing out particularly that the documentary evidence in one of the other cases were necessary, and should be made use of in the trial of his case This application was refused by the first Court, and the lower Appellate Court decided the case of the applicant upon evidence recorded with it, and disposed of the others as governed by that judgment. *Held* that all the cases should have been tried together, but as the Judge failed to comply with the application to do so, he should have tried each case separately on its merits. **Nehal Singh v Ali Ahmed 15 W R 110.**

Notes —Ref 22 Cal 511.

55 —Cases in which evidence is similar

A Judge should not, without the consent of the parties allow his judgment in one case to govern his decision in another, even if the subject of dispute is of a similar nature and the evidence similar in character, when the parties are not the same and the subject-matter of the suit is different. **Soorendranauth Roy v Purmanund Ghose. 15 W R 342.**

(2) Appeal

56 —Civil Procedure Code, 1877 1882, s 582 (Act XXIII of 1861, s 37)—'Powers ——'Jurisdiction"

S 37 of Act XXIII of 1861 did not apply to cases where the subject which was being dealt with by the Court was not the actual appeal itself, and could not, therefore, be rightly treated as standing in an analogous position to that of the original suit itself and, further, that the same section had not the effect of making s 7 of the same Act applicable to cases where the Appellate Court had passed an order under ss 5 and 6 dismissing the appeal *Semble*—The word 'powers' in s 37 of Act XXIII of 1861 was not synonymous with, and did not comprehend, "jurisdiction' **Kalikrishna Chandra v Harihar Chuckerbutty 1 B L R A C 155= 10 W R 160**

57 —Insufficiently stamped appeal, validity of—Due presentation

Held that the presentation of an appeal memo, insufficiently stamped is a proper presentation within the meaning of the Limitation Act and that the deficient Court fee might be levied

Appellate Court-*Contd.*

2 Exercise of powers in various cases-*Contd*

after the expiry of the appeal time. 12 All 129, dissented from. **Chennappa Rai v Raghunathaya. 15 Mad 29=1 M L J 598.**

Notes:—Fol: 22 Mad 494; 5 M L J 233; 9 M L J 37. Ref: 19 Cal 780; 24 Mad 331; 25 Mad 380; 19 M L J 340 F B; 32 Mad 305 F B; 32 Cal 654. Diss: 8 C W N 174.

Memorandum of appeal insufficiently stamped.

58.—Appeal, memorandum of.

One of the defendants in a suit valued his appeal at a certain amount and paid Court-fee on his memorandum of appeal in accordance with such valuation. The other co-defendants filed a separate appeal, valued at the same amount, but paid a Court fee of Rs. 2 only on their memorandum of appeal. *Held*, that the memorandum of appeal was not sufficiently stamped.

Ghazanfar Ali Khan v Ram Dayal. 3 O C 163.

59.—An appeal was preferred to the District Court.

One of the grounds of appeal alleged actual partiality against the Judge whose decree was appealed against. The District Judge returned the memorandum of appeal for being amended, and contained expression disrespectful to the Court of first instance. The pleader for the appellant refused to amend it saying that he wished to rely in appeal, on those passages which were objectionable and adding that the Court may if it likes, strike them out. The District Judge however rejected the memorandum under Civil Procedure Code s. 543. The objectionable portions were found to be separable from the rest.

Held, on appeal to the High Court against the order rejecting the appeal to the District Court.

Per Subramanya Ayyar J.—The District Judge should have ordered the objectionable matters to be expunged and then to have admitted the appeal.

Per *Moor J*—(Holding that the statement which accompanied the memorandum of appeal on its representation contained expressions amounting to contempt of court). The District Judge should have returned the appeal memorandum and have refused to receive it until the objectionable parts had been expunged.

Appellate Court-*Contd.*

2 Exercise of powers in various cases-*Contd*

Zamindar of Tuni v Binnaya. 22 Mad 155.

Notes:—Fol: 13 M L J 300. Ref: 27 Mad 21.

59 A.—Appellate Court—Appeal from one Civil Judge to another.

One Civil Judge is not empowered to hear an appeal from another Civil Judge. **Dawala v Rao Sahib Balwant Rao Bhuskute. 12 C P L R 10.**

(3) Power to separate suits misjoined.

60.—Power to separate suits misjoined.

An Appellate Court has jurisdiction under s. 37, Act XXIII of 1861, to separate misjoined suits, and to try them separately. **Shoroop Chunder Paul v Mothoor Mohun Paul Chowdhry. 4 W R 109.**

Notes:—Ex: 12 W R 11.

61.—S. 559—Parties—Addition of parties—Appellate Court—Powers of an appellate Court to add any party as respondent in appeal—Practice-Procedure.

Plaintiff brought this suit to recover Rs.1,000, alleging that confiding in defendant 1, she handed him Rs. 600 to be profitably invested and he assured her that the money had been lent to solvent persons and handed over a bond purporting to be executed by defendants 2 and 3. The defendants 2 and 3 having denied execution, plaintiff framed her suit so as to recover from them, if they executed the bond, and from defendant 1, if they did not. The Court of first instance holding that the bond was duly executed by defendants 2 and 3, passed a decree against them. Defendants 2 and 3, appealed to the District Court, when the District Judge under S. 559 of the Civil Procedure Code, made defendant 1 a party to the appeal and eventually passed a decree against him.

Held, that the District Judge was justified in making defendant 1 a party to the appeal, as he was "interested in the result of the appeal;" and that, having brought him on the record, under S. 559 of the Civil Procedure Code, it was open to the District Judge, to vary the decree of the

Appellate Court-*Contd.*

2 Exercise of powers in various cases-*Contd*

Court of first instance, under S. 577 of the Code by transferring the liability to the plaintiff's claim from the shoulders of defendants 2 and 3 to those of defendant 1. **Karviraya v Laxmibai. 3 Bom L R 172.**

(4) Withdrawal of suit on.

62.—Withdrawal of suit on appeal.

An appellate Court has under this section power to allow a suit to be withdrawn.

Gregory v Dooley Chand 14 W R O C 17.

(5) Arbitration References to.

63.—Act VIII of 1859, ss. 312 and 313—Act XXIII of 1861, s. 37.

An Appellate Court has no power, even, by consent of parties, to refer a case to arbitration under the arbitration sections of Act VIII of 1859, which apply only to Courts of original jurisdiction; nor is such power conferred on an Appellate Court by s. 37, Act XXIII of 1861. **Juggessur Dey v Kritarthomoyee Dossee. 12 B L R F B 266=21 W R 210.**

Contra, Russool Bibee v Jan Ali Chowdhry 12 B L R 267 note; 17 W R 31.

Chiranji Lal v Jamna Das. 7 N W 243.

Quære—Whether it can. **Hachun Banoo v Abdul Hakim, 19 W R 321.**

64.—The Second Schedule r 15 (1882 Ss, 521, 522)—Award set aside—Appeal-Appellate Court's power to go into the question of the propriety of the order of the first Court setting aside the award. Where a Court sets aside an award and gives a decree on the merits and an appeal is preferred therefrom, the appellate Court has jurisdiction to enquire into and decide as to the propriety or otherwise of the decision of the first Court setting aside an award. **Achutayya v. Thimmayya 18 M L J 228=31 Mad 345**

65.—Power of Appellate Court to refer to arbitration.

The parties referred the matter in dispute to arbitration in the Court of first instance, with power to the arbitrators to appoint an umpire. An umpire was appointed, but through illness was unable to act, and the Court directed the appointment of another umpire. The arbitrators failed to comply with this direction, and the Court itself proceeded with the case. and passed a decree for the plaintiff. No objection was taken to this procedure, but the defendant appealed on the merits of the case. At the hearing of the appeal, it was objected for the defendant that the original Court had no jurisdiction to withdraw the case from arbitration, and the Lower Appellate Court, allowing the objection, served the arbitrators with notice to appoint an umpire. The arbitrators were unable to agree as to the appointment, and at the request of the parties, the Appellate Court appointed an umpire, who made an award in defendant's favour. Plaintiff then appealed to the Additional Commissioner, who held that the original Court had proceeded according to law, and that the first Appellate Court had no power to again refer the dispute to arbitration. From this decision, defendant appealed to the Chief Court.

Appellate Court-*Contd.*

2 Exercise of powers in various cases *Contd*

Held, per Lindsay and Melvill, JJ, that the Court of first instance acted legally in itself proceeding with the case to final judgment, but that it was competent for the Appellate Court, under Section 37, Act XXIII of 1861, to refer the matter to arbitration, and incumbent upon the Court so to proceed when requested to do so by the parties. **Mehtab v Mussammat Madan. P R 24 of 1875,**

66.—Civil Procedure Code, 1877, s. 582.

Under s, 582 of the Civil Procedure Code, a Court of Appeal has the power, with the consent of the parties, of referring to arbitration matters in dispute in an appeal. 12 B L R, F B, 266: 21 W R 210, dissented from. **Sangaralingam Pillai. 3 Mad 78.**

Notes:—Fol: 12 Cal 173; 18 Cal 507,

66 A—First Court setting aside award for misconduct—Civil Procedure Code (Act X of 1877), Sections 522. 591-Power of Appellate Court to pass judgment in accordance with award.

Held, that where in a case which has been referred to arbitration, the Court has set aside the award on the ground of the misconduct of the arbitrators, and disposed of the case on the merits. an appeal will lie on the whole case, and the Appellate Court can, under Section 591 of the Code of Civil Procedure, consider whether the award was set aside on insufficient grounds, and if it come to the conclusion that the award was so set aside, can restore the award and pass

Appellate Court-*Contd.*

2 Exercise of powers in various cases-*Contd*

judgment in accordance with it. (P R 59 of 1875) approved. **Sher Jang v. Maihun. P R 72 of 1881.**

67—*Semble:*—Under S. 582 of the Civil Procedure Code (1882) an appellate Court has the power to refer a case to arbitration at the instance of the parties. 3 Mad 78 cited. 12 B L R 266, cited and distinguished. **Bhugwan Dass Marwari v. Nund Lall Sein, 12 Cal 173.**

Notes:—Fol: 18 Cal 507. Ref: 13 Bom 119.

68—An appellate Court has power to refer a case before it to arbitration if the parties wish it to be referred under S. 582 of the Civil Procedure Code. 3 Mad 78 and 12 Cal 173, followed.

Suresh Chunder Banerjee v. Ambica Churn Mookerjee, 18 Cal 507.

(6) Attachment order of.

69—Setting aside order of attachment made by another Court.—

No Court other than a Court of Appeal or a High Court acting under s. 622 of the Civil Procedure Code can discharge an order of attachment issued by another Court. **Kolasherri Illath Narainan v. Kolasherri Illath Nilakandan Nambudri, 4 Mad 131.**

Notes—Dist 18 Mad 405. Ref: 11 Mad 280; 16 Bom 608; 17 M L J 95 F B; 30 Mad 335 F B.

(7) Award of Ameen.

70—Power of Appellate Court as to Ameen's award of wasilat where it has been confirmed by lower Court.—

After obtaining a judgment for possession, the judgment-creditor sued for wasilat. After decree, an enquiry was made into the amount of wasilat, and on the report of an Ameen, the decree-holder being present and the opposite party not appearing, the Court made an order for the payment of the sum therein mentioned. Subsequently the judgment-debtor appeared and petitioned that the award might be corrected by deductions to which he was entitled On his application being refused, he appealed to the Judge, who remanded the case with a view to its being ascertained whether any and what amount should be deducted. *Held*, that the Judge should not have interfered with the award of wasilat, which was a final award so far as the Appellate Court was concerned. **Punchanun Bose v. Oomanath Roy Chowdry, 14 W R 160.**

Appellate Court-*Contd.*

2 Exercise of powers in various cases-*Contd*

71—C P C Sch. II r 16 (1882—S. 522)—Award—Set aside by Court of first instance—Jurisdiction of appellate Court, to pass a decree in its terms.

When a Court of first instance, through which a suit has been referred to arbitration, sets aside the award on the ground of misconduct of the arbitrator, the appellate Court has no jurisdiction to pass a decree in the terms of the award. (3 A L J 168, Fol:) **Kalyan Das v. Pyare Lal. 4 A L J 256=A W N (1907), 110.**

(8) Caste question of Evidence on.

72—On questions of caste a lower Appellate Court has a right to come to a finding based on history or the custom of the country.

Roghoonath Dass Mohapattur v. Bydonath Dass Maharatha. 14 W R 364.

(9) Decree.

73—Madras Rent Recovery Act Section 10—Error in the decree of the lower Court—Power of the appellate Court to pass the decree which lower Court ought to have made.

In a summary suit under Madras Rent Recovery Act, to enforce the acceptance of a patta by the defendant from the plaintiff the landlord, the Court of first instance found in plaintiff's favour, the appellate Court dismissed the suit on the ground that the patta tendered was not a proper patta. *Held*, the Judge, as the appellate authority, ought to have passed the decree which the first Court should have passed (Section 10, cl. 3, Act VIII of 1865). The Judge was in error in dismissing the suit on the ground that the patta was not a proper one. **Nagaraja v. Kasimsa, 11 Mad 23.**

74—C.P C O. 41, r.30 (1882 S 571)-Judgment in appeal, when pronounced—Death of appellant before argument-Legal representative not on record. Decree after hearing deceased appellant's pleader—Legality of—Nullity of decree.

Where an appellant dies before the hearing of the appeal and his representative is not placed

Appellate Court-*Contd.*

2 Exercise of powers in various cases-*Contd*

on the record, the decree passed by the appellate Court is a nullity. **Janardhan v Ramchandra 4 Bom L R 23=26 Bom 317.**

(10) Issues.

75—s. 567, C. P. C. –Return of finding-Power of Court to transfer.

Where an appellate Court has made an order of reference under section 566 of the Code of Civil Procedure, the return of such order must be made to the same Court and such Court is not competent to transfer the appeal for disposal elsewhere.

Udit Narain Singh v Jhanda.' 15 All 315=13 W N 108.

76—Appeal, claim not made in.

A claim for compound interest not distinctly made in any of the points of appeal was disallowed. **Shrinivasapa v Keshavji 1893 P J 36.**

(11) Jurisdiction.

77—Jurisdiction of High Court.

Where the High Court is the Court of appeal from any particular Subordinate Court, and that Court acts without jurisdiction in the trial of a suit or an appeal before it, the High Court has power as an appellate Court to set right the proceedings of such Subordinate Court. 4 All. 237. W N 1887, P. 76 overruled. **Jwala Prasad v Saligram. 13 All 575 =11 W N 158.**

78—C. P C Ss. 561, 577-Prayer for possession and in the alternative for the return of the purchase-money—Decree for possession in the first Court—Jurisdiction of Appellate Court to modify the decree by granting the alternative relief in the absence of memo of objections

The plaintiff sued for possession of property or in the alternative, the return of the purchase money. The first Court gave a decree for possession. The District Judge on appeal held that the suit for possession was barred by S. 317, C. P. C., but gave a decree for money, which he found the plaintiffs to have paid. There was no memorandum of objections under S. 551, C. P. C. *Held*, that the plaintiff having got his primary relief, there was nothing for him to file a memo under S. 561. C. P. C., and that it was within the jurisdiction of the Appellate Court to modify the decree in the way

Appellate Court-*Contd.*

2 Exercise of powers in various cases-*Contd*

it did. 28 Mad 219 dist. **Kuppusawmi Chetti v Samudra Vijia Nainar 18 M L J 586.**

(12) Local investigation, Interference with result of.

79—An Appellate Court should not interfere with the result of a local investigation or enquiry except upon very clearly defined and sufficient grounds. **Sarat Sundari Debi v Prosonno Tagore 6 B L R 677; 15 W R P C 20. Monkee Dumber Sahee v Monkee Bhullunder Sahee, 15 W R 423.**

(12 A) Decree after.

80—Ground for reversal by Appeal Court.

An Appellate Court ought not to reverse the decision of a first Court based upon very careful inspection of the land in dispute, except upon a very clear and strong opinion upon the evidence, and upon recording sufficient and satisfactory reasons for such opinion. **Brindabun Bharotee v Dhununjoy Narain Bhunjo Deo. 18 W R 452.**

(13) Plaint.

81–Order to file new plaint–Withdrawal of suit.

An appellate Court, having set aside the whole of the proceedings, including the plaint, directed that a new plaint be presented in a proper Court, *Held*, that this order, equivalent to directing the plaintiff to institute a new suit, was wrong; and that, with only the alternative of having leave to withdraw the suit and bring a new one, his suit should have been dismissed. **Ledgard v Bull P R 9 All 191; L R 13 I A 134.**

Notes.—AP: 9 C W N 956=2 C L J 384; 25 Cal 39: 1 M L J 537. Fol: 11 Mad 26 P C. Dist: 17 Cal 155; 13 Mad 273. Ref: 11 Bom L R 1330; 6 A L J 483; 36 Cal 193; 28 Mad 437=15 M L J 236; 31 Cal 849; 13 Mad 211: 23 Mad 314 10 M L J 51; 13 Bom 650: 21 Bom 351; 11 C W N 1011 F B; 5 C L J 611; 6 C L J 320 F B: 547; 7 C L J 152; 8 C L J 366; 35 Cal 61 F B; 12 C W N 590.

82.—Return of plaint after trial on the merits

An appellate Court has power to direct the return of a plaint, notwithstanding a trial upon the merits in the first Court, if it be found that such Court ought to have returned it under S. 57

Appellate Court-*Contd.*

2 Exercise of powers in various cases-*Contd*

(a) of Act X of 1877. **Shadi v Mussammat Aishan. P R 55 of 1878.**

Notes—Ref: 118 P L R 1881; Appr: 90 P R 1884.

83.—Discretion of Court to receive or decline to receive any written objection preferred after time.

The Court has full discretion to receive or refuse to receive written objections after time. If no memorandum has been filed either party can be heard verbally against the finding. The Court is not bound to accept the finding when no written objections are filed. **Mussammat Aman Bibi v Mula Mal. 131 P R 1889.**

84—Civil Procedure Code S. 57—Return of plaint when Court has no jurisdiction.

An appellate Court may no doubt return a plaint to be presented in the proper Court, but the Legislature desired to leave the matter to the discretion of the Court, so that the Court may refuse to exercise the power of returning the plaint under certain circumstances. **Yacoob v. Mohan Singh, 11 Mad 482.**

85—C P C O. 41 r. 1 Section 541-Necessity for copy of decree appealed against accompanying a memorandum of appeal.—

Held, that an appeal unaccompanied by a copy of the decree is not a good appeal in law, and an Appellate Court has no authority to dispense with the presentation of a copy of the decree appealed against.— **C. v. C. and B., 22 P R 1903.**

86—C P C S. 107 (2); O. 22, r.11; S. 104: O.43; S. 105 (1882 Ss. 582, 588 (6) 589) — Return of plaint by Appellate Court—Appeal.

S. 582 gives the appellate Court power to return a plaint presented in a Court of a grade lower than that of the Court competent to try it for presentation to the proper Court. An appeal lies from such an order. 3 All 456 overruled. 21 Mad 234 and 26 Cal 276, foll. **Wahid-ullah v. Kanhayilal, 1902 A W N 222=25 All 174 FB**

Notes:—Ref: 21 *Cal* 344.

86*A*—Return of plaint for presentation to proper Court.—

An appellate Court has jurisdiction to return a plaint for presentation to the proper Court. (7 Cal 157, 9 Bom 266, Fol.) **Krishna Rao Amrit Buty v Raghunath Sadashiv, 6 C P L R 105**

Appellate Court *Contd.*

2 Exercise of powers in various cases *Contd*

(14) Plaint, Amendment of

87—*Semble*—A plaint cannot be amended in an Appellate Court. **Abdul Gafoor v. Nur Banu 1 B L R A C 78=10 W R 111.**

Appellate Court-Exercise of power in various cases—Special cases—Plaint, amendment of.

See:—Multifariousness.

88—Civil Procedure Code, Secs. 53, 562 and 582—Remand—Amendment of plaint in appeal—Appellate Court's power to amend plaint—Suit for rent converted into one of ejectment.—

An amendment of a plaint, which materially transforms the nature of the claim, cannot be made under Sec. 53 of the Code, and certainly not in appeal. Sec. 53 permits amendment of the plaint before judgment, and not after. The larger powers conferred on Appellate Courts by Sec. 582 do not authorize such a material transformation of a suit in appeal. **Bai Shri Majirajba v. Maganlal, P J 1894, 137=19 Bom 303.**

Notes:—Ref. 18 All 151.

89—Objection for defect in plaint.—

An Appellate Court is competent at any stage to allow objections to be taken to an apparent defect in the plaint. **Colvin Cowie v. Elias, 2 B L R A C 212=11 W R 40.**

90—Striking names out of plaint and amending issues—Merits of case, Error not affecting—Act VIII of 1859, S. 350.—

Four plaintiffs sued as partners, but it was found during the trial that they were not all partners at the time the cause of action accrued; and the Judge thereupon amended the issue which had been raised on that point, and raised the question whether the plaintiffs were or were not partners; and it being decided in the negative, the Judge ordered two of the plaintiffs' names to be struck out of the plaint, and he gave a decree in favour of the other plaintiffs. *Held*, that the Judge acted rightly in amending the issue, but that he should have done so without striking the names of the plaintiffs out of the plaint. Such

Appellate Court-*Contd.*

2 Exercise of Powers in various cases-*Contd*

an error is "an error in an interlocutory order not affecting the merits of the case", and therefore, under s. 350, Act VIII of 1859, not a ground for reversing the decrèe on appeal.

East Indian Railway Company v. Jordan, 4 B L R O C 97=14 W R O C 11.

Notes:—See 14 W R O C 11.

91—Remand—Civil Procedure Code, 1877, s. 562.—An Appellate Court is not empowered by Act X of 1877 to order or allow a plaint to be amended, or to remand a case under s. 562 of that Act for the purpose of such amendment.

Farzand Ali v. Yusuf Ali, 2 All 669.

Notes:—Not Fol: 6 Mad 239. Ref: 19 Bom 303.

Appellate Court—Powers after remand:—

See 34 Cal 996.

92—When a case has been remanded under s. 354, Act VIII of 1859, and a time fixed within which objection to the findings on remand are to be taken, the Appellate Court is not competent to alter such of the findings in respect of which no objection is preferred within the time fixed. Where a person executes a deed as witness with full knowledge of its contents, such execution may be taken to be evidence of his assent to the statements contained in the deed.

Mussammat Noorun v Khoda Buksh, 1 Agra Rep A C 50.

92A—Waiver of defect in plaint in Court below —Ground for dismissal—

In a case in which, although the plaint mentioned no overt act justifying the plaintiff's request for a declaration of title, and still it appeared on the admitted facts of the case that there was a cause of action, and the Court of first instance adjudicated on the merits and passed a decree in favour of plaintiffs—*Held* that it was too late for the lower Appellate Court to dismiss the claim on the ground of the above defect in the plaint. **Shome Dutt Chowdhry v Surb Narain Chowdhry 24 W R 242.**

93—Succession by collateral heir—Proof of title by person claiming as collateral heir. Where a plaintiff brings a suit as collateral heir, he is bound to allege and prove his title through the common ancestor in all its stages. **Kedarnath Doss v Protab Chunder Doss 6 Calc 626 =8 C L R 238.**

Appellate Court-*Contd.*

2 Exercise of Powers in various cases-*Contd*

94—Dismissal or withdrawal of case—

Where the Court of Appeal sets aside the whole of the previous proceedings in a suit, it cannot direct a new and amended plaint to be filed, but must give the plaintiff the alternative of having his suit dismissed or of withdrawing it with leave to bring a new action. **Ledgard v Bull L R 13 I A 134=9 All 191.**

95—An amendment of a plaint ought not to be allowed on appeal, if by so doing the defendant is likely to be precluded from pleading limitation, and where no leave to amend was asked for in the Court of first instance. **Mallikarjuna v Pallaya. 16 Mad 319.**

Notes.—18 Mad 33; 17 M L J 551; Dist. 31 Mad 86.

96—Shebait suit by, for recovery of advances made by him-Dispossession by co-shebait-Parties —Plaint—Appellate court, power of, to allow amendment-Civil Procedure Code (Act XIV of 1882), Secs. 53, 582.

Held, that an Appellate Court has power under s. 582 read with sec. 53 of the Civil Procedure Code to allow an amendment of the plaint. 9 Cal 695, 22 Cal 692, 20 Mad 467 ref. to.

Where the object of an amendment of a plaint is merely to seek relief ancillary to the principal prayer of the plaint, such amendment does not alter the character of the suit. **Raja Peary Mohan v Narendro Krishna 5 C W N 273.**

97—Objection not taken to plaint—Ground for dismissal of suit—Suit for declaratory decree without asking consequential relief.—

A suit should not be dismissed by an Appellate Court on the ground of its being one asking merely for a declaratory decree, and no consequential relief, where that objection has never been taken by the defendants to the suit. The plaintiffs should in such a case be allowed an opportunity of amending their plaint. **Limba Bin Krishna v Rama Bin Pimplu. 13 Bom 548.**

Notes—Fol. 14 Mad 46; Dist. 26 Cal 845; 15 Mad 255; 19 All 428; Ref. 15 Mad 15; 5 Bom L R 339.

98—Act VIII of 1859, Sections 348, 354—Verbal objection under Section 348—Power of

Appellate Court -*Contd.*

2 Exercise of Powers in various cases-*Contd*

Court under Section 354 to decide a question in absence of any objection under Section 348.—

Plaintiff sued for possession of certain land which he alleged he had purchased from defendant. He stamped his plaint as for a claim valued at Rs. 150. The original Court gave plaintiff a decree for Rs. 300, the amount of the purchase money said to have been paid, on the ground that defendant had no legal power to sell the land. Plaintiff appealed to the Deputy Commissioner, asking for possession of the land, instead of a refund of the purchase money; the appeal was dismissed, and the Deputy Commissioner also set aside the money decree for Rs. 300 (believing that plaintiff had not paid the defendant), without any written objection taken by defendant under Section 348, Civil Procedure Code.

Held, per Lindsay, J , that as defendant had not taken proper objection under Section 348, the Deputy Commissioner had no jurisdiction to reverse the money decree of the original Court, which would accordingly be affirmed.

Held, per Campbell, J., that as plaintiff had not sued for a refund of the purchase money, and as the stamp on his plaint was not sufficient to cover the amount, and, moreover, as plaintiff himself appealed from the decree awarding him Rs. 300 instead of possession, the Deputy Commissioner was competent to reverse the decree without giving the plaintiff other relief. *Held*, also, that a verbal objection under Section 348 is sufficient.

Held, per Cunningham, J , that the Deputy Commissioner was justified in reversing the order of the first Court, as under Section 354 the Appellate Court may raise and decide any question of fact essential to the right determination of the suit upon the merits. **Ramjee Dass v Choohur P R 78 of 1870.**

99—Suit for declaration of title without asking for possession.—

Where a person brings a suit merely for declaration of his title without seeking to recover possession, although he may be in physical possession, the appellate Court will not grant an opportunity to amend the plaint if the plaintiff had already such an opportunity and did not

Appellate Court-*Contd.*

2 Exercise of powers in various cases-*Contd*

avail himself of it. **Raj Narain Das v Shama Nando Chowdhry. 26 Cal 845= 4 C W N 162.**

Notes—Reviewed. 33 Cal 1362. Ref: 28 Bom 332; 11 C W N 186; 10 C L J 189; 36 Cal 720; 4 C L J 568.

(15) Appellate Court's powers to make any orders to meet the ends of justice.

99A—Alienation by widow-Legal necessity how to be made out—Burden of proof of necessity—Effect of lapse of time—Devolution of impartible property—One or other of the plaintiffs entitled by succession—Failure of first plaintiff to make out title—Right of the other plaintiffs—Dismissal of suit—Appellate Court's powers to make any orders to meet the ends of justice—C P C (1908) O 41 r 33.

Payment of full value for the property would not of itself justify a sale by a Hindu widow in the absence of legal necessity. In order to justify legal necessity, it must be shown that the expenses could not have been made from the income of the estate, that they were reasonable, and what they were. Evidence of a vague character is insufficient.

It is for the alienee to establish either that there was legal necessity in fact or that from sufficient enquiries made, he honestly believed that there was such necessity. Lapse of time does not affect the onus, except in so far as it might give rise to a presumption of acquiescence or save the alienee from adverse inferences arising from the scanty proof offered.

Where impartible property passes by survivorship from one line to another, it devolves not on the co-parcener nearest in blood, but on the nearest co-parcener of the senior line.

If one or other of the plaintiffs is entitled by succession, it is not right that the suit should be dismissed because the first of the plaintiffs alone had failed to make out a title, particularly, when, as the result of so holding, the right of the co-plaintiffs (who, if the first plaintiff were not joint with the last male holder, would, on failure of the first plaintiff's case, be entitled) was thereby barred.

In such a case, the appellate Court should act under O 41 r 33 of the Code. **Raveneshwar Prasad Singh v Chandi Prasad Singh. 38 Cal 721.**

Appellate Court-*Contd.*

2 Exercise of powers in various cases—*Contd.*

100—Appellate Court powers of—Application by appellant for extension of time for payment of price—Appeal.

A plaintiff in a pre-emption case cannot merely by filing an appeal obtain extension of the time fixed for payment of the price. A Court of appeal has power to extend the time, but in practice it does not do so except for some special reason. An appellant in a pre-emption case who wishes to save the time for payment of the price extended is not bound to put in a separate written application to that effect but may make the request at the hearing. **Ram Dial v Mussammat Jafri Begam** 7 O C 359.

(16) Lower Appellate Court adding a postscript to its judgment.

101.—The respondent claimed possession of a grove containing 21 mango trees and Rs. 40, the value of mangoes appropriated by the appellants On the 21st July, 1880 the lower appellate Court gave him a decree for Rs. 14, value of fruits appropriated. On the 14th August, 1880, the lower appellate Court added a postscript to its judgment of the 21st July in these terms:—"My attention has been drawn to the fact that I have not given a decree for the land: this is an oversight· I find in my first judgment that the plaintiff is entitled to the land, which of course carries the trees on it with it· I therefore amend my order and give plaintiff appellant a decree for the land and trees as well as for the value of the fruit." *Held* that it was not competent for the lower appellate Court to make the addition to its judgment contained in the order of the 14th August.
Harjas v Shib Dayal 1 W N 95.

(17) Incompetency of Appeal Court to pass decree against a defendant in absence of prayer.

102.—Appellate Court, functions of—Decree prayed for against two defendants-Decree passed against one—Appeal—No Memo of Objections—Incompetency of Appeal Court to pass a decree against the other defendant in the absence of prayer;—

Plaintiff sued as really entitled on a pro-note executed by 2nd defendant in the name of the 1st defendant. Relief was asked for against 1st defendant for not having collected the money and paid it. The Munsif passed a decree against the 2nd defendant. On appeal by the 2nd defendant the District Judge dismissed the suit. The plaintiffs preferred no appeal or memo of objections asking for a decree against the 1st defendant. *Held*, that the suit was rightly dismissed by the District Judge and that the Judge was not wrong in not passing a decree against 1st defendant which was not asked for at all in any manner. 28 Mad 229 fol. 18 M L J 452 18 M L J 586 dist.
Asundi Basavon v Govindappa (1910) 20 M L J 369.

(18) Power of Appellate Court to call upon respondent to furnish security for performance of appellate decree.

103.—C P C O 41 rr 5, 6; 144 (1) (1882 C P C Ss 545, 546 583)—Delivery of possession stay of order for—Order staying proceedings, effect of, pending appeal—Appellate Court, power of, to stay order and proceedings—Rule nisi, order for effect of—Execution, order for, when actually carried—Court jurisdiction of—Express provisions of the Code-Procedure, matters of Court, inherent power of—security for restitution of property or for carrying out of decree-Construction of statutes.

The Appellate Court, having seizin of the appeal, has an inherent power over the subject litigation the nature of which is indicated and implied by section 583 of the Code of Civil Procedure and can in the exercise of that power and notwithstanding that the decree has been executed, call upon the respondent to furnish security for the due performance of any decree which may be made on such appeal.

Per Woodroffe J.—Section 546 of the Code of Civil Procedure has reference to the case where an order has been made for execution and the execution is pending or about to be given effect to. It does not apply where the order for execution has been actually carried out and where the property in suit has actually been delivered under the order made.

Per Mookerjee J.—The words in sec 546 of the Code of Civil Procedure, namely the Appellate Court may for like cause direct the Court which passed the decree to take such security," are not controlled by or merely confined to the case in which an order has been made for the execution of a decree and the execution proceedings are still

Appellate Court—*Contd.*

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pending. The words in question are wide and the Court should not put too narrow construction upon them and thus restrict the power of the Appellate Court.

Sec 546 of the Code authorises a Court of appeal to take security from a decree-holder even after execution of the decree under appeal has been completed. **Hukum Chand Baid v Kamalanand Singh 3 C L J 67= 33 Cal 927.**

Notes:—Fol. 10 C L J 91; Ref: 33 Cal 1904 =10 C W N 719: 4 C L J 306. 5 C L J 611; 11 C W N 1030 F B; 34 Cal 97; 6 C L J 298 F B: 34 Cal 1037 F B: 6 C L J 601; 33 Bom 469: 10 Bom L R 1141: 36 Cal 193.

103A.—Ss 196, 197—Power of Appellate Court to remand. The expression used in S 197 is most liberal so long, always, as the decision of the Court, in which a suit is instituted, whether made rightly or wrongly, is the decision from which an appeal lies to the District Judge. If the Appellate Court has not before it all the materials necessary for the final decision of the appeal, it has the power to remand the case to any Court which it considers competent to try it. **Badam Singh v Mussammat Sabta Kuar 2 A L J 119.**

(19) Execution of appellate decree.

104.—S 144 (1) (1882 S 583)—Execution of appellate decree—Restitution—Mesne profits-Execution Court—Jurisdiction—Auction sale, validity of—Mortgage—Redemption-Appellate Court :—R executed a usufructuary mortgage in favour of D in 1863. R's interest in the property was subseqently purchased by one Z and his sons. Z died in 1873. In 1877 his sons brought a suit for redemption against D. The suit was decreed by the first Court, on condition of the plaintiffs' paying a certain amount of mortgage money. They paid the amount and got possession of the property. On appeal the High Court decreed a larger amount to the mortgagee than what was decreed by the Court of first instance. The excess so decreed by the High Court was not paid to the mortgagee within the fixed time. The mortgagee thereupon applied in execution to get back the property and also prayed for mesne profits for the period during which he had been out of possession owing to the decree of the first Court The Court awarded the mesne profits in order to realise these, the equity of redemption was put to sale and was purchased by the mortgagee himself. Subsequently the representative of the mortgagor sold a portion of the property to P: in a suit brought by P to redeem the mortgage of 1863:

Held, that P had no right to redeem.

Held, further, that a decree of reversal by an appellate Court contains, by necessary implication, a direction to the Court below, to cause restitution to be made of all the benefits of which the successful party in the appeal was deprived by the enforcement of the erroneous decree of the Court of first instance. In the absence of a specific direction in the decree of the appellate Court the Court executing the decree is not deprived of its jurisdiction to award mesne profits by way of restitution. The executing Court has jurisdiction to decide whether mesne profits should or should not be awarded and if any sale takes place for the realization of the mesne profits so determined it is a valid sale (9 W R 402: B L R Sup Vol. 985; 23 Mad 306 28 All 665: A W N (1906) 171: 3 A L J 665 Fol; 32 Cal 434; 32 I A 68, Dist.

Pandit Parbhu Dayal v Sheik Ali Ahmad 4 Ind Cas 376.

(20) Power of Appellate Court to make co-defendants liable upon appeal by one of the defendants.

105—Appellate Courts—Power of, to make co defendants liable upon appeal by one of the defendants—Mortgage Suit:—

In an appeal by defendants Nos, 2 to 8 against the decision of the first Court in which the real contest was whether defendant No. I who was joined as a respondent with the plaintiffs or defendants Nos. 2 to 8 were liable for the mortgage debt, the Appellate Court has power to alter the decree of the first Court so as to make defendant No. I liable and to direct that a decree to recover the mortgage-debt against defendant No. 1 be made in favour of plaintiff. **Iswar Dhary Singh v Bibi Sahebzadi. 12 C W N 720= 35 Cal 538**

(21) Power of Appellate Court to order security to be given for satisfaction of decree before re-hearing an appeal decided exparte.

106—Civil Procedure Code (Act XIV of 1882 Sections 108, 560 and 582—Ex-parte decree—Power of Appellate Court to order security to be

Appellate Court-*Contd.*

2 Exercise of powers in various cases—*Contd.*

given for satisfaction of decree before the hearing an appeal which has been decided *ex-parte*.—

A decree was passed *ex-parte* by the lower Appellate Court against the defendant-appellant. On his applying to have the appeal re-heard, he was directed to furnish security for satisfying the decree passed against him before his application could be considered, and being unable to furnish the required security his application was rejected. On appeal to the Chief Court it was urged that lower Appellate Court could only require security for the costs of the suit.

Held, that as under Section 560 of the Code of Civil Procedure an Appellate Court may rehear an appeal which has been decided *ex-parte* 'on such terms as to costs or otherwise as the Court thinks fit to impose," the words "or otherwise" would authorize the Court to impose terms other than those relating to costs, and would cover an order as to furnishing security for the due performance of the decree.

Held, further, that, as a Court of original jurisdiction could, under Section 108 of the Civil Procedure Code, direct the payment of the decree into Court prior to admitting an application to have an *ex-parte* decree set aside, an Appellate Court would, by virtue of Section 582, have the same power as a Court of original jurisdiction in this respect. **Bawa Narain Singh v Ganga Ram P R 70 of 1885**

(22) Power of Appellate Court to stay execution sale for money decree.

106A—*C.P.C.O.* 41 rr. 5,6 (1882 Ss.545,546)—Execution, stay of, by Appellate Court—Appellate Court, power to stay execution sale for money decree—Money decree sale for. stay of—Civil Procedure Code (XIV of 1882), Secs. 545, 546, para 3, 582.

Per Brett, Mitra, Woodroffe and Mookerjee JJ

The appellate Court has, during the pendency of an appeal against a decree for money, power to stay the sale of immoveable property of the judgment-debtor in execution of that decree.

Held by a majority of the full Bench (Brett and Mitra J. J. dissenting)—That the last paragraph of section 546 of the code of Civil Procedure gives Courts of original jurisdiction and not the appellate Court, power to stay the sale of immoveable property of the judgment-debtor in execution of a decree for money.

Appellate Court-*Contd.*

2 Exercise of powers in various cases—*Contd.*

Per Rampini C. J. and Mookerjee Bertt J and Mitra JJ., contra) S. 582 read with S. 545 of the C, P. Code, does not authorise the Court to make an order for stay of execution.

Per Mookerji J.—The third paragraph of S. 316 of the C. P. C. read with S. 545 gives the appellate Court power to stay sale of immoveable property in execution of a decree for money which is under appeal, upon certain terms which may be settled by itself or be left to be settled by the original Court. **Tribeni Sahu v Bhagwat Bux Rai 6 C L J 298=34 Cal 1037=11 C W N 1030**

Notes—Fol 10 C L J 91.

(23) Dismissing appeal for non-appearance after remand.

106 B—Dismissing—In Default—Remand-Dismissal of appeal—C. P. C. S. 556.

An Appellate Court remanded a case to the first Court for the trial of certain issues and the first Court returned the proceedings as the plaintiff Respondents produced no additional evidence and as the Defendant Appellant did not appear. *Held*, that the Appellate Court shou'd not have dismissed the appeal merely because the Appellant had not appeared before the first Court after the remand, but should have decided it on its merits. S. 556 of the C. P. C. had no application to the case. **Dhondia v. Mt. Sita 8 C. P. L. R. 69.**

(24) Power to stay execution of decree on presentation of pauper appeal

106 C—Civil Procedure Code (Act X of 1877) Section 545—Execution of decree—Stay of, on presentation of pauper appeal.

In the case of an application for leave to appeal as a pauper, accompanied by a memorandum of appeal which is not forthwith rejected under Section 592, Act X of 1877, the Appellate Court has power under Section 545 Act X of 1877 to order execution to be stayed, although the appeal may not have been admitted as a pauper appeal—**Lancester v Lahore Ice and Water Aerated Co. (P R 70 of 1879)**

(25) Jurisdiction of Appellate Court to grant interest injunction

107—C.P.C.S. 107 (2) O. 22 r. 11 ss 108 O 43 r 2 (1882—Ss. 582, 587, 590)—"Procedure"-"Powers" Distinction between-Interim injunction-Jurisdi-

Appellate Court-*Contd.*

2 Exercise of powers in various cases—*Contd.*

ction of appellate Court to grant, in appeal, against order:—Per Chief Justice and Subrahmanya Aiyar J. (Davies J. dissentiente):

An appellate Court has jurisdiction under the Code to pass an *interim* order of injunction before return of notice pending an appeal against the order of the lower Court refusing to grant a temporary injunction pending disposal of a suit for recovery of properties. The fact of the appeal not being against a decree does not prevent the appellate Court from exercising jurisdiction in the matter. Per Chief Justice:—it would be anomalous to hold that the High Court in second appeal possesses powers which it does not possess in an appeal from an original order, and the want of uniformity in the language of Ss. 590 and 587, C. P. C. is no good reason for so holding. *Semble* :—Even apart from the provisions of the code, an appellate Court has inherent jurisdiction to grant such an *interim injunction*. *Per Davies J.*:—The term "procedure" in S. 590 C. P. C. is not intended to cover all the provisions of ch XL of the Code and the term "powers"—S. 582—is preeminently not a point of "procedure" as used in S. 590. **Mahedeva v Setharam Sahib. 14 M L J 471.**

(26) Jurisdiction of District Judge to transfer appeal to Court of additonal District Judge

107 A—Court of Additional District Judge Subordinate to District Court.—

Per Curiam:—The Court of an Additional District Judge is a Court under the District Judge's administrative control and the District Judge is competent to make over to the Additional District Judge an appeal which he had withdrawn from a Subordinate Judge to whose file it had at first been transferred. (9 C W N 705=32 Cal 875, *Commented on*,) **Rakha Chandra Tewary v The Secretary of State for India in Council 10 C W N 841=8 C L J 34**

(27) Power of District Judge to transfer case remanded by the High Court.

107 B—Transfer of case—District Judge—Jurisdiction—Transfer of case remanded by the High Court-Bengal and North-Western Provinces Civil Courts Act (XII of 1887), s. 22.

The District Judge has power to transfer an appeal for hearing by a Subordinate Judge, even after such appeal had been previously heard by him and has been remanded by the High Court for a hearing. 15 W R 574: 23 Mad 314 Dist.

Prankrishna Shaini v Kunja Behari Das. 9 C L J 572.

(28) Power of appellate Court to make an order staying the carrying out of preliminary decree

107 C—C.P.C.O 20 r 16; O 41 r 5 (1882 S 215 A 545)—Appeal against preliminary decree for account—Power of Appellate Court to stay further proceedings.

Where an appeal is pending in the High Court against a preliminary order made by a Subordinate Court under 215-A, C P C., the High Court having seizin of the appeal can apart from the question whether the case falls within s- 545 C P C make an order staying the carrying out of such order pending the hearing of the appeal.

Balkishen Sahu v Khugno 8 C W N 572= 31 Cal 722; F B.

Notes.—Fol: 33 Cal 927=3 C L J 67. Dist 31 Cal 1081; Ref 34 Cal 1057 F B; 9 C W N 123. 3 C L J 29; 11 C W N 1030 F B; 6 C L J 298 F B.

(29) Power to remand for trial on merits

107 D—C.P.C.O 41 rr 23, 25 (1882 ss 562,564,566).

Power of appellate Court to remand for trial on the merits otherwise than under the provisions of s 562. S.564 of the Code of Civil Procedure must be read subject to the other provisions of the Code, for example, those contained in S 27 S 32 or S 53. An appellate Court has power to make an order under any of those sections. and in order to give effect to the provisions of the section, which is applicable it is necessary that it should in certain cases send back the case to the Court of first instance. Under such circumstances S 564 of the Code will not preclude an appellate Court from remitting a case to the Court of first instance. 12 All 510; 1891 A W N 105; 17 All 29; 18 All 131; 18 All 332; 19 All 396; 10 Bom 399 and 19 Mad 157 ref to. The appellate Court has inherent power to remand *exdebits justitiat* apart from the Civil Procedure Code. **Habib Bakhsh v. Baldeo Prasad. 1901 A W N 39= 23 All 167.**

Appellate Court-*Contd.*

2 Exercise of Powers in various cases-*Contd*

Notes.—Ref: 28 Mad 437=15 M L J 236: 30 Mad 55 F B; 33 Cal 927=3 C L J 67. Fol: 16 M L J 479 F B=I M L T 268.

(30) Proper order to be made in appeal on removal of crops pending appeal.

107 E—Appeal Removal of crops pending appeal—Net income—Proper order to be made.

Where the respondent has, pending the appeal, removed the crop in dispute, the only course open to the Court to direct him to pay the appellant its net-value, i. e. the gross value *minus* the expenses of cultivation (13 Mad 15 Ref:) **Ana Pattar v C S Swaminatha Pattar** **10 M L T 190**

(31) Jurisdiction to deal with the case in the absence of formal decree by the first Court.

107 F—Decree not prepared by Court of first instance—Jurisdiction of appellate Court.

The mere fact of the absence of a decree giving effect to the decision of the Court of first instance, does not prevent the appellate Court from entering into the case, not from remanding the case to the first Court for preparing a decree. 5 All 520 Ref. **Kadir Baksh v Kifaitullah** **A W N 1884, 224.**

(32) Power of appellate Court to enter into question of misconduct or corruption of arbitrator.

107 G—Ss 518, 522, 588 (26) Civ Pro Code 1882—Modification of award under S 518—appeal—Power of Appellate Court to enter into question of misconduct or corruption of arbitrator.

An appeal under S 588 (26) of the Civil Procedure Code is limited solely to the question of the correctness of the order passed under S 518; S 522 of the Code does not allow an appeal from a decree based upon so much of an award as disposes of the matter referred to arbitration. The word award in the last sentence of S 522 means the modified award where the original award is modified. The concluding sentence of S 522 of the code does not empower an appellate Court to enter into the question of the corruption or misconduct of an arbitrator merely because he has delivered an award which includes an adjudication on a matter not submmitted to him. **Kalu v Khair Din** **13 P R 1906**

Appellate Court-*Contd.*

2 Exercise of Powers in various cases-*Contd*

(33) Power to alter effect of decree

107H-C P C O 21 r 35 (1882 S 263)-Decree for redemption, delivery of possession of land under, includes standing crops thereon—Appeal from order in execution of decree-appellate Court cannot alter effect of decree, **Aung Baw v Tun Gaung** **3 L B R 129.**

(34) Power to dismiss the suit.

107 I—C.P.C.O 17 r 3; 104 O 43 r 1 (1882 Ss 158 and 588).

Appeal against an order of the District Judge, dismissing the suit under s 158. *Held* that the District Judge has no power on appeal to pass an order under S 158 and even assuming that he had, he could only exercise such powers with reference to an appeal before him and not with reference to the suit in the Court of first instance. The Judge having set aside what was undoubtedly a decree, his order dismissing the suit also amounted to a decree and an appeal lay from his order. **Kusher v Jugrag Singh** **10 O C 245**

(35) Power to enlarge time for payment prescribed in decree,

107J—To enlarge time for payment prescribed in decree—Appeal from mortgage-decree—Formality of order making decree absolute—Practice.

The Transfer of Property Act, 1882, not being in force in Burma outside Rangoon, it is quite clear that this Court has no power in execution of enlarging the time prescribed for payments by its decree of the 14th December, 1896. There can, however, be no doubt that the Privy Council has the power of enlarging the time, and that any Appellate Court deciding an appeal from a mortgage decree has similar power. Where that Act is not in froce, it is not the practice to pass a final order making the decree absolute, and, if such an order is passed, it is merely a formal order. (15 Bom 644, 13 Bom. 106, 17 Bom. 547, 18 All. 223, 455, 20 Bom 279, 7 Bom 532, 11 Bom. 142, Ref. 13 Cal 13) **Kadir Moideen v Charles Widikend Nepean.** **L B R 1893-1900, 420.**

(36) Power to go behind first Court's order setting aside award.

107 K—Sch II r 15 (—s. 521, Civ. Pro. Code 1882)—Arbitrator receiving evidence from one

Appellate Court-*Contd.*

2 Exercise of Powers in various cases-*Contd*

party in the absence of the other—Judicial misconduct—Setting aside award—Appeal—Appellate Court's power to go behind first Court's order setting aside award:

A Court is perfectly justified in setting aside the award of the arbitrators, on the ground that the latter had been guilty of judicial misconduct in having taken the evidence of one party in the absence of the other which was wholly unavoidable and in having omitted to give the latter sufficient opportunity to produce his own evidence. *Quære.*—Whether an appellate Court had power to go behind the order of the first Court, setting aside such an award. (2 All 181, 3 All 636, 28 All 408, 22 Mad 204, 8 C W N 390 Ref.)

Sobha Ram v Ram Das. 66 P R 1907= 159 P L R 1908=148 P W R 1907.

(37) Power to review its own order of remand.

107L—S. 105 (1) (1882 S 591)——Construction of the word "decree," in—Appeal after remand and decision by original Court—Appellate Court's power to review its order of remand.

Held, that the word "decree" in S. 591 should be construed as meaning a decree passed by the Court which made the order which is alleged to be erroneous, defective or irregular. (14 W R 235 21 W R 199; 3 All 755 ; 14 All 348 ; 32 Bom 432. Ref:) ; and that an appellate Court could not review its own order of remand when the suit comes again on appeal after remand and decision by the Original Court. **Jammalamadaku Subbalakshmamma v Jammala Yenkatarayadu. 5 M L T 75=32 Mad 318= 2 Ind Cas 525.**

38 Power to stay execution.

107M—Ss. 244 (c) 545, 647 Civ Pro Code 1882—Stay of Execution—Appeal from order in execution pending.

The Appellate Court can stay execution during the pedency of an appeal before it, from an order in execution. (7 All 178 F B; 11 W R 494 Ref.) **Pasupathi Nath Bose v Nand Lal Bose. 28 Cal 734=5 C W N 67.**

Notes:—Fol: 3 C L J 67=33 Cal 927 ; Ref: 3 C L J 29 : 34 Cal 1037 F B=11 C W N 1030=6 C L J 298, 3 C L J 29; Dist: 31 Cal 1031, 9 C W N 128.

Appellate Court-*Contd.*

2 Exercise of Powers in various cases-*Contd*

(39) Right of tenant to plead occupancy rights in the Appellate Court.

107N—Ss. 3 (7), 6 (1), 23—"Now, in possession," meaning of—Decree for ejectment of ryot before passing of Act—Passing of Act pending appeal—Right of tenant to plead occupancy rights in the appellate Court—Powers of appellate Court—"Final decree," in S. 3 (7)—Old waste.

Held by the Full Bench (White C J. dubitante). Where an appeal from a decree in ejectment passed under the old law is heard after the date of the commencement of Madras Act I of 1908, the defendant, a ryot in possession of *ryoti* land on such date, is entitled to claim a right of occupancy under S. 6, cl I of the Act, notwithstanding the original decree.

The word 'now' in the said section refers to the date of the commencement of the Act.

The word 'final' in S. 3, cl. 7 of the Act, does not mean final as distinguished from a preliminary or interlocutory decree of the Court, in the sense in which these decrees are provided for in the Code of Civil Procedure, but means a decree not under appeal or liable to be set aside on appeal, that is, a decree obtained in a proceeding independent of that in which the question of occupancy right is dealt with under S. 6 cl (1) or the presumption under S. 23 of the Act is made.

The powers of a Court of appeal in India discussed by the Division Court. (1 M W N 309 ; 8 M L T 258 . 7 Ind Cas 202 over. 5 M H C R 215 Ref.) **Gorakala Kanakaiya v Janardha Padhai. 8 Ind Cas 736**

(3) EVIDENE & ADDITIONAL EVIDENCE ON APPEAL.

(1) Evidence Act 1855 S. 57.

108—Re-hearing of ex-parte case on fresh evidence.

Where a Court of first instance sets aside its own *ex-parte* judgment, and after a new trial, in which it takes fresh evidence as well as admits that originally recorded, again gives plaintiff's a decree, it is the duty of the lower Appellate Court to enquire, under s. 57 of Act II of 1857, whether

Appellate Court-*Contd.*

(3) Evidence and additional evidence on appeal—*Contd.*

independently of the evidence originally recorded, there was sufficient to justify the decree.

Rosul Singh v Kishoree Lall. 8 W R 499.

109-Custom evidence as to-Appellate Court's power to supplement evidence.

In a matter of evidence as to custom, where there is sufficient evidence to show that such a custom exists, but its limits and incidents are clear ly before the Court, it is within the discretion of the appellate Court to allow that evidence to be supplemented, particularly when independent evidence of Government Officers is available.

Sitab Rai v Dubal Negesia. 6 C L J 218

(2) Evidenbe sufficient for Judgment.

110—Civil Procedure Code, 1859, s. 353.

When parties have had an opportunity of putting in such evinence as they consider sufficient to entitle them to a judgment upon the material issues of the case, the evidence ought to be held sufficient under s. 353, Civil Procedure Code to enable the Appellate Court to pronounce a satisfactory judgement. **Zahrah v Bhugwan Dass. 16 W R 211.**

(3) Consideration of evidence in exparte case.

111—When a party fails to file a memorandum of objections under s. 354, Act VIII of 1859, the Appellate Court is not at liberty to decide the case *ex parte* without considering the evidence. **Woomesh Chunder Roy v Jonardun Hajra. 15 W R 235**

Notes—Diss: 1 All 165 F B; Ref: 5 N W P 114.

(4) Appeal against part of decree.

112—Duty of Judge

Where a plaintiff, dis-satisfied with so much of the decision of the first Court as is adverse to him, appeals, making the party in whose favour the decree is made the sole respondent, the Judge of the Appellate Court has only to determine whether, as between the appellant and respodent, the order of the first Court is correct.

Kishore Singh v Pookhun Singh. 10 W R 432.

Appellate Court-*Contd.*

(3) Evidence and additional evidence on appeal—*Contd.*

Notes—Fol: 12 W R 461 ; 16 W R 7 ; 17 W R 458.

(5) Adjudication on evidedce.

113—Suit for contribution where shares were not specified.

In a suit for contribution on account of Government revenue, which was decreed by the first Court, but dismissed by the lower Appellate Court, because the plaint did not specify the shares of the different shareholders.—*Held* that the lower Appellate Court was bound to adjudicate upon the evidence. **Bhono Bibee v Pallan Gazee. 11 W R 131**

Notes.- Fol: 5 N W P 215.

(6) Evideuce improperly admitted in lower Court.

114—The lower Appellate Court was not competent to reject the documentary evidence which had been admitted by the Court of first instance merely because it had been admitted after the first hearing of the case, or after the date on which it had been ordered to be produced.

Honooman Singh v Fell. 3 Agra 148

(7) Decision in lower Court on merits.

115--In a suit instituted in the Court of an Assistant-Collector under cl. (h), s. 93 of the N W P Rent Act, an objection was taken that, the plaintiffs not being recorded share-holders, the suit was not maintainable in the Revenue Court. The objection was allowed, but the Court, at the same time disposed of the case on the merits and dismissed the suit. On appeal, the lower appellate Court affirmed the decree, on the ground that the Revenue Court had no jurisdiction in the matter. *Held*, that as there were materials on the record for the determination of the suit, the Judge should, with reference to s. 207 of the Rent Act, have disposed of the appeal on the merits. (6 All 378) referred to.

Sheo Prasad v Anrudh Singh. 6 All 440=4 W N 154

(8) Additional Evidence on appeal.

116—Evidence excluded by lower Court because it had sufficient evidence.

A Court of first instance ought not, because it is satisfied upon the evidence which one of the

Appellate Court-*Contd.*

(3) Evidence and additional evidence on appeal—*Contd.*

parties has given, to prevent him from putting upon the proceedings all the evidence that he wishes to give, so that he may have his case brought fairly before the Appellate Court. Where a party has thus been prevented in the first Court, and the evidence on the record is not deemed sufficient by the Appellate Court, the latter Court does wrong if it refuses to receive the evidence which has been excluded in the way indicated.

Brij Soondar Roy v Kaimoonnissa. 23 W R 63=14 B L R 367.

Notes:—Ap: 9 Cal 105; Foll: 4 All 423; Ref: 5 C L R 268; 18 All 131; 25 All 48.

116A—Ss. 584. 568—Admission of additional evidence in appeal – Discretion of Court.

The refusal by an appellate Court to exercise the discretion vested in it by S. 568 with respect to the admission of additional evidence would be an error or defect in procedure within the meaning of S. 584 of the Code, because S. 568 distinctly implies that discretion must be exercised. But refusal in the exercise of discretion to admit additional evidence is undoubtedly not such an error of defect. **Ram Piari v Kallu 23 All 121=1901 A W N 11.**

117-C.P.C.O 41 r 27 (1882 S. 598)—Additional evidence on appeal—Jurisdiction.

Held that the legitimate occasion for S. 568, Civil Procedure Code, is when on examining the evidence as it stands some inherent lacuna or defect becomes apparent, not when a discovery is made outside the Court of fresh evidence and the application is made to import it. 31 Bom 381 Fol.

Held, therefore, that an order made by the Judge admitting a sale deed in evidence was made without jurisdiction. (31 Bom 381 Fol).

Krishnamchariar v Narasimha Chariar. 3 M L T 308=31 Mad 114.

118—Where a new issue was raised in appeal, *held* that an opportunity ought to be given to the parties to adduce their evidence on it.

Ranu Khetri v Baji and Balaji 1895 P J 191.

119—Power of Appellate Court to receive further evidence,

Quary: Whether, when a party has distinctly closed his case in the lower Court, and stated that

Appellate Court-*Contd.*

(3) Evidence and additional evidence on appeal—*Contd.*

he has no more witnesses to call, the Appellate Court can admit further evidence on behalf of such party. **Shahzadah Gholam Mahomed v Bheem Sein. P R 25 of 1870.**

120-Civil Procedure Code. 1859, s. 355, Court taking evidence under.

A lower Court, in taking evidence ordered under s 355, Act VIII of 1859, acts in a ministerial capacity. **Ram Joy Surmah v Prankishen Singh. Buroda Debia v Prankishen Singh. Pronnoda Debia v Prankisen Singh. 2 W R 80.**

Notes.—Ref: B L R Sup 985.

121—Time for making application.

An application to give additional evidence should be made when the case first comes before the Appellate Court. It is too late to make such an application when the case has been remanded and has come back for final disposal.

Ardeshir Dhanjibhai v Collector of Surat, 3 B H C 123.

Notes—Ref: 3 Bom L R 910.

122—*C* C.P.O 41 r 27; S.108 (1882 ss.568, 587)—Letting an evidence in—Evidence not placed before the Lower Appellate Court.

A party can validly object to the letting in of fresh evidence, not placed before the Lower Appellate Court, in second appeal, (28 Bom 4 and 18 Mad 480; Ref.) **The Secretary of State for India v Manjeshwar Krishnaya. 31 Mad 415.**

123—Power of Appellate Court—Discretion of Court.

It is within the discretion of a lower Appellate Court to allow the parties an opportunity to adduce fresh evidence, if it is satisfied that the interests of justice require that course.

Damoodur Dass v Ritoo Singh. 24 W R 325.

124—C.P.C.O 41 r 27 (1882 S 568)-Evidence, additional—Appellate Court—When to be taken -Mortgage--Undivided share—Partition—mortgage during partition suit—Right of mortgagee-Share allotted to mortgagor.

S. 568, Civ Pro Code, 1882, authorizes an appellate Court to admit evidence in appeal, when, on

Appellate Court-*Contd.*

3 Evidence and additional evidence on appeal—*Contd.*

hearing the case it thinks that such evidence is required to enable it to pronounce judgment, but it does not authorize it to make a new case not justified by the pleadings.

A person taking a mortgage from one co-sharer takes the security, subject to the right of the other sharers to enforce a partition and thereby to convert what was an undivided share of the whole into a defined portion held and severalty. He would take the subject of the pledge in the new form which it would assume by the partition.

A mortgage executed during a partition suit must be followed against the share allotted to the mortgagor, and cannot affect the share of a non-mortgagor. 31 Bom 381 (P C); 11 C W N 721: 6 C L J 5; 4 A L J 461; 2 M L J 435; 8 Bom L R 671; 17 M L J 347; Ref: 1 I A 106; 21 W R 233. Foll: **Baikuntha Nath Roy** v. **Sheikh Nura 6 Ind Cas 196**

125—Functions of—Evidence, appreciation of:

The appellate Court cannot, appreciating the evidence on a question of fact differently from the lower Court, do so by adopting a suggestion thrown out purely by a pleader conducting the case on behalf of one of the parties, explaining thereby the depositions of witnesses on a possible confusion on their part. **Nawab Shah Ara v Nanhi Begam 11 C W N 130 P C=1 M L T 429= 29 All 9=9 Bom L R 80=17 M L J 32= 5 C L J 4**

126—The Appellate Court ought not to have decided against the plaintiff without taking the evidence of the defendant. The defendant was summoned in the first Court but did not appear and the Sub-Judge drew a presumption from his absence. If the Appellate Court was not to draw the same presumption the defendant should have been summoned and examined before it. **Timman v Parmeshvar. 1895 P J 424.**

127—C P C. (Act V of 1908) O XLI, rr 23 and 27—Evidence shut out—Remand illegal.

Where the Appellate Court finds that the Lower Court has shut out evidence, the proper course is to admit the evidence in appeal under Order XLI, Rule 27 and not to remand the case to the Lower Court. **Kachi Raghuramiah v Vajjala Mahalakshmamma. 6 M L T 273.**

128—Power to direct fresh evidence to be taken.

Appellate Court-*Contd.*

3 Evidence and additional evidence on appeal—*Contd.*

A power to direct fresh evidence to be taken is not inherent in the appellate Court and is not necessarily incident to the exercise by the appellate Court of the appellate jurisdiction conferred by S. 195 Cr. P C. **Rama Iyar v Venkatachela Padayachi. 17 M L J 123.**

129—Evidence objected to in Lower Appeal Court and not required in Original Court.

The Appellate Court considered that the plaintiff ought to have given in evidence in the Lower Court a lease on which he relied. This objection had not been taken in the Lower Court by the defendants. The plaintiff produced the lease and an affidavit in support of it before the Appellate Court. *Held*, that the refusal of the Lower Appellate Court to receive such evidence prejudiced the plaintiff's case and that an opportunity to give such evidence ought to have been given. **Nagshet v Rajekhan. 1888 P J 25.**

130.—An application was made by plaintiff for time to produce a previous deposition of defendant against defendant and was rejected by Subordinate Judge. *Held*, that the appellate Court was right in admitting the deposition and ought to have called upon the defendant's pleader to explain it. **Pandharinath v Bapuji. 1888 P J 158.**

131.—Where the Chief Court on special appeal raises an issue so far new that it was not prominently brought before the parties in the first Court, the Court can direct that each party be allowed to produce fresh evidence bearing on that issue. **Ganda v Gurmukh Singh. P R 115 of 1876.**

132.—Evidence insufficient.—

When the evidence upon the record is not sufficient to enable the Appeallate Court to pronounce a judgment upon regular appeal, it may require the Court against whose decree the appeal is made to take additional evidence, denying the points to which such evidence is to be confined, in order to enable the Appellate Court finally to determine the case. **Narasimharav Krishnarav v Antaji Viru Paksh. 2 B H C 64; 2nd Ed 61,**

Notes—19 All 26 F B.

133—Civil Procedure Code, S. 355—Evidence taken in lower Court insufficient.

Appellate Court-*Contd.*

3 Evidence and additional evidence on appeal—*Contd.*

Where a Munsif, without framing issues or examining the plaintiff, passed a decree in his favour upon an admission made by the defendant, and upon inspection of a document that was upon the record of a former suit, but the Judge, on appeal, reversed the decree of the Munsif on account of the insufficiency of evidence, the document, in his opinion, not being admissible.—It was held that the Judge ought not to have reversed the Munsif's decree without first exercising his power of taking fresh evidence under S. 355 of the Code of Civil Procedure.

Appa Valad Kashinath v Vithoba Valad Tukaram.
6 B H C 88.

134.—Opportunity to produce evidence.

In a suit by plaintiffs to recover their share in property from auction purchasers of their father's interest, *held*, that the Appellate Court was wrong in deciding that the property being *saranjam* was impartible and inalienable beyond the holder's life-time without giving plaintiffs an opportunity of producing evidence on those points which were not raised in the Court of First Instance.

Govind v Dinkar.
1888. P J 350.

135.—Ex parte decree—Court of appeal proceeding on point on which no evidence given.—

Where the plaintiff sued defendants for possession of lands purchased by him at a sale in execution of a decree against the defendants' father and the defendants not appearing, the Court of First Instance awarded the plaintiff's claim but the Court of appeal modified the decree and awarded only the father's share on the ground that the plaintiff had not adduced any materials to show that the whole estate was sold, *held*, that as the defendants did not appear in the First Court and no issue was raised as to what had passed under the sale the Court of appeal ought to have given the plaintiff an opportunity of producing evidence to show special circumstances indicating an intention to put up for sale the entire interest of the family in the property.

Nathaji v Daji
1893 P J 23

136.—Civil Procedure Code, 1859, Sections 356, 357.

Appellate Court-*Contd*

3 Evidence and additional evidence on appeal—*Contd.*

Where defendant appealed in a suit to recover arrears of rent in which the genuineness of the kabuliat was in issue, and the defendant asked the Deputy Collector to summon certain witnesses to prove that he had been paying at a particular rate, the Judge ought, under S 356, Act VIII of 1859, to have directed the Deputy Collector to send up either the witnesses or their evidence, and, under Sec. 357, to have directed the evidence to be confined to the rate and time of payment, and the rent to which the payment had been appropriated. **Mohun Munder v Brij Bhookun Singh.** **9 W R 127.**

137—Omission to call evidence in lower Court.—

A suit to recover money having been commenced against P and others, an attachment was applied for, and certain goods, supposed to be the defendants', were attached by order of the Court. Two other persons coming forward and claiming the attached goods as their property, plaintiffs concluded them to be partners with the original defendants, and made them also defendants. The lower Court at the trial held that the proof of partnership failed. *Held*, on appeal, the plaintiff's case could not at this stage be supplemented by examining parties whom the plaintiffs did not think fit to call, or by books which they did not produce, in the Court below.

Velaet Ali Khan v Matadeen
10 W R 402.

Notes:—Ref: 14 W R 236.

138.—Section 568, cl. (b)-Appellate Court—Additional evidence—Substantial cause.

Where an appellate Court, being of opinion that the plaintiff had not prosecuted his case properly in the Court of first instance, allowed witnesses to be examined whom the plaintiff might have called, but did not choose to call in the Court of first instance. *held*, that its procedure was not authorized by S. 568, cl. (b) of the Civil Procedure Code, and the additional evidence so taken was not legal evidence and could not be regarded as relevant. **Rahim Bakhsh v Nanak.**
S C 241

139—Fresh evidence—Civil Procedure Code, Section 568.

An appellant who had ample opportunity of

Appellate Court-*Contd*

3 Evidence and additional evidence on appeal—*Contd.*

giving evidence in the Court below and elected not to do so, but to rest his case on the evidence as it stood, ought not to be allowed at the stage of appeal to give evidence which he could have given below. **Ram Das Chakarbati v Official Liquidator of the Cotton Ginning Company. 9 All 366.**

Notes:—Ref: W N (1907) 168; 29 All 562, 7 C L J 251.

139A.—C P C O 41 r 27 (1882 S 568)—

Admission of fresh evidence in the Court of Appeal. It is not open to anybody to complain of the examination of witnesses by the Court of appeal, where such examination was taken with the assent of both sides, and it cannot be objected that the admission of certain documents on appeal was irregular, where the admission was not objected to at the time.

Jagarnath Pershad v Hanuman Pershad 10 C L J 74.

139B—Additional evidence on appeal—Power of appellate Court—Legitimate occasion for taking additional evidence.

The legitimate occasion for the admission of additional evidence by an appellate Court arises, when, on exmining the evidence as it stands some inherent defect becomes apparent.

Where a Sub Judge on appeal did not examine the evidence and come to any conclusion that a fresh local investigation was needed to enable him to pronounce judgment, but remanded the case for further investigation: *held*, that the order of the Sub Judge was wholly without jurisdiction. 31 Bom 381. 11 C W N 721; 6 C L J 5 4 A L J 461; 2 M L T 435; 9 Bom L R 671; 17 M L J 347; (P. C) and 31 Mad 114; 3 M L T 308. relied upon **Janki Koer v Lal Man Roy, 10 Ind Cas 332.**

140.—Additional evidence in appeal when receivable.

The power of receiving fresh evidence in appeal is one which must be sparingly exercised. It is only when the Court of Appeal is satisfied that by some inadvertence or mistake a party has been prevented from producing evidence, and that the mistake or inadvertence is likely to be prejudicial to him, that if the omission was unintentional, undesigned, or accidental, he may be

Appellate Court-*Contd.*

3 Evidence and additional evidence on appeal—*Contd.*

allowed to produce such further evidence. It must also be explained why such evidence was not forthcoming in proper time. If the party has not acted with perfect good faith, such evidence will not be received.

Gangadhar v. Bapu. 1896 P J 475.

141.—S. 568.—Where a tenant for the first time in appeal raised the defence of want of notice to quit, *held* that the Appellate Court should have allowed the landlord an opportunity of showing that notice was not necessary owing to a disclaimer by the tenant of his title.

Vyankaji v Bala. 1895 P J 165.

142—Where the special appellant tendered fresh evidence in the Chief Court, that Court allowed him to withdraw the special appeal, leaving him free to apply for a review of the judgment of the Court below. **Ghulam Mahomed Khan v Shadi Khan. P R 109 of 1876.**

143—Application to put in evidence on appeal which applicant refused to produce in lower Court.

The plaintiffs had applied, during the hearing of the case in the Court of first instance, for the production of certain books of account of the defendants. The defendants resisted the application, and the Court refused to order the books to be produced. The suit having been dismissed the plaintiffs appealed, and in the Court of Appeal the defendants applied to be permitted to put in evidence the books which they had refused to produce:—*Held* that the evidence could not be admitted **Monohur Ganesh Tambekar v Lakhmiram Govindaram. 1887 P J 169=12 Bom 247.**

Notes.—Ap: 23 Cal 645. Appl: 23 Bom 659. Ref: 24 Cal 418; 25 Cal 112; 15 Bom 309; 625; 11 All 18 F B; 28 Bom 215; 14 M L J 105; 27 Mad 435; 10 C L J 355 F B; 19 M L J 651; 11 Bom L R 589; 33 Bom 387; 8 Bom L R 756; 2 C L J 460.

144.—Additional evidence not allowed when party had opportunity to produce it in Lower Court

Where a widow sued her servant for an account of Rs. 10,000 paid to him, *held*, that the Court would not help him under section 568 to

Appellate Court-*Contd.*

3 Evidence and additional evidence on appeal—*Contd.*

prove repayment of part of it, because he has had ample opportunity in the Court below of proving that defence and because, in his written statement and evidence, he untruthfully denied all connection with this sum of Rs. 10,000 and because doing so would be a premium on perjury. **Satyapa v Gangabai. 1894 P J 374.**

145.—Reversing decision without fresh evidence.

Defendant, having purchased a decree, caused the judgment-debtor's (B's) rights and interest in certain property to be sold in execution, and bought them himself. Plaintiff, who had purchased one B's rights and interest in a 4-annas share of the property, intervened; but his intervention having been rejected in the summary department, he sued to set aside the summary order, and to establish his vendor's right in the property. The vendor, having admitted the sale to the plaintiff, the first Court thought it unnecessary to examine the witnesses to, and the writer of, the deed of sale, and finding the plaintiff in possession, decreed the suit. This decision was reversed on appeal. *Held* that the lower Appellate Court did wrong in presuming collusion between B and his vendee (the plaintiff), and ought not to have rejected the deed without examining the writer and witnesses; and that it should have decided whether plaintiff was in possession at any time under the deed of sale.

Ram Lall Jha v. Issur Chunder Dey. 10 W R 451.

146.—C P C Ss 109, 115 (1882 s. 595, 622-Leave to appeal to the Privy Council-Letters Patent S. 30—Order of the High Court under S. 622 C. P. C., allowing a party to sue in forma pauperis—Power of High Court to grant certificate.

An order passed by the High Court under s. 622 C. P. C., deciding that a certain party should be allowed to sue in *forma pauperis* is not a final decree passed in an appeal within the meaning of s.595, C. P. C., nor is it a final judgment made on appeal within the meaning of sec. 39 of the Letters Patent of 1865. **Babu Sakan Sing v Gopal Chandra Neogi. 8 C W N 296.**

147.—Admission of fresh documentary evidence.

Appellate Court-*Contd.*

3 Evidence and additional evidence on appeal—*Contd.*

The Appellate Court should not send for and admit fresh documentary evidence which has not been put in by either party in the lower Court. **Dwarkanath Shaha v Ram Lochun Biswas. 10 W R 92.**

147A.—Appeal—Tender of documentary evidence—Rejection.

Where a sale deed, which the defendant alleged to be a fraudulent document, was withheld in the Court of first instance, although it had been returned unregistered to the plaintiff by the Registration Officer during the pendency of the suit, *held* that the plaintiff was not entitled to tender it in evidence for the first time in the appellate Court. **Imrat Khanum v Muhammed Sarfaraz Khan. A W N 1882, 5**

148.—Where the Court of First Instance upon an application to procure a certain document, made an order that "it would see after perusing the other papers whether this one was necessary"; *held*, that the order tended to mislead the applicant and prejudice his case, and that the Court of First Appeal should have allowed the production of the document. **Kankya v Balaji 1886 P J 208.**

149.—Civil Procedure Code, 1859, s. 355—Additional evidence after review.

Where a lower Appellate Court admitted a review with the object of taking into consideration a material issue which it had omitted to consider at the trial.—*Held* that, having admitted the review on grounds independent of fresh evidence, it was competent for the Court under s 355, Act VIII of 1859, to admit fresh evidence if required, to enable it to pronounce satisfactory judgment, or for any substantial cause.

Beharee Lall Nundee v Troyluckho Moyee Burmonee 12 W R 223.

Notes:—3 B L R 346. Ref: 12 W R 461; 11 Cal 139.

150.—Civil Procedure Code, 1859, s. 355.

The true interpretation of s. 355, Act VIII of 1859, is that, when a Court sees that by some inadvertence or mistake a party has not produced some evidence which he was capable of adducing

Appellate Court-*Contd.*

3 Evidence and additional evidence on appeal—*Contd.*

and that he is likely to be prejudiced by that omission or mistake, which was simply unintentional, undesigned, and accidental, the Court will allow such further evidence to be taken.

Gowhur Ali Khan v Sakheena Khanum. 15 W R 507.

151—Civil Procedure Code, 1859, s.355-Appeal from ex-parte decree.

The Court declined on appeal from an order rejecting an application under s. 119, Act VIII of of 1859, to set aside an *ex-parte* decree, to receive an affidavit which had not been previously tendered, and held that s. 355 was not meant to have application to such a case as this, but empower the Court of Appeal, at its discretion, to receive evidence upon issues of facts which had been tried in the Court of first instance.

Leslie v Allender. 17 W R 390.

152.—Civil Procedure Code, 1859, s. 355—Error in law.

In a suit for ejectment on the ground that defendant was holding over after the expiration of his lease, the defendant's vakil deposed on oath in the first Court that the defendant had no documents whatever, and that those he once had were burnt. When the case came before the Subordinate Judge on appeal, he permitted the defendant to file a new piece of evidence, viz, a pottah which was alleged to have escaped the general destruction. *Held* that the admission of the pottah on the mere *ipse dixit* of the defendant was a substantial error in law, even though plaintiff neither admitted nor denied the document; that the Subordinate Judge had no right to admit the pottah under the circumstances; and that, if he had, he was wrong in deciding the case upon it without taking evidence as to its genuineness. **Serajool Huq v Keramatoollah. 19 W R 88.**

153.—Civil Procedure Code. 1859, s. 355—Evidence excluded by first Court.—

When the first Court was satisfied with the evidence produced, and therefore did not allow the plaintiff to produce all his evidence and the Appellate Court does not think the evidence sufficient, it ought to allow the plaintiff on appeal to call the evidence excluded by the first Court. **Brijo Soondar Roy v Kamroonnissa 23 W R 63.**

Appellate Court-*Contd.*

3 Evidence and additional evidence on appeal—*Contd*

Notes:—14 B L R 367. Ap: 9 Cal 105. Fol: 4 All 423. Ref: 5 C L R 268: 18 All 131; 25 All 48.

154.—Improper reception of evidence—Remand.

When a lower Court disposes of a case upon the merits as proved by evidence not legally admissible against the defendants, and the Appellate Court considers it proper to allow the plaintiff to adduce further evidence, it may either take such further evidence itself or send the case back to the lower Court to take such evidence.

Ramjoy Surmah Mojoomdar v Puran Kishen Singh. W R F B 124.

155.——Where a Subordinate Judge disposed of the suit upon a preliminary point and the Lower Appeal Court did not reverse that decision as contemplated by section 562, *held* that the Lower Appeal Court could not therefore reverse the decree and remand the case under section 563; and that if fresh evidence was considered necessary the Court should have proceeded under sec. 569. **Revubai v Nagapa. 1892 P J 34.**

156.—Discovery of fresh evidence—Application for review.

The High Court decided a case irrespective of certain documents brought forward by a party at the hearing of the appeal, and afterwards rejected an application for a review of that judgment. In an application to the Privy Council for special leave to bring in those documents,—*Held* that further evidence ought not to be admitted under s. 355, Act VIII of 1859; that there was great danger in the Court of ultimate appeal lightly introducing evidence which had not been under the considerations of the Courts below, and which the parties had had no means of testing.

Gobind Sundari Debia v Jagadamba Debia. 3 B L R P C 25.

157-C P C O. 41 r. 27;S. 114;O. 47 r. 1 (1882 Ss. 568, 623)—Dismissal of application for review on the ground of discovery of new evidence—Jurisdiction of Appellate Court to take such evidence on application—Unprecedented Chapter in appellate procedure—Railway Co.—Suit.

The Code of Civil Procedure permits an application for review on the ground of discovery of new and important evidence, but it enjoins the

Appellate Court-*Contd.*

**3 Evidence and additional evidence on appeal—*Contd*

Judge to require the facts as to the absence of negligence to be strictly proved, and it makes the Judge who tried the case final on such applications

The legitimate occasion for S. 568 is when, on examining the evidence as it stands, some inherent *lacuna* or defect becomes apparent, not where a discovery is made, outside the Court of fresh evidence, and an application is made to import it. That is the subject of the separate enactment in S 623

Therefore where after the failure of an application for review on the ground, of discovery of fresh evidence an application was made for the admission of such evidence on appeal, and it was admitted, *held* that the Appellate Court had no jurisdiction to admit this evidence

In a suit for damages for personal injuries sustained by a passenger through the negligence of a Railway Company by reason of the train overshooting the platform, a question was raised as to the sufficiency of light for passengers to alight safely where the train stopped The Court of first instance held that the light was not sufficient and the plaintiff was injured not by his own negligence. An application was made for review on the ground of discovery of new and important evidence, and it was rejected. The Judges of the Appellate Court admitted the evidence, made an inspection of the locality 'under conditions approximating as closely as possible to those which prevailed when the plaintiff met with his injuries and allowed the appeal upon the impressions left on their minds by such inspection and also on the additional evidence

Held, that the procedure was not legitimate nor the conclusions sound The procedure adopted by the Lower Appellate Court was unprecedented.

Kessowji Issur v The Great Peninsula Indian Railway, 2 M L T 435=11 C W N 721=17 M L J 347=4 A L J 461=6 C L J 5=31 Bom 381=9 Bom L R 671=34 I A 115

Notes—Fol 31 Mad 114 Ref 13 C W N 1197

Appellate Court -- Exercise of powers in various cases--Special cases.

See Multifariousness.

158—Civil Procedure Code, s. 568 —

Appellate Court-*Contd.*

**3 Evidence and additional evidence on appeal—*Contd.*

The Appellate Court is the sole judge of the test as to where additional evidence should be allowed in appeal or not The test is whether the Appellate Court requires the evidence "to enable it to pronounce judgment or for any other substantial cause or not **Prem Chand Moonshee Upendra Mohan Ghose v Gopal Chundra Ghose, 21 Cal 484.**

Notes—Ref 28 Bom 4.

159—Issues sent—Taking fresh evidence in determining

Where an Appellate court sends down issues, it is not necessary that it should direct fresh evidence to be taken to enable the Lower Court to take such evidence if it thinks it advisable **Ramchandra v. Krishnaji, 1890 P J 320**

160 C P C O 41 r 27 (1882 S 568)-Remand -Taking of evidence by District Court permissible

It is the invariable practice of the Courts in the mofussil that when a remand involving the taking of fresh evidence is ordered, the District Court sends down the case to the first Court in order that the evidence may be taken there, and this is done in the interests of the parties themselves and for their convenience But nevertheless the District Court still remains empowered by the order of remand to take what evidence it may see fit to take, and record its findings upon it **Kushaba v Chandrabhagabai, 10 Bom L R 536.**

161—Ss 568, 569—Genealogies not proved but treated as proved—No consent to be inferred —Evidence allowed in appeal.

Where certain genealogies were not proved before the Lower Court, but were treated in its judgment as proved and were not objected to in the Lower Court, *held* that no consent to their admission can be safely inferred as there was nothing on record to justify such inference, *held* also that the parties producing them should be allowed to prove them and the opposite party to give rebutting evidence, and the lower Court was therefore directed to take evidence under sections 568 and 569 **Basawa v Lingangawda, 1892 P J 109.**

162-163—Reasons, Record of-Power to take fresh evidence—Discretion of Court.—

Appellate Court-*Contd.*

3 Evidence and additional evidence on appeal-*Contd.*

The power given to the High Court by the Code of Civil Procedure, of taking, of its own motion, original evidence anew, should be exercised very sparingly, and, when exercised, it is desirable that the reasons for exercising it should always be recorded or minuted by the Court in the proceedings **Sreemanchunder Dey v Gopal Chunder Chuckerbutty, 7 W R P C 10=11 Moore's I A 29**

Gunga Gobind Mundul v Collector of 24 Pergunnahs, 7 W R P C 21=11 Moore's I A 345.

Juggobundhoo Deb v Goluck Chunder Haldar, 10 W R 298

Joog Maya Debia v Ram Chunder Chatterjee, 10 W R 378

164—Reasons for taking fresh evidence —

Held, that the lower Appellate Court should state most fully and clearly its reasons for calling for fresh evidence, but that in point of law it was sufficient if that Court considered the matter and stated that such reasons existed without mentioning what they were

Shib Chunder Mahtoon v Kasheenath Kurmokar, 12 W R 245

165 C P C O 41 r 27 (1882 S 568)-Appellate Court—Additional evidence—Recording reasons

The legitimate occasion for S 568, C P C, 1882, is when, on examining the evidence as it stands, some inherent *lacuna* or defect becomes apparent not where a discovery is made, outside the Court, of fresh evidence, and the application is made to import it

The appellate Court admitted a fresh document into evidence, without recording on the proceedings of it the reasons for admitting such additional evidence *Held*, that the order of that Court cannot stand 31 Bom 381 (P C)=11 C W N 721=6 C L J 5=4 A L J 461=2 M L T 435=9 Bom L R 671=17 M L J 347, Fol.

Moniruddin Sarkar v Mochhabin Mondal, 2 Ind Cas 995

166—Sufficiency of reasons for taking fresh evidence —Where an Appellate Court received additional evidence, recording only that the papers were material and important, there was held to be no sufficient compliance with the proviso of S. 355, Civil Procedure Code, which requires the

Appellate Court-*Contd.*

3 Evidence and additional evidence on appeal-*Contd.*

reasons for admitting additional evidence to be stated **Juggut Indur Bunwaree v Bhubo Tarinee Dassee, 14 W R 19.**

167—Reasons for taking fresh evidence —

Additional evidence cannot be admitted in appeal without some substantial reason being recorded in the proceedings

Snadden v Todd Finlay & Co 7 W R 313

168—S 568, cl (b)—Additional evidence, improper, addition of—Second appeal, evidence admitted by Court of first appeal rejected in.

The District Judge as the Court of first appeal accepted a mortgage deed as additional evidence for the following reason "I think it would be reasonable to allow the appellants an opportunity of producing the deed It has a distinct bearing on the third issue, and if it be a genuine document, it will go far towards proving that issue in favour of appellants' *Held, (per J Deas, J C)* that whether reasons are or are not given for the admission of additional evidence, such evidence must be held to have been improperly admitted, and to be liable to rejection in second appeal, if this Court is satisfied that in admitting it the lower Appellate Court has clearly acted on insufficient grounds, or has improperly exercised its direction *Per G T Spankie, A J C*, that additional evidence should be admitted only on the special grounds stated in S 568, Civil Procedure Code, and if it is not admitted on any of those grounds, it must be rejected

Sitti v. Narpat, 1 O C 199.

169—Reasons for taking fresh evidence.—

The provision in the Code of Civil Procedure which requires Judges who admit fresh evidence on an appeal to record their reasons, though not a condition precedent to the reception of the evidence is yet one that ought at all times to be strictly complied with **Gunga Gobind Mundul. v The Collector of the 24 Pergunnahs 7 W R P C 21=11 Moore's I A 345**

Sreeman Chunder Dey v Gopal Chunder Chuckerbutty 7 W R P C 10=11 Moore's I A 28

Hurpershad v Sheo Dyal L R 3 I A 259=26 W R 55

Lowa Jha v Bissessur Singh 11 W R 6,

Chardon v Ajeet Singh 12 W R 59

Banee Pershad v Lalla Joggessur Dass 11 W R 47.

Appellate Court-*Contd.*

3 Evidence and additional evidence on appeal—*Contd.*

Notes:—See 11 M I A 345.

170.—Where the evidence of a defendant has been taken by the Court of first instance so imperfectly that the lower Appellate Court cannot pass a satisfactory judgment between the parties, it is competent to the judge of that Court, under the provisions of s 355, Civil Procedure Code to have the defendant fully examined before himself, but not to remand the case for rehearing and re-trial If he examines the defendant he is bound to record his reasons for so doing, in order that the High Court may be enabled on appeal to decide whether or not the new evidence has been rightly admitted. **Mohesh Chunder Dass v Madhub Chunder Sirdar 13 W R 85.**

Notes: --Ref 18 Mad 94.

171.—Civil Procedure Code 1859 s 355—Reasons for sending for document on appeal.—

Where a Judge sends for a map or other document he is bound, to record his reasons for doing so, according to the provisions of the Civil Procedure Code and the evidence so obtained must be taken and received by him in the presence of the parties in open Court and afterwards kept on the record. It is not competent to him under s 355 merely of his own discretion to send for a document for personal inspection irrespective of the parties to the suit. **Gunput Roy v Ram Deour Roy 21 W R 416.**

172.—Civil Procedure Code, 1859, s. 355-Suit for arrears of rent—

Where, in a suit for arrears of rent, tenancy was acknowledged, but the rate of rent questioned by tenant, and the Subordinate Judge, not feeling satisfied with the documents purporting to show the rents during three years, called for the documents relating to payment of rent during three earlier years,—*Held* that the Subordinate Judge was justified in requiring this further evidence, because, though such evidence should rarely be called it was within the discretion of an Appellate Court to do so, giving its reasons for the course which it pursued. **Shookrah Shaikh v Nund Coomar Banerjee 25 W R 246.**

173.—Civil Procedure Code, (1882) s 568 the High Court will interfere when the lower Appellate court allows taking additional evidence without being satisfied that it is necessary under cl.(a) or cl (b) of s 568. But it will not interfere if the lower court is satisfied though it does not record reasons for allowing such evidence. **Hafiz Abdul Kurim v Shri Kissen Rai 11 Cal 139.**

174.—Civil Procedure Code (1882) s 568-The provision in s 568 by which an Appellate Court has to record its reasons for admitting additional evidence is directory merely and not mandatory. **Gopal Singh v Thakri Rai 12 Cal 37.**

Notes:—Fol: 24 Cal 98.

175.—Civil Procedure Code 1859 s 355-Reasons for taking fresh evidence.

Where the first Court refused the plaintiff's application to summon five of his witnesses, notwithstanding that it postponed the case for ten days, although fifteen other of the witnesses were present, the High Court held that the first Court's omission to summon the witnesses was, under the circumstances, a sufficient reason within Act VIII of 1859. s 355 for the lower Appellate Court to send for them and take their evidence. **Abelakh Roy v Guggun Bhuggut 22 W R 269.**

176.—Record of reasons.

In a suit for possession of certain lands under a howla tenure, khas possession of which for some generations was alleged, no special documentary title was set up in the plaint; but one of the plaintiffs in his deposition referred the title to a particular pottah, which he said had existed, and had been lost in the time of his grandfather. Two of the defendants were the zamindars of the talukh in which the howla tenure was said to exist, and had transferred their proprietary right to the other two defendants. The zamindars did not defend the stit and were not examined in the Court of first instance. The lower Appellate Court "considered it necessary, for the proper decision of the case," to examine the zamindars, and, relying mainly on their evidence, reversed the decision of the Munsiff, and gave a decree in favour of the plaintiff. *Held*, on appeal, that the lower Appellate Court had sufficiently recorded its reasons within the meaning of s 355 of Act VIII of 1859 for requiring the additional evidence; that it was right in so doing; and that although no special title had been set up in the decree which

Appellate Court-*Contd.*

3 Evidence and additional evidence on Appeal—*Contd.*

was given on the evidence in favour of the plaintiffs could not be reversed in special appeal.

Radhanath Dhubi v Ramgobind Pal 3 B L R A C 218

Radhanath Dhoopee v Luckhee Kant Pal 12 W R 224 note

177.—Reasons for taking fresh evidence.

Where the plaintiff himself is present, the lower Appellate Court may in its discretion examine him if it considers his evidence material The requirements of the law are sufficiently fulfilled if the Court records that it considers his examination necessary. **Hafiza v Azhur Hossein** 13 W R 328

(9) Improper admission of evidence.

178.—Evidence Act (II of 1855), s 57.

An Appellate Court should not receive evidence, though alleged to be material and important, which has not been produced in the lower Court, without substeantial reason for its non-production. The High Court refused to reverse a decision on the ground of the improper admission of evidence. **Jogadindra Banwari Gobind v Bhobotarini Dasi** 5 B L R Ap 54

179-180.—Improper rejection of evidence.

Where an appellate Court in trying the main issue which arose between the parties to an appeal before it improperly had rejected an important piece of evidence bearing on that issue and had failed to notice the existence on the record of other evidence directly bearing on that issue it was *held* that the issue had really not been tried inasmuch as the trial of an issue implied the consideration by the Court of all the material evidence bearing on the issue, and that a reference under s 566 of the Code of Civil Procedure was called for. **Yar Ali v Hashmat Bibi** 17 W N 90

181.—Omission to give reasons for admitting it. Where evidence has been taken by an Appellate Court in the presence of parties or their agents, it should not be objected on appeal merely because the Court omitted to record its reason for admitting it. **Bhugwan Chunder Ghose v Rajcoomar Goho.** 13 W R 303.

C. C. 88

Appellate Court-*Contd.*

3 Evidence and additional evidence on Appeal—*Contd.*

(10) Rejection of document in first Court on the ground of want of Registration.

182—Rejection of document in first Court on the ground of want of registration—Subsequent registration and presentation to Appellate Court.

The plaintiff, as purchaser at a Court's sale, sued in 1871 for possession of certain immoveable property and tendered in evidence a sale certificate dated 20th September 1865. The first Court decided against the plaintiff on the ground among others, that the certificate was not registered though registration of it was compulsory. On the 9th February 1875 the plaintiff filed an appeal in the High Court against that decree, and on the 26th July 1875 applied to that Court for permission to give an evidence a new certificate of sale issued on the 1st February 1875 regarding the same property as that to which the certificate of the 20th September 1865 related. *Held* by the High Court that as the new certificate was issued after the first Court had made its decree, the High Court ought not to receive it or to suggest or facilitate any application to the lower Court for a review of its decree on documentary evidence which had no existence when that Court made such decree.

Lalbhai Lakhmidas v Kamaludin Husen Khan. 12 B H C 247.

Notes—Dist. 6 Bom 139, 10 Bom 444; Ref: 9 Bom 472.

183—Civil Procedure Code, (1882) S. 568.

An appellate Court will not allow adducing of additional evidence if no sufficient cause and circumstances are shown. **Nadiar Chand Singh v Chunder Sikhur Sadhu.** 15 Cal 765.

184—Ss. 142 and 142 (a)—Tender in evidence.

Where a document tendered in evidence in a Court of first instance was rejected as inadmissible but was nevertheless allowed to remain on the record of the case. *Held* that the mere fact of the document remaining on the record did not make it evidence in the appellate Court, but it must be tendered as evidence in the appellate Court, and accepted thereby. **Hir Gobind v Noni Babu.** 14 All 356 = 12 W N 42

Appellate Court-*Contd.*

3 Evidence and additional evidence on Appeal—*Contd.*

185—The Code of Civil Procedure (1882) s 568.

The appellate Court is to be sole judge as regards the test as to whether additional evidence should be taken in an Appellate Court under s. 568 of the Code and that depends upon the question whether or not the Appellate Court requires the evidence "to enable it to pronounce judgment or for any other substantial cause."

Prem Chand Moonshee Upendra Mohan Ghose v Gopal Chandra Ghose. 21 Cal 484.

Notes:—Ref: 28 Bom 4.

186—Civil Procedure Code (1882), s. 568 —Remand—Direction by Appellate Court to take further evidence.

In a suit on a hypothecation bond the plaintiff relied in bar of limitation on endorsements of part-payments appearing on the bond. The Court of first instance held that the endorsements were genuine. The Court of first appeal remanded the suit for further evidence to be taken with regard to the endorsements, and directed the Court to record an opinion on the section of the handwritting of the endorsements, and held upon the return of the evidence that the endorsements were forgeries, and dismissed the suit. *Held*, that the additional evidence was legally taken and admitted under s 568.

Shrinivasachariar v Rangammal. 18 Mad 94

187—Remand—Additional evidence in Appellate Court—Findings of fact based on evidence taken after remand—Civil Procedure Code (1882) s. 568.

The High Court, in a second appeal set aside the decrees of both the lower courts on the ground that certain issues raised in the suit were not considered by those Courts, and remanded the case to the lower Appellate Court for a proper decision. Evidence was taken on the issues untried before, and the Court came to findings of fact on that evidence. Held, that the lower Appellate Court tried the case, not as an original case, but as an appeal, and acting under the powers given to it took fresh evidence.

Beni Pershad Kuari v Nand Lal Sahu. 24 Cal 98.

188—Civil Pro. Code (1882) Ss. 562, 568, 569.

Appellate Court-*Contd.*

3 Evidence and additional evidence on Appeal—*Contd.*

Additional evidence in Appellate Court—Illegality of the order of reversing the decree of the lower Court for excluding evidence

A District Munsiff after hearing evidence & deciding issues passed a decree. The subordinate Judge in appeal reversed the decree on the ground that certain documentary evidence tendered by the defendant had been refused and plaintiffs' witnesses cited in the list had not been wholly examined. In appeal from that order held—(1) the Subordinate Judge cannot act in such cases under s. 562 of Civil Pro. Code; the only proper and legal course for him was either to take himself evidence that is excluded or ask the Munsiff to take it under s. 568 or 569. 23 Mad 445 distinguished. **Seshan Pattar v Seshan Pattar. 23 Mad 447.**

Notes.—Ref: 16 M L J 479 F B=1 M L T 268=30 Mad 55 F B.

(11) Admissibility of fresh evidence discovered after filing of appeal.

188A—Appeal—Additional evidence—Admissibility.

Fresh evidence will not be allowed to be adduced in appeal, which was not tendered in the lower Court, on the ground that it was discovered after the filing of the appeal. (31 Mad 114 ; 3 M L T 308, Ref:) **Guromurthi Chetty v Archibold Read. 9 Ind Cas 251= 12 Cr L J 40=9 M L T 323.**

(12) Declaration of removal of objections to admissibility of document.

188B—S. 568—Admission of fresh evidence—Declaration of removal of objections to admissibility of document—Powers of appellate Court—C. P. C., 1908, O XLI, rr. 23, 33——Ground arising subsequent to lower Court's decree—Reversal of decree—Power of appellate Court.

Where the appellate Court does not purport to dispute the case on merits, but simply declares that objections to the admissibility of a document on account of insufficiency of stamp are removed :

Held, that the appellate Court will not be precluded from admitting that document in evidence and remanding the case to the Lower Court for disposal.

Appellate Court-*Contd.*

3 Evidence and additional evidence on Appeal—*Contd.*

S. 568, C. P C, 1882, contemplates a case in which the appellate Court wishes or is asked to admit additional evidence for the purpose of disposing of the appeal on its merits.

The appellate Court has, either under r. 23 or r. 33, O XLI, C. P. C. 1908, power to set aside the decree of the lower Court and remand the case for disposal on the merits, on a ground which arose subsequently to the passing of the decree by the lower Court. 31 Bom 390 Expl. **M. R M. S. Yellayappa Chetti v R. Nellayappa Pillai. 9 M L T 317.**

(13) Admissibility in evidence of application before a Criminal Court.

188C—Limitation Act (XV of 1877), S. 26—Right of way-Application before a Criminal Court admissibility in evidence of-C. P. C. (Act XIV of 1882), s. 568-Additional evidence.

In a suit for declaration of right of way the Plaintiff in order to show that the period of 20 years ended within two years before the institution of the suit as required by S. 26 of the Limitation Act produced before the first Appellate Court a petition filed by the Plaintiff before the Criminal Court complaining of the obstruction in question, and the first Court, and was not marked as exhibit by the Appellate Court which also did not comply with the requirements of S 568 of the C. P. C. for admitting additional evidence.

Held—That the petition was inadmissible & the lower Court was wrong in relying upon it. **Juggernath v Kanai Das. 6 C W N 31**

(14) Document received and acted upon by Court of first instance.

188D——Admissibility——Appellate Court's powers.

When a document has been received and acted upon in the Court of first instance, a Court of Appeal ought to be very slow to interfere with the exercise of the discretion by the original Court 13 M I A 77 ; 12 W R 32 ; P C. ref to.

Lilabati Misrain v Beshun Chobey, 6 C L J 623.

(15) Lower Court overlooking much of the evidence on record:

188E—That Court below has overlooked evidence—Act X of 1877.

Appellate Court-*Contd.*

3 Evidence and additional evidence on Appeal—*Concld.*

The Court, holding that the procedure of the lower appellate Court, in over looking so much of the evidence on the record, had been defective and might have occasioned error in the determination of the case on the merits, remanded the case under s. 566 of Act X of 1877.

Mahesh Singh v Masri Singh. 1 W N 12

(16) Materials on record to guide Appellate Court.

188F—Materials on record to guide Appellate Court.

An Appellate Court can determine the appeal only upon the materials on record. 5 C W N 877 Foll.

Rakhal Moni Dassi v Adwyta Prosad Roy, 30 Cal 613=7 C W N 419.

4 REJECTION OR ADMISSION OF EVIDENCE, ADMITTED OR REJECTED BY COURT BELOW.

(1) Unstamped documents.

189—Admission of unstamped document in evidence—Act X of 1862, ss. 15 and 17—Objection made on appeal—Act VIII of 1859, s. 350,

When the Court of first instance admitted, without objection, unstamped receipts in evidence but the Judge on appeal rejected the documents, and reversed the decision of the lower Court,—*Held* that the documents, once received without objection, were wrongly rejected, and the decision below wrongly reversed on appeal, as the irregularity was not affecting the the merits of the case under s. 350, Act VIII of 1859 ; and that the Court had no power to receive the documents on payment of the stamp duty and penalty under s. 17, Act X of 1862.

Lalji Sing v Akram Sen. 3 B L R A C 235 : 12 W R 47
Curness v Sheochurn Sahoo. W R 1864, 184.

190—In a case under Act X of 1862: where an unstamped deed of sale appeared on the file, the Chief Court passed judgment upon the merits, taking the document as evidence to be considered, but remanded the case to the first Court to exact a proper penalty. **Turtee v Mukh Ram P R 59 of 1867.**

Appellate Court-*Contd.*

4 Rejection or admission of evidence, admitted or rejected by Court below-*Contd.*

191—Document admitted in Court below.

An Appellate Court has no right to refuse to admit on technical grounds a document which has been received and read in the Court below without objection. **Akbur Ali v Bhyea Lal Jha 6 Cal 666: 7 C L R 497.**

Mohabeer Doss v Lalla Roy 1 W R 12.

Gour Surn Das v Kanhy Singh. 2 W R 237.

Crawley v Maling 1 Agra 63.

Hur Chunder Ghose v Wooma Soonduree Dossee 23 W R 170

Roy Luchmeeput Singh v Moshuruff Ali 25 W R 80.

Kashee Nath Mookerjee v Mohesh Chunder Goopto 25 W R 168.

Nem Roy v Lalmun Roy. 25 W R 376.

Notes.—Not Fol. 9 Cal 813 Fol; 5 M L J 81. Dist: 12 Cal 182 Ref: 4 C L J 548; 31 Cal 155.

192—Objection to the admissibility of document taken before the Privy Council but not taken at the trial-Certified copy of an old document—Its admissibility in evidence—Practice.

Where a document was received in evidence without any objection at the trial their Lordships were of opinion that it was too late to take an objection to the admissibility before them.
A certified copy of an *ewa-namah*, or deed of exchange, dated January 1782, produced from the custody of one of the appellants, and found to be written on paper bearing the same stamp and water mark as other contemporary documents in the record of certain litigation, was held admissible in evidence. **Shahzadi Begam v The Secretary of State for India. 9 Bom L R 1192.**

193—Document admitted in Court below.

Where a document was admitted in evidence by the Court of first instance without any objection by the parties, but the Assistant Judge on appeal held it inadmissible, because it was insufficiently stamped, although no objection was made to it in the memorandum of appeal,—*Held* that the Assistant Judge ought not to have excluded it from his cosideration. **Kastur Bhavani v Appa 5 Bom 621.**

Notes:—Ref: 5 Bom 630; 1 Bom L R 587.

Appellate Court-*Contd.*

4 Rejection or admission of evidence, admitted or rejected by Court below-*Contd.*

194—195—Document admitted or rejected in Court below.

The decision of the Court of first instance as to the admissibility of a document, subject to the payment of stamp duty, is final, and cannot be reviewed by the Appellate Court.
Lakshmi Narayana Aiyar v Suppira Gaundan 2 M H C 321

Notes:—Ref: 3 M H C R 71.

196-Stamp Act I of 1879, Sec 4, cl (3) Stamp-Evidence-Document not sufficiently stamped admitted in evidence by Lower Court-Appellate Court cannot exclude it-Practice-Procedure.

A Court of first instance having admitted in evidence a document improperly stamped, the Appellate Court cannot question its admissibility.
Shidapa v Irava, P J 1893 p 527. 18 Bom 737.

197—Power of Appellate Court to reject unstamped document admitted by lower Court.

In a case where a document had been executed when Act X of 1862 was in force, *held* that an Appellate Court could not reject as evidence an unstamped or insufficiently stamped document admitted in evidence by the Original Court.
Umbah v Hurjus P R 21 of 1866.
Narain Dass v Sunt Lal P R 79 of 1870

198—Question of liability to stamp.

It is open to an Appellate Court to consider the question whether a document which the Court of first instance has declared liable to be stamped under Act X of 1862 is properly so liable.

Subraya Pillai v Srinivasa Pillai. Durga Pillai v Srinivasa Pillai. Chella Pillai v Srinivasa Pillai 3 M H C 71.

199—The fact that the document was received in evidence without a stamp is no reason for reversing the decision in appeal. **Currie v Mutu Ramen Chetty, 3 B L R A C 126. 11 W R 520.**

200—Where title deeds of land had been deposited by a debtor with the Bank of Bengal, and a letter was given authorizing the Bank to sell the land and apply the proceeds in liquidation of a debt then existing and due to the Bank, the

Appellate Court-*Contd.*

4 Rejection or admission of evidence, admitted or rejected by Court below-*Contd.*

Court declined to entertain the question whether the document relied on was one requiring a stamp, as being a matter not affecting the merits of the case or the jurisdiction of the Court.

Ibrahim Azim v Cruickshank. 7 B L R 653=6 W R 203.

201—Ground for reversal of decision.

An Appellate Court has no power to reverse the judgment of a Court of first instance, merely on the ground that the document on which the suit was based did not bear a stamp at all.

Srinath Saha v Saroda Gobindo Chowdry 5 B L R Ap 10.

Notes—Dist· 11 B H C R 129.

202—Error not affecting the merits—Improper admission of unstamped document—Civ Pro Code 1859, s. 350.

Where a Court of first instance, treating an unstamped promissory note, the after stamping of which was inadmissible, as a bond, received such instrument in evidence, on payment of the stamp duty chargeable on it as a bond and of the penalty, *held* that the reception of such instrument by such Court, being an irregularity not affecting the merits of the case, was no ground for reversing the decree of such Court when the same was appealed from. **Afzul-un-nissa v Tej Ban. 1 All 725.**

202*A*—S. 57—Printed Letters—Admission of secondary evidence—Right to reject in Appeal—Canon Law usage—Trustee—Rights of—S 30 of the Civ. Pro. Code—Limitation.

In a suit for declaration that a church and its properties were trust and that plaintiffs were its trustees and for possession of the same from defendants, certain documents consisting of printed letters of the Priests of the Jesuit Mission in the Madura District, dated about 75 years ago, were admitted in evidence under S. 57, Evidence Act, as books of reference to prove the history of Christianity and especially of the Roman Catholic Mission. *Held* that, though the books were admissible to prove facts of public history, they could not be relied on to prove where certain particular Missionaries were living or when they died. The Court can dispense with evidence only of what may be regarded as notorious facts of public history.

Appellate Court *Contd.*

4 Rejection or admission of evidence, admitted or rejected by Court below-*Contd*

Where the Lower Court has received secondary evidence certain documents, the Court in Appeal would be slow in rejecting the same on the ground that there was no satisfactory explanation for the non-production of the originals. (1888) A W N 102. Ref. 23 Mad 271, (P C); 17 Cal 3, (P C) Fol. **Ambalam Pakkiya Udayan v Right Reverend J M Barthe. (1912) 1 M W N 152.**

203—Admission by first Court of document unstamped.

The provisions of the Stamp Law, by which unstamped or insufficiently stamped documents are excluded, were framed primarily in the interests of the Government revenue, but were never intended to create or put an end to the rights of the parties. Where a document is admitted by the first Court as not requiring a stamp, its admissibility cannot be questioned in appeal.

Enayetoollah v Meajan. 16 W R 6.

203A—Ss. 12 (3), 36, 61—Drawing two lines across the face of an adhesive stamp—Effect—Appellate Court's power to question admissibility of document admitted by Court of first instance.

It seems that the drawing of two lines across the face of an adhesive stamp on a document amounts to such cancellation as is required by S. 12 (3) of the Indian Stamp Act.

Where a document, on which a suit is brought is filed with the plaint, and is admitted in evidence in the First Court without demur or objection, *held*, that the objection to its inadmissibility cannot, under the circumstances of the case, be raised in the appellate Court.

No order with regard to the stamp having been made in this case by the Court of first instance, S. 61 of the Act is inapplicable. 28 Bom 432; 6 Bom L R 436, doubted. 139 P R 1890; 2 P R 1891; 24 Bom 360, Ref. **Piran Ditta v Mangal Singh. 108 P R 1908.**

204—A Court of first instance admitted in evidence an unstamped acknowledgment of a debt which embraced items more than three years old, and consequently barred by limitaion. *Held*, that the Appellate Court was precluded from taking up the question whether the acknowledgment had, under the provisions of Act XVIII of 1869, been

Appellate Court-*Contd.*

4 Rejection or admission of evidence, admitted or rejected by Court below-*Contd.*

wrongly admitted in evidence as unstamped. **Dyal Singh v Mangal Singh P R 28 of 1878.**

205—Admission of unstamped document on payment of penalty.

A plea that a deed of sale filed had been originally unstamped, and that the lower Court was incompetent to supply the deficiency of the stamp by paying the penalty in the appellate stage of the case, was overruled. **Ram Sarun Sahoo v Veryag Mahton 25 W R 554.**

206—Where the original Court determined what the stamp was and received the penalty accordingly, *held*, that the decision could not be questioned on appeal. **Moola Mull v Gunput P R 66 of 1866.**

207—Stamp Act, s 50—Document admitted as duly stamped.

Where a document has been admitted in evidence as duly stamped, such admission can only be called in question by the Appellate Court under s. 50 of the Indian Stamp Act. **Reference under Stamp Act 1879. 8 Mad 564.**

Notes—Fol: 13 Bom 449 F B.

208 Civil Procedure Code, 1877, s. 578-Unstamped hundi admitted in lower Court.

Suit by payee against drawer upon a hundi drawn in *British* India upon a person at Colombo. The hundi was not stamped when drawn. Objection taken to its admission in evidence by defendant was allowed by the *Munsif* but plaintiff was permitted to sue for the amount due upon the original consideration. The suit was dismissed on the ground that no consideration was proved. Upon appeal the District Judge held that the hundi did not require a stamp, as it was not intended to operate in British India, and admitted the hundi in evidence as a business letter admitting responsibility, and found that there was consideration. *Held*, upon second appeal, that the hundi having been admitted in evidence, though contrary to law, by the District Judge, no objection could be taken to the decree in second appeal upon that account. **Ramasami Ramasami 5 Mad 220.**

Notes—Ap: 13 Bom 449 F B; Fol: 8 M L J 66; Ref: 17 Bom 235.

Appellate Court-*Contd.*

4 Rejection or admission of evidence, admitted or rejected by Court below-*Contd*

208 A.—Power of appellate Court to reject unstamped document admitted by lower Court.

Where a document executed on an unstamped or insufficiently stamped paper befor Act X of 1862 came into force was admitted in evidence by the lower Court but was rejected by the Appellate Court. Held that an appellate Court has no power to reject such a document. **Umbah v Hurjas 21 P R 1866 and Narain Doss v. Sunt Lall 79 P R 1870.**

209—Question of stamp duty.

Where the objection is taken for the first time in special appeal that a document, which, according to Act X of 1862, ought to have been stamped, has been admitted by both the Courts unstamped, the High Court is bound to take notice of the objection (although not one of the grounds set forth in the petition of appeal), and to require payment of the stamp duty and penalty or to reject the document. **Adinarayana Setti v Minchin 3 M H C 297.**

210—Stamp Law, Memorandum of appeal. Act VII of 1870 s. 7 cls. I, II, III and ss. 17, 18.

Held that, if a document, which ought to bear a stamp under the Court Fees' Act has been used in the High Court, and the mistake or inadvertence which permitted its reception in a lower Court, without being properly stamped, comes to light in the High Court, any Judge of that Court may, under s. 28 of the Court Fees' Act, direct that it should be properly stamped. **Chedi Lal v Kairath Chand. 2 All 682.**

Notes—Diss: 8 Cal 595 F B; Ex: 15 Bom 416. Con: 16 All 401; 29 All 749 F B; 4 A L J 636 F B. Ref: 12 All 129 F B; 33 Cal 1282.

211—On the 26th January, 1889, an application was presented to the Munsarim of the District Judge's Court for review of a judgment passed on the 19th December, 1888. The application was insufficiently stamped and the Munsarim endorsed on it, "Stamp insufficient" On this a dispute ensued between the pleader for the applicant and the Munsarim as to the sufficiency of the stamp. On the 25th April, 1889, the deficiency pointed out by the Munsarim was made good. On the 26th May, the Judge admitted the

Appellate Court-*Contd.*

4 Rejection or admission of evidence, admitted or rejected by Court below-*Contd.*

application on the applicant paying the Court-fee payable on an application presented on or after ninety days from the date of the decree. *Held* that no sufficient cause had been shown, within the meaning of s. 5 of the Limitaion Act, for not making the application within ninety days; and that the application was consequently barred by limitation and ought to have been rejected. **Munro v The Cawnpore Municipal Board 12 All 57=9 W N 197.**

Notes—Fol: 28 All 310=3 A L J 838=(1906) W N 21.

212—Release, Letter amounting to-Admission in evidence.

Held, that an objection may properly be taken in a Court of first appeal to an unstamped document, and such Court is bound to entertain the objection, and may direct that the document be stamped, and the penalty imposed. **Safdar Ali Khan v Lachman Das. 2 All 554**

Notes—Ref: 17 Bom 235; 33 Cal 613 =10 C W N 551=3 C L J 576.

(2) Stamp Act 1869 S. 20 & Sch II art 5 & II.

213—Tender of penalty of stamp duty—An appellate Court has no power to direct the receiving of a document, not stamped, to which the provisions of S. 20 of the Stamp Act (XVIII of 1869) apply, unless the amount of stamp duty and penalty was tendered when the document was first offered in evidence and rejected.

Champabaty v Bibi Jibun. 4 Cal 213.
Gour Pershad Lal v Lalla Nund Lal 7 W R 439.

(3) Stamp Act 1879 S. 34.

214—Admission of documents in evidence—Unstamped promissory note admitted as a bond on payment of stamp duty and penalty.

The plaintiff sued to recover the amount due on three khatas. The defendant objected that the khatas were not duly stamped. The Subordinate Judge held that the instruments were bonds, and as such admitted them in evidence on payment of the proper stamp duty and penalty under s. 34 proviso 1, of the Stamp Act (1 of 1879). At a subsequent stage of the same suit, his successor in office was of opinion that the khatas in question

Appellate Court-*Contd.*

4 Rejection or admission of evidence. admitted or rejected by Court below-*Contd.*

were promissory notes; that as such they could be stamped only at the date of their execution, and that they had been illegally admitted in evidence under s. 34, proviso I He accordingly dismissed the suit. On appeal, the District Judge agreed with the Subordinate Judge that the instruments sued on were promissory notes, but held that, after they had once been admitted in evidence on payment of the stamp duty and penalty, the question of their admissibility could not be subsequently raised in the suit under proviso III to s. 34 of the Stamp Act (1 of 1879). He therefore reversed the decreed of the Subordinate Judge, and remanded the case for trial on the merits. Against this order of remand defendants appealed to the High Court. *Held*, that the promissory notes, having been once admitted in evidence, could not afterwards be rejected on the ground of their not being duly stamped. **Deva Chand v Hira Chand Kamaraj. 13 Bom 449**

Notes—Fol: 8 M L J 66; 18 Bom 737.

215-Stamp Act 1879, S.34-Instrument admitted as duly stamped—Appellate Court's power to question the admission.—

Where a Court of first instance has admitted a document in evidence as duly stamped, s 34 cl 3 of the Stamp Act (1 of 1879) precludes the Appellate Court from questioning the admission of such document. If the Appellate Court considers the document to be insufficiently stamped it can only proceed under s. 50 of the Act. **Gurupadapa Bin Irapa v Naro Vithal Kulkarni. 13 Bom 493.**

Notes—Fol: 18 Bom 737; Ref 17 Bom 235.

215 A—Ss 90, 4—Document—Proof of custody—Genuineness presumed by original Court—Right of appellate Court to reject document—Practice as to proof of document—Preliminary-decree—Final decree—Appeal against former—Whether affected by latter.

Where the Court of first instance presumed a document to be genuine under S 90 Evidence Act, it was competent for the first appellate Court to hold that it should not be presumed to be genuine and to reject it without calling for further proof of the same.

According to the practice prevailing in this Presidency in the trial of suits, when *prima facie* evidence of custody and of the date of a docu-

Appellate Court-*Contd.*

4 Rejection or admission of evidence, admitted or rejected by Court below-*Contd.*

ment purporting to be 30 years old is given, the Court generally marks the document on the footing that there is sufficient evidence to justify its being marked as an exhibit at that stage. It is only subsequently that the opponent exercises his right of adducing evidence of circumstances which entitle him to say that the presumption under S. 90 of the Evidence Act should not be drawn with respect to that document. And the Court generally arrives at its conclusion on the matter, after the evidence on both sides has been given.

The right of a party to appeal against a preliminary decree is not affected by the subsequent passing of a final decree (26 All. 581; 2 C L J 592. Dist. 31 M L J 1063 Foll ; 15 C W N 830 not Fol). **Ramien v Veerappudaiyan 11 M L T 69=(1912) I M W N 117.**

215 B—S. 115—Appellate Court acting in contravention of s. 578 of the Code Ss 59, 62, 63 Court of first instance allowing document on which suit based to be produced at a late stage—Appellate Court-Dealing with case as if there was no evidence-revision—

Where a document upon which a suit was based was not produced along with the plaint, but the Court allowed it to be produced at a later stage and, relying on it gave the plaintiff a decree, but on appeal the Appellate Court rejected the document merely because it was not produced along with the plaint, and dismissed the suit.

Held, that, having regard to the provisions of s. 578 of the C P C (Act XIV of 1882) the Appellate Court acted illegally and with irregularity in the exercise of its jurisdiction, and the High Court could interfere (11 Cal 6; 3 C W N 581 Ref).

The policy underlying Ss, 62 and 63 of the C P. C (Act XIV of 1882), is to exclude evidence, as to the existence of which at the date of the suit there may be reasonable doubt, and as to the genuineness of which suspicion might rightly arise because it was produced at a late stage (8 Bom 377 and 12 C W N 312, 8 C L J 147 Ref)

The Appellate Court in the above circumstances should have considered whether leave for the reception of the document was properly granted, and whether the trial was prejudiced thereby and whether by reason of the delay in the production of the document, there was a well-founded ground of suspicion that this document was not genuine.

The appellate Court dealt with the case on the footing that, besides the excluded document there was no other evidence to support the plaintiff's case when, as a matter of fact, there was other evidence on the record.

Held, that there was no proper trial and it was incumbent on the High Court to interfere. **Mewa Lal Sahu v Kumerji Jha 13 C W N 797=10 C L J 33=2 Ind Cas 946.**

216—Power to reject deed wrongly admitted in evidence by first Court—

Defendant mortgaged to plaintiff by two written deeds two plots of land with the right to half the produce thereof. The deeds were for sums over Rs. 100, and were not registered. In a suit brought by plaintiff to recover the value of his share of the produce from defendant for kharif, Samvat 1932; the Court of first instance admitted the deeds in evidence and decreed the claim, but this decree was reversed by the Judicial Assistant on appeal, on the ground that the deeds were inadmissible in evidence for want of registration

Held, by the Chief Court, that the Judicial Assistant was competent to reject the deeds on the ground that they were inadmissible in evidence, notwithstanding their admission by the Court of first instance— **Sarbaland Khan v Chanda Singh P R 84 of 1877.**

Notes—Fol: 123 P R 1882.

(4) Valuation of Suit—Error in Valuation of Suit

217—Civil Procedure Code, 1859 s. 350.—

An error in the valuation of a claim is not an error, defect, or irregularity which affect the merits of the case, and an Appellate Court is restrained by s. 350 of the Code of Civil Procedure from ordering the reversal of a decree on account of any such error, which does not also affect the jurisdiction of the Court which originally tried the suit. **Nansa Bin Biba v Baba Bin Bahiru I B H C 163**

Subah Roy v Baldeo Singh 24 W R 225.

Notes—Ref 11 W R 257.

Appellate Court-*Contd.*

4. Rejection or admission of evidence admitted or rejected by court below—*Contd*

218—Error in valuation.—

An error in a matter of stamp is no ground for appeal. and is no reason for interfering with the decision of the Court below, under s. 350 of the Code of Civil Procedure. **Showdamine Dossee v Ram Roodro Gangooly 8 W R 367**
Mahomed Shaha v Lall Mahomed. 15 W R 179

(5) Under Valuation.

219—Dismissal—Remand—

If a lower Appellate Court finds a suit to have been undervalued, when its proper value would have placed it beyond the jurisdiction of the Court of first instance where it was instituted, it should dismiss the case, and not remand it with a view to the deficient stamp duty being made up **Augopura Chowdhry v Meah Bibee. 10 W R 207**

220—Supplemental plaint where suit was undervalued—Irregularity—

Where a suit was remanded to a Munsif's Court, and, on the defendants objecting that the plaint had been undervalued, an order was made by the Court that the plaintiff should, in some shape or other, put in the additional amount of stamp duty, and a supplemental plaint with the required stamp was accordingly put in and received, the irregularity was not considered to have affected the merits of the case or to call for a reversal of the Munsif's decision. **Guddadhur Banerjee v Premomoyee Debia 10 W R 286.**

221—Civil Procedure Code, 1859, s. 350—

In a suit in a Munsif's Court it was found, after issues had been fixed and some evidence recorded, that the claim had been undervalued and that the proper valuation would carry it beyond the jurisdiction of the Munsif. The plaint was accordingly returned; and additional stamps having been filed, the case was tried by the Principal Sudder Ameen. The Judge, on appeal, held that the plaint had been illegally returned by the Munsif, and that the act of the Principal Sudder Ameen in proceeding to try the case was illegal. He accordingly dismissed the suit. *Held*, with reference to s. 350, Act VIII of 1859, that the Judge was wrong in reversing the decree of

Appellate Court-*Contd.*

4. Rejection or admission of evidence admitted or rejected by court below-*Contd.*

the Principal Sudder Ameen. **Ram Gutty v Goono Monee Debia. 11 W R 177.**

Notes--Ref. 8 Cal 126; 12 All 553.

222—A lower Appellate Court was held to have done right in dismissing a suit on the ground of undervaluation, although the plaint had been admitted and acted on by the first Court without objection by the parties. **Mewa Lall v Beharee Lall. 14 W R 195.**

223—Civil Procedure Code, 1859, s 350—

S. 350, Act VIII of 1859, did not prohibit a Court of Appeal from modifying or reversing a decision of a lower Court, on the ground of undervaluation of the suit, if the proper valuation would have taken it beyond the jurisdiction of the Court. **Hurer Pandey v Bassoo. 11 W R 257.**

Notes:—Ref. 3 B L R Appx. 125.

224—Civil Procedure Code, 1859, s. 350—

An Appellate Court is restrained under s. 350, Act VIII of 1859, from reversing a decree on account of any error in the valuation of a claim which does not also affect the jurisdiction of the Court which originally tried the suit.
Ramessur Dyal Sing v Raj Kishore Singh. 13 W R 325.

225—Duty of, while returning plaint for presentation to proper court-Suits Valuation Act S. 11—Plaint.—

The appellate Court before discharging a decree and returning the plaint for presentation in the proper Court on the ground that the Court of first instance had no jurisdiction to try the case by reason of the over-valuation or undervaluation of the claim is bound to find whether the over--valuation or under-valuation had prejudicially affected the disposal of the case on the merits, and it is only in case it finds in the affirmative it will be open to it to discharge the decree and to return the plaint. **Wahid-ullah v Kanhaya Lal 25 All 174=1902 A W N 222 F B.**

Notes.—Ref 31 Cal 344.

(6) Dismissal of suit for insufficient stamp.

226—Act VIII of 1859, ss. 31 and 350—

Where a defendant, after the case had been gone into on the merits, set up that the suit had

Appellate Court-*Contd.*

4. Rejection or admission of evidence admitted or rejected by court below—*Contd*

been undervalued, and the Court of first instance found in favour of the plaintiff on that issue, but the lower Appellate Court was of a contrary opinion, and dismissed the suit—*Held*, that the lower Appellate Court should, before dismissing the suit on that ground, have allowed the plaintiff the option of supplying the necessary stamps, as the first Court would have done, under s. 31, Act VIII of 1859. In any case, the order of the first Court was not one affecting the merits of the case or jurisdiction of the Court; and therefore, under s. 350, Act VIII of 1859, the suit could not be dismissed on appeal upon that ground.

Wajid Ali Khan v Lala Hanuman Prasad. 4 B L R A C 139=12 W R 484.

227—Insufficient stamp—Return of plaint—Act VIII of 1859, s. 30—Jurisdiction—

Held, on special appeal, that the lower Appellate Court was right in setting aside the proceedings of the Munsif on the ground that the property in suit was valued at an amount beyond his jurisdiction, but the plaintiff was entitled to have the plaint returned to him, that he might present it with the proper additional stamp before the proper Court. **Jadu v Hifazat Hossein 5 B L R Ap 15.**

Edoo v Hifazat Hossein. 13 W R 358.

228—Undervaluation—Civil Procedure Code, 1859, s. 31–

Where a petition of appeal had been filed, time allowed for the issue of notice, and a day fixed for hearing, it was held to be the duty of the Judge, under s. 31, Act VIII of 1859, on finding that the petition was inadequately stamped, to give the appellant an opportunity of filing the proper stamp. **Nusserut Aly Chowdhry v Mahomed Kanoo Sirdar. 11 W R 145.**

(7) Court fees Act 1870 S. 12.

229—Erroneous decision of Munsif as to valuation of suit—

Where a Munsif ruled erroneously that a suit instituted in his Court had been correctly valued, and it appeared that, if the suit had been correctly valued, the Munsif would not have had jurisdiction to entertain it, the lower Appellate Court, having regard to cl. 2, s. 12 of the Court Fees Act, VII of 1870, ordered that appeal should

Appellate Court-*Contd.*

4. Rejection or apmission of evidence admitted or rejected by court below—*Contd*.

be decreed and the plaint retained until the plaintiff should pay the additional stamp duty, when the suit would be made over to the Subordinate Judge for re-trial *Held* that the order was a proper one. **Brojo Coomar Sen v Eshan Chunder Das. 3 C L R 79.**

230—Grounds—Deficiency of Court fees—Reversal of decree—

The refusal of a plaintiff-respondent to make good a deficiency in Court-fees in respect of his plaint when called upon to do so by the Appellate Court is not a ground upon which the Appellate Court should reverse the decree of the Court of first instance and dismiss the suit. **Mehdi Husain v Madar. 2 All 889.**

231—Court Fees Act, VII of 1870, Section 12 Insufficient stamp—Valuation of suit—Civil Procedure Code, Act X of 1877, Section 578.

Notwithstanding the provisions of section 578 of the Code of Civil Procedure, an Appellate Court is competent under section 12 of the Court Fees Act, VII of 1870, to dismiss the plaintiff's suit when it has been brought upon an insufficient stamp, and the plaintiff does not, when so directed, pay the amount of the delivey, although no objection as to the amount of the stamp shall have been taken in the Court below. **Shama Soondary v Hurro Soondary. 7 Cal 348= 8 C L R 528**

Notes.—Dist 15 Mad 288; Ref. 12 All 129 F B.

232—Court Fees Act, 1870 s. 12—Memoradum of appeal—Stamp—Suit for recovery of land and money—

In deciding the amount of stamps to be borne by the memorandum of appeal, the High Court is not bound by the decision of the Court of first instance as to the stamp on the plaint. **Motigavri v Pranjivandas. 6 Bom 302.**

Notes.—Fol. 15 Bom 82. Ref. 20 Bom 265 Not 16 M L J 562=1 M L T 426; 30 Mad 61.

233—Court Fees Act, VII of 1870, s. 12—Stamp—Plaint—Undervaluation—Rejection—Finality of decision -

The decision of the Court of first instance, that a plaint is undervalued, is binding upon the

Appellate Court-*Contd.*

4. Rejection or admission of evidence admitted or rejected by court below *Concld.*

Court of appeal, reference, or revision; but that Court of first instance is not justified in rejecting the plaint without giving to the plaintiff an opportunity of affixing the proper stamp.

Bai Anope v Mulchand Girdhar. 9 Bom 355.

Notes.—Fol. 14 Bom 395 Ref. 10 Bom 610 F B.

234—S. 28. Per Mahmood J., that the powers conferred by s. 28 of the Court Fees Act cannot be exercised by an order passed after the decision of the case to which the question of the payment of court fees relates and, even assuming that they can be so exercised, such an order, though it may be subject to such rules as to appeal or revision as the law may provide, cannot be given effect to by making insertions in an antecedent decree. *Per* Oldfield, J., that the Court had power to make the order it did inasmuch as the collection of court-fees was no part of a Judge's function in the trial of a suit which could be said to have ceased with its determination; and the provisions of the Court Fees Act fixed no time within which the presiding Judge could exercise his power of ordering documents to be stamped, and seemed, on the other hand, to contemplate the exercise of that power at any time subsequent to the receipt, or use of a document, and to make the validity of the document and the proceedings relative thereto dependent on the document being properly stamped.

Maha Dai v Ram Kishun Das. 7 All 528=5 W N 140.

Notes—Ref. 6 C L J 651: 12 All 129 F B; 12 C W N 37.

5. ERRORS AFFECTING OR NOT, MERITS OF CASE.

(1) Delivery of Judgment out of Court.

235.—Error in procedure—Civil Procedure Code, 1859, s. 350.

In a suit for possession of land, the Judge, after hearing the evidence and admitting the documents on both sides, intimated that he should examine the place to satisfy himself with respect to the boundaries. He did make such examination, the defendant attending, but the plaintiff being absent; and afterwards delivered his judgment in favour of the defendant out of Court. *Held* that the mere circumstance that the judgment delivered out of Court did not constitute error under s. 350, Act VIII of 1859 and was no ground of appeal. **Nilmoney Singh Deo v Bhobany Churn Panda. Marsh, 327 : 2 Hay, 305.**

Appellate Court-*Contd.*

5 Errors affecting or not, merits of case —*Contd.*

236.—C.P.C. S. 33 O 20 r. 1 S 99 (1882 S 198) —Judgment pronouncement of, in open Court—Failure to pronounce—Irregularity—Practice—C P C S 578.

The provisions of s. 198 of the Civil Procedure Code, 1882, regarding the pronouncement of judgment in open Court should be strictly observed. Apart from the fact that the failure to do is in direct opposition to an express provision of the law, the practice is highly inconvenient, and deprives the Court and the litigants of a valuable safeguard against error.

Per Jenkins C J—" I strongly disapprove of any failure to observe the provision of sec. 198 of the Civil Procedure Code; and I desire to express my disapproval, because it has been represented to us that it is not an uncommon practice in the mofussil Courts to omit to pronounce judgment in open Court .. .. .. If the practice exists, I trust it will cease and that judgments will always be pronounced, as the law requires, in open Court; and that pleaders will attend when judgment is pronounced and assist the Court by pointing out any error that may occur." **Bai Dahi v Hargovandas. 8 Bom L R 229=30 Bom 455.**

Appellate Court Errors affecting or not, merits of case—See Evidence—Civil Cases—Reports of Ameen and other officers.

237—Sections 582, 578.—

Where the judgment in appeal was signed by K. but was delivered by B his successor. *Held*, that under section 582 of the Civil Procedure Code, B had power to deliver the Judgment, and that, whether that be so or not, section 578 covered the case. **Bai Rewa v Mehta Motilal. 1896 P J 541.**

238.—Material irregularity—Revision—Appellate Court reversing decree on point not affecting merits.

Appellate Court-*Contd.*

5 Errors affecting or not, merits of case —*Contd.*

It may be a material irregularity and ground for revision, that an appellate Court, in contravention of the provisions of Section 578, Civil Procedure Code, has reversed the decree of a Subordinate Court merely by reason of an irregularity not affecting the merits of the case of the jurisdiction of the Court

No appeal lies from an order granting a review of judgment except in the cases set forth in Section 629, Civil Procedure Code, 1882. *12* Bom 171, followed.

Jaimal Singh v Gunpat Mal, 65 P R 1891.

(2) Omission to decide limitation.

239—Error or defect in decision of case.

An omission to decide a question of limitation, though not raised in the grounds of appeal, is an error or defect in the decision of the case on the merits. **Sabuji Kesraji v Rajsangji Jalmsangji. 2 B H C 169= 2nd Ed 162**

(3) Admission of invalid document.

240.—Civil Procedure Code, 1859, Section 350—Bom Reg. XVIII of 1827 S 10—Objection to validity of document unstamped.

An objection to the validity of a document under Bombay Regulation XVIII of 1827, s. 10, as distinguished from its inadmissibility in evidence, or from a prohibition to Courts of Justice or public officers to act upon it, is an objection on the merits under Act VIII of 1859.

Girdhar Nagjishet v Ganpat Moroba. 11 B H C 129.

Notes.—Ref : 13 Bom 493.

(4)—Order without Jurisdiction.

241.—Civil Procedure Code, 1859, Ss. 350, 351, 355.

Every order passed by a Court is not void for want of jurisdiction simply because it is illegal, —*e g*, where a Court remands a case under Sec. 351, Act VIII of 1859, instead of following the provisions of s. *355*. Such an order is not necessarily an error affecting the decision on the merits. **Jowad Ali v Hossein Bibi. 8W R 207.**

Notes.—Ref : 19 Bom 668.

Appellate Court-*Contd.*

5 Errors affecting or not, merits of case —*Contd.*

242.—Sec. 99 (1882 S. 578)—Varification—Defect—Objection on appeal—Irregularity.

Defective varification, if there is no reason to suppose that any one is prejudiced thereby, is no ground, at an appellate stage, either for returning the plaint for amendment or for refusing relief on the basis of the alleged defect in the plaint. 18 All 396 : 22 All 55 Fol.

Ram Komal Saha v Bank of Bengal of Akyab 5 C W N 91.

243.—Want of jurisdiction in hearing the appeal—Act XXIII of 1861, Section 35.

Where the Court of first instance has no jurisdiction, and the Appellate Court, instead of reversing the first Court Judgment for want of jurisdiction, afirms it on the merits. *Held.* by Boulnois and Lindsay, JJ. (Campbell, J, dissenting) that the Chief Court can, under Section 35 of Act XIII of 1861, revise the proceedings of the Courts below, on the ground that the Lower Appellate Court in hearing the appeal exercised a jurisdiction not vested in it by law.

Hazari Mall v Mussammat Hardevi. P R 80 of 1873.

(5) Decree passed without Jurisdition.

244.—Reversal or modification of decree—Civil Procedure Code, 1859 s. 350.

Where the proceedings and the decree passed by a lower Court were without jurisdiction,—*Held* (Spankie, J, dissenting) that s 350 of the Code of Civil Procedure did not apply, as the judgment of the High Court could not be for reversing or modifying the decree of the lower Court, there being no decree to reverse or modify. **Bijee Kooer v Damodhur Dass. 5 N W 55.**

Notes—Diss: 1 All 87.

245.—Section 99 (1882 Section 578) jurisdiction.

That the word "jurisdiction" may either mean that is ordinarily understood by the term "jurisdiction" when used with reference to the Local or pecuniary jurisdiction of a Court or its jurisdiction with reference to the subject matter of a suit; or it may mean the legal authority of a Court to do certain things. The term 'juris-

Appellate Court-*Contd.*

5 Errors affecting or not, merits of case —*Contd.*

diction' in section 578 C P C, is used in the former sense.

That Sec. 578 of the Civil Procedure Code is applicable in curing the defect of an erroneous order of remand if it does not affect the merits of the case. **Mohesh Chunder Das v Jahiruddi Mollah. 5 C W N 509=28 Cal 324.**

Notes:—Ref: 28 Mad 437=15 M L J 236, 6 C L J 547; 12 C W N 590. Fol: 5 C L J 71; 11 C W N 380; 9 O C 80.

(6) Trial on different issues and reversal in Appellate Court.

246—Trial on different issue and reversal in Appellate Court.

A suit having been decreed in favour of plaintiff in the Court of first instance, where it was tried on a certain issue, the decree was reversed in the Appellate Court where it was tried on a different issue. Plaintiff upon this objected in special appeal that he had been misled by the issue framed in the first Court, and, but for it, would have adduced evidence to prove his case. *Held* that, if plaintiff had any evidence to offer upon the issue tried in the Appellate Court, he should have moved the Judge to allow him the opportunity of offering it, and that there was no error of law in the proceedings of the lower Appellate Court. **Eshan Chundra Sein v Dhonaye 11 W R 61.**

(7) Irregular verification of plaint.

247—S. 575 C P C.

Held that the mere fact that the plaint in a suit has not been signed by the plaintiff or by his duly authorised agent will not of itself make the plaint absolutely void. A defect in the signature of the plaint or the absence of the signature when it appears that the suit was in fact filed with the knowledge and by the authority of the plaintiff can be cured by amendment at any stage of the suit. (18 All 396) (17 Cal 580) referred (19 W N 55) overruled. (11 W N 152) distinguished (14 W N 95) (16 All 240) discussed. **Basdeo v John Smidt. 19 W N 172, F B=22 All 55.**

Notes.—Fol: 5 C W N 91; 28 All 214=(1905) W N 263; 25 All 635.

Appellate Court-*Contd.*

5 Errors affecting or not, merits of case —*Contd.*

248—99 (1882 S 578)—(Second appeal)—Plaint not duly signed-amendment.

Where it was contended in second appeal that the lower Courts had erred in law in not having rejected the plaint inasmuch as it was not signed by any person duly authorized in that behalf.

Held, these grounds did not affect the jurisdiction of the Court or the merits of the case and therefore s. 578 debarred the Court from reversing or varying the decree, whether the orders of the lower Court were right or wrong.

Opendur Rahman v Palaneappa Chetty. 14 Bur L R 122.

249—Irregular order to amend Plaint—(Act X of 1877).

One K sued R for damages for the loss of the produce of 3 *bighas* of land in field No 90; and R sued A for damages for the loss of the produce of 2½ *bighas* of land in field No 90, and 1 *bigha* 15 *biswas* of land in field No. 374. The Court of first instance dismissed both these suits on the merits. The lower appellate Court remanded the cases in order that the plaints be amended by the addition of a clause praying for possession of the definite lands on which the crops in dispute had been sown, and the cases be re-tried. The first Court retried the suits and again dismissed them. The lower appellate Court gave *R* a decree, and dismissed the suit of *A*. *Held* that as the irregularity committed by the lower appellate Court in ordering the plaint to be amended did not affect the merits of the case or the jurisdiction of the Court it was covered by s. 578 of Act X of 1877. (2 All 667) followed.

Kashi Nath v. Rachpali. 1 W N 121.

249 A—S 99 (1882 S 578)—Defects in signing etc, of plaint.

Per Curiam—That the defects, in the signing and verification of the plaint, cured by S. 578.

Rakhal Chandra v. The Secretary of State 10 C W N 841=8 C L J 34.

(8) Admission of illegal evidence.

250—Civil Procedure Code, 1859 s 350

The objection that papers were admitted as evidence which were not legally admissible, is

Appellate Court-*Contd.*

5 Errors affecting or not, merits of case —*Contd*

not ground sufficient under s. 350 of the Code of Civil Procedure, to warrant a decree being reversed or modified, or a case being remanded, when it is admitted that there was other evidence to support the lower Court's finding, and the insufficiency of such other evidence is not alleged in the gronds of appeal. **Kenaram Shamunt v Gopeenath Geeree 10 W R 130.**

Notes:-1 B L R 91 Ap 8 Bom 31, Dist 24 Cal 661 Con. 15 W R 550 Over 13 C W N 533, 9 C L J 443.

251—S. 99 (1882 s 578).

Where in a suit for ejectment by a landlord against a tenant the Munsiff instead of recording the evidence in full in the language of the Court, which he was bound to do, recorded the evidence in English as it was a suit for rent.

Held that this was a mere irregularity which was cured by the provisions of s. 578 C P C **Ratan Lal Gir v. Farshi Bibi. 34 Cal 396= 11 C W N 826.**

(9) Splitting cause of action

252—Splitting cause of action

Where the lower Courts allowed a plaintiff erroneously to bring separate suits where he ought to have brought only one,-*Held* that, as the separate suits against the co-proprietor were instituted simultaneously the error in splitting up the claim against him did not affect the merits, and accordingly the decree was affirmed. **Vithu v Narayan Dabhul Rar. 5 B H C 30**

(10) Multifariousness.

253—Causes of action over some of which lower Court had jurisdiction —Duty of Judge to try these

A suit was brought against six defendants the cause of action against five of them being unconnected with the cause of action against the sixth. The Assistant Judge in whose Court the suit was brought, tried one of the causes of action, over which he had jurisdiction, but refused to try the other, over which he had no jurisdiction. In appeal, the District Judge refused to enter into the merits of either on the ground of the misjoinder or the causes of action. *Held* that the District Judge was bound to enter into the merits of the claim over which the Court of first instance had jurisdiction, it not being affected by the error in the misjoinder of the two claims **Samsuddin Pirjade v. Gunpatra Jagannath 7 B H C 19.**

See, Rukmini Burmonia v Foodun Koomaree Burmonia 23 W R 408

254——Ss 43, 44—Multifariousness—Court of remand power of.

Having regard to S 578 a decree cannot be reversed in appeal on the ground of multifariousness. An objection on this ground cannot be taken for the first time in a District Court after remand from the High Court. **Vithu v Navji 1888 P J 184.**

(11) Misjoinder of causes of action

255—Where no objection to misjoinder of causes of action is taken in the Court of first instance the appellate Court ought not to dismiss the suit on the ground of misjoinder, but should allow the plaintiff an opportunity to amend his plaint. **Behari Lal v Kodu Ram 15 All 38.**

See, Kalian Singh v Gurdial 4 All 163

Notes —Ref 18 All 131, 2 C L J 602.

256—C. P. C. S 99 (1882 s. 578)-Misjoinder of C. A. not cured.

The powers of the Courts are derived in India entirely from Legislative enactments, and their jurisdiction does not commence till a suit has been instituted in the manner allowed by law. Hence misjoinder of causes of action is not cured by the provisions of S. 578, C. P. C. (11 Cal 524, 26 Bom 259, 34 Cal 652 Ref). **Mangham Mal Rochiram v Michuma Rewachand. 1 Sind L R 181.**

257-C P. C. S. 99 (1882 s. 578) Misjoinder of C A.—Irregularity

The appellate Court is debarred under S. 578 from setting aside a decree on the ground of misjoinder of causes of action **Rup Narain v Gopal Davi. 36 Cal 780=19 M L J 548 =11 Bom L R 833=10 C L J 58= 13 C W N 920=6 A L J 567 P C.**

Notes —The new section is in confirmity with this ruling.

Appellate Court-*Contd.*

5 Errors affecting or not merits of case —*Contd.*

258.—Power of appellate Court to grant leave.

The Court below dismissed this suit on the ground that the plaintiff had, without obtaining the leave of the Court joined a claim to move able property. As it was a case in which the issue as to moveable property would decide the claim as to immoveable property the High Court in first appeal gave plaintiff leave to join the causes of action and remanded the case under s 562, Code of Civil Procedure. **Naziran Bibi v Abdus Samad. 7 C W N 266.**

(12) Misjoinder of parties and causes of action.

259.—Error not affecting merits—Civil Procedure Code, 1882, s. 578.

Held, per Mitter, J. (Pigot, J, dissenting), that, as regards the objection to the suit for misjoinder and under s 44 of the Code of Civil Procedure, the Appeal Court was precluded by s 578 of the Code from reversing the decree of the lower Court, as the error (if an error at all) could not affect the merits of the decision. **Mokund Lall v Chobay Lall 10 Cal 1061**

Notes.—*Ap*: 18 Mad 415

259A.—C P C O 1 Rr 1, 4 (a)—(1882 S 28) —Misjoinder of parties—Misjoinder of causes of action-Assault—Suit for damages.

Plaintiff's father and son, went to the house of defendants, two brothers. During the interview, in which the second plaintiff was claimg payment of some money, a quarrel took place in the course of which the first defendant struck the first plaintiff with his shoe and the second defendant struck the second plaintiff on the head with his fist The plaintiffs, thereupon, filed a suit against the defendants for damages The defendants contended that there was a misjoinder of parties and causes of action. The lower Courts disallowed the objection and awarded to plaintiffs Rs. 300 as damages.

Held, (1) that as regards the joinder of defendants, they could rightly be sued together, under S. 28 of the Code of Civil Procedure, as it was found that they were acting in concert, but

(2) that the two plaintiffs were not entitled to

Appellate Court-*Contd.*

5 Errors affecting or not merits of case —*Contd*

bring one suit, for evidently they had not the same cause of action, since the infringement of the first plaintiff's right to personal security took place when he was struck and was quite distinct from the infringement of the second plaintiff's right when he received a blow, and

(3) that the case did not come within the terms of S. 578 of the Code.

Varajlal v Ramdat 3 Bom L R 878= 26 Bom 259.

Notes—*Dist* 33 Cal 1133=10 C W N 1010 =4 C L J 121; Ref. 11 C W N 680, 29 Bom 219 Fol *34* Cal 662.

260.—C P C. S 99 (1882 S. 578)—Misjoinder of causes of action against several defendants.

A misjoinder of causes of action against different defendants is an irregularity which cannot be cured by S. 578, C P C. 17 Mad 168 at 175 followed, 24 Cal 540 explained **Muthappa Chetty v Muthu Palani Chetty. 27 Mad 80**

Notes—*Dist*: 29 Mad 50=16 M L J 39 Not *Fol* 31 Mad 252=18 M L J 238.

(13) Misjoinder of Parties

261.—C. P C (1882) S 578—Misjoinder of parties

In an appeal, the respondents contended, in support of the decree of the Lower Court, that the claim was liable to be dismissed by reason of the misjoinder of plaintiffs with different causes of action. The objection was raised in the written statement and the Court was asked to raise an issue on the point. *Held* that it was open to the respondents to raise the objection as to misjoinder in appeal 20 W R 240 distinguished. L R (1894), A C, 494, referred to. **Mohim Chundra Roy Chowdhry v Atul Chundra Chakravarti Chowdhry. 24 Cal 540**

Notes.—Ref 27 Mad 80, 2 *C* L J 602

262—Misjoinder of plaintiffs—Error of procedure

The misjoinder of plaintiffs which does not produce error in the decision of the case on its merits is not a ground for the reversal of a decree on special appeal. *Semble*—That such misjoinder

Appellate Court-*Contd.*

5 Errors affecting or not, merits of case —*Contd.*

is not a ground for the reversal of a decree in regular appeal. Where the widow of H, a Mahomedan, and his two daughters brought a joint suit for their respective shares of the estate of H, which were awarded to them jointly,—*Held* that this was an error of procedure which did not affect the merits of the case **Miya Gulam Nabi v Kharanbibi 6 B H C 177**

263—Objection to declaratory decree—Civil Procedure Code, 1859, s. 350.

A lower Appellate Court has no power to reverse the decree of a Court of first instance on the ground of misjoinder of parties After a Court of competent jurisdiction has exercised its discretion under section 15, Act VIII of 1859, and passed a declaratory decree, it does not lie within the power of a Court of Appeal, under section 350 of that Act, to set aside the decree upon an objection which does not affect the merits, and which was not taken at the time when the decree of the first Court was passed. **Ram Kanaye Chuckerbutty v Prossuno Coomar Sein. 13 W R 176**

264.—Son's liability to pay father's debts—Decree against father—Suit against son after father's death—Civil Procedure Code, Ss 43, 244—Limitation Act XV of 1877, Sch II, Art 120—Non-joinder of plaintiffs

Where a money decree payable by instalments had been obtained against a Hindu father and two of his sons and an application for execution on the father's death against two other sons born after the decree had been dismissed, *held*, that the nonjoinder of the plaintiff's undivided brother was only an immaterial irregularity by reason of the amendment made in the plaint by which the plaintiff was described as the managing co parcener and representative of his joint family **Ramayya v Venkataratnam 17 Mad 122= 4 M L J 52**

265—C. P C. O 1. r 13, O 21 r 63 S 99 (1882 Ss. 34 283, 578)-Defect of parties, objections not taken in first Court—Waiver—Relief—One member of joint Mitakshara family, if competent to maintain action.

Under section 34 of the Code of Civil Procedure (Act XIV of 1882) all objections for want of parties have to be taken at the earliest possible opportunity and in all cases before the first hearing, and any such objection not so taken is to be deemed to have been waived by the defendant; but this provision does not entitle the plaintiff to a measure of relief larger than the right he really possesses. If the plaintiff merely asks for a relief larger than the facts asserted by him would warrant, he would not necessarily be debarred altogether from any relief to which on the facts proved he might be entitled

A member of a joint Mitakshara family is, regard being had to his position as such in relation to any portion of the family property, entitled as against a trespasser or a person who seeks wrongfully to seize the property in execution of a decree obtained against a stranger, to recover possession or to ask for a declaration that the properties are not liable to be sold in execution as the properties of the alleged judgment-debtor Every member of a Mitakshara family in the position of the plaintiff in the present suit is interested in the whole of the property subject to the rights of his co-parceners. If, therefore, a member finds that the property in which he is jointly interested is about to be seized in execution as the property of stranger who has no title therein, he is entitled to maintain an action to prevent the impending mischief If the decree-holder insists that the coparceners of the plaintiff should be brought on the record and if the objection is taken in time, they may be added as party defendants, but the plaintiff is clearly entitled to obtain the necessary declaration

There is well known distinction between non-joinder of necessary or indispensable parties and non-joinder of proper but not indispensable parties, and where, as here, the parties ommitted are necessary only for the purpose of protecting the defendant from further litigation, the Court may in its discretion disregard the objection if not raised at the proper stage.

Under the provisions of section 578 of the Code of Civil Procedure, the appellate Court is not entitled to reverse the decree of the lower Court on the ground that the co-parceners of the plaintiff have not been joined on the record unless the appellate Court is satisfied that the omission has affected the merits of the case or the jurisdiction of the Court. The Court must in a case of this description look to the essential justice of

Appellate Court-*Contd.*

5 Errors affecting or not, merits of case —*Contd*

the case and keep in view the substance and merits rather than strict adherence to what turns out, as in this case, to be a matter of form

Dursun Singh v Durbijoy Singh 7 C L J 623

266 —S 99—Misjoinder—Non joinder

For the purpose of construing Section 99 of the Code of Civil Procedure the word 'misjoinder includes 'Non joinder'

Where a suit is based upon an arrangement with a previous Karnavan it would seem to be unnecessary to make the other members parties unless they choose to join as such. (7 Mad 428 Dist 21 Mad 373 Fol) **Ekkanatha Eachara v Manakkat Vasunni** 7 M L T 102= 5 Ind Cas 774=20 M L J 344

(14) Order adding party to suit.

267 —Civil Procedure Code 1859 s 363

An order adding a party to a case is not affecting the merits in the sense of s 363, but where such order is made without postponing the case, (s.73) for a reasonable time, it is a very important matter **Koomara Oopendra Krishna Deb v Nobin Krishna Bose** 17 W R 370 note

Upendra Krishna Deb v Nobin Krishna Bose. 3 B L R O C 113

Notes –Ref 17 W R 364

(15) Rescission of order on same day as made without notice to one of the parties

268.—Adjournment –Civil Procedure Code, 1859, s. 146.

Where an order was regularly made by a Munsif under Act VIII of 1859, s 146, granting time to the parties, adjourning the hearing, and fixing a day for the further hearing, but was rescinded on the same day on the application of the defendant, and the case tried on the following day, when all the evidence which the plaintiff was entitled to produce was not before the Court,—*Held* that as it was not shown that the rescinding order was regularly and properly made, there was a defect in the procedure and a defect in the procedure and a defect in law, which might most materially have affected the decision on the merits **Bishen Perkash Singh v Ruttun Geer Chela** 20 W R 3

(16) Decree against agent instead of principal.

269 —Suit brought in name of agent instead of corporate body—Civil Procedure Code, 1859, s. 350

Where a decree makes a party liable who is not liable (*e g*, an agent instead of the corporate body whose agent he is) the error is one affecting the merits within the meaning of s. 350, Civil Procedure Code **Nubeen Cnunder Paul v Stephenson.** 15 W R 534.

(17) Technical error

270 —Ground for reversing judgment.

The lower Appellate Court is not justified in reversing a decision of the Court of first instance for a technical error, unless that error has affected the decision of the case on the merits. The best test to ascertain whether an erroneous interlocutory order has affected the ultimate decision on the merits is to see whether the Court would have come to the same decision, had the erroneous order not been passed **Pran Nath Bhadoory v Shree Kant Lahoree** 2 C L R 257.

(18) Filing appeal without copy of decree

271 —Cure of irregularity.

The appellant filed an appeal against the judgment of the Court of first instance without a copy of the decree. Subsequently the decree of the Court of first instance was filed within the time allowed for appeal and accepted by the Judge *Held* that the irregularity was cured, and the appeal should not have been dismissed on the ground of such irregularity **Lullee v Ram Pershad** 2 Agra 34

(19) Improper exercise of discretion in granting declaratory decrees.

272 —An improper exercise of discretion in granting a declaratory decree under s. 42, Specific Relief Act is nothing but a mere irregularity

Appellate Court-*Contd.*

5 Errors affecting or not, merits of case —*Contd.*

cured by s. 578. This does not imply that, even in cases where the discretionary power to award declaratory relief has been exercised wholly arbitrarily, and in a manner grossly inconsietent with judicial principles, the Court of Appeal would have no power to interfere. **Sant Kumar v Deo Saran. 8 All 365.**

(On the first point also) **Muhammad Mashuk Ali Khan v Khuda Buksh. 9 All 622.**

273—Objection disallowed by First Court—Appellate Court.

Held that where a claim for moveable property had been joined with one for immoveable property without the leave of the Court, but the objection was overruled by the Court of first instance it was not proper to interfere with the discretion of the lower Courts on that ground with reference to s. 578. **Bulaki v Mul Chand 1 W N 15.**

(20) Error in allowing wrong party to begin.

274.—The defendants in a suit on a bond admitted the execution of the bond, but denied that they had received, as the bond recited they had at the time of its execution, the consideration for it. The Court of first instance instead of calling on the defendants to establish the fact that they had not received the consideration for the bond, as it ought to have done under the circumstances, irregularly allowed the plaintiff to produce witnesses to prove that the consideration for the bond had been paid at the time of its execution. The evidence of these witnesses proved that the consideration of the bond had not been paid at the time of execution, and that, if it had been paid at all it had been paid at some subsequent time. The plaintiff did not give any further evidence to establish such payment and the Court of first instance, without calling on the defendants to establish their defence, dismissed the suit. The lower appellate Court held that the defendant should have been required to begin under the circumstances, and reversed the decree of the Court of first instance and gave the plaintiff a decree. *Held* that, although the plaintiff ought not to have begun, yet as he had done so,

Appellate Court-*Contd.*

5 Errors affecting or not, merits of case —*Contd.*

and his witnesses had proved that the consideration for the bond had not been paid as admitted in the bond, a new case was opened up, in which the *onus* was shifted back to the plaintiff to establish that he had, not at the time alleged in the bond, but at some subsequent time, paid to the defendants the consideration for the bond. Also that it was doubtful, having regard to the provisions of s. 578 of Act *X* of 1877, whether it was competent for the lower appellate Court to reverse the decision of the Court of first instance; but even if it were, the lower appellate Court should not have ignored what had taken place, but should have dealt with the case in appeal in the shape it came before it. **Makund v Bahori Lal. 3 All 824=1 W N 86.**

(21) Omission to state reasons for decision.

275.—Civil Procedure Code, 1877, s. 578.

In a suit to recover possession of certain immoveable property alleged to have been purchased by the plaintiff from a Hindu widow who claimed to have had the same as heir of her husband, the defendant, who was the mother of the husband, contended, *inter alia*, that the alleged purchase and sale were invalid by reason that she herself was entitled to maintenance out of the property. The first Court gave the plaintiff a decree, and this decree was affirmed on appeal by the District Judge, who, however, gave no reason of his own for his judgment, but merely adopted those of the lower Court. *Held*, that having regrad to the nature of the case and the simplicity of the point for determination, the fact of the District Judge having omitted to state his reasons did not amount to such an error of law within the meaning of s 857 of the Code of Civil Procedure as affected the merits of the case or the jurisdiction of the Court. **Rohimoni Dabi v Zamiruddin 8 C L R 597.**

276.—Ss 99, 100 (1882 s 578, 584)—Appellate judgment—Omission to state reasons for decision—Defect if curable—Ground of second appeal.

Where the first Appellate Court gave the following judgment:—"The point in dispute is a question of fact and I see no reason to differ from finding of the Lower Court. The appeal is dismissed."

Held, that the appellate judgment did not

Appellate Court-*Contd.*

5 Errors affecting or not, merits of case —*Contd.*

comply with the provisions of s 574 Civ Pro Code. The points for determination were set out but the reasons for the decision were not stated.

Held, also that the facts of the case demanded fuller treatment than they received, and the defect was not cured by the provisions of s 578 of the Code.

Defect in the appellate judgment is a ground of second appeal. 12 Cal 199 Dist.

Shaharulla Mondal v Bangoo Mondal 13 C W N 143=2 Ind Cas 404

Notes.—Ref: 13 C W N 1031.

(22) Objection by one of several parties

277.—Civil Procedure Code 1877 s 578-Irregularity not affecting the merits or jurisdiction—Misjoinder.

Where one party alone objected to the frame of the suit and the defect (of misjoinder and multifariousness) did not affect the merits of the case or the jurisdiction of the Court, the Lower Appellate Court ought not, regard being had to s 578 of Act X of 1877, to have reversed the decree of the Court of first instance by reason of such defect.

Kallian Singh v Gur Dayal 4 All 163.

Notes.—Ref 2 A L J 91; 2 C L J 602. Not Fol 6 A L J 925.

(23) Error in frame and valuation of suit.

278.—(Act X of 1877). The plaintiffs in this suit alleging that they were co-sharers of a certain village, that certain land situate in such village was the property of the co-sharers, and that such land had been improperly sold by the persons occupying it to one of the co-sharers, sued the vendors and the purchaser and the other co-sharers for possession of their share of such land and the setting aside of the sale so far as their share was concerned and valued the suit according to their share. *Held*, that the error in the frame and valuation of the suit, inasmuch as it did not affect the jurisdiction of the Court in which the suit was instituted or the merits of case was not, under s.578 of the Code of Civil Procedure, a ground on which the appellate Court should have reversed the decree of the Court of first instance. (12 B L R 370)

Param v Achal 4 All 289=2 W N 36.

Notes—Ref 15 Bom 309.

Appellate Court-*Contd.*

5 Errors affecting or not, merits of case —*Contd.*

(24) Dismissal of suit for undervaluation.

279—Civil Procedure Code, 1877, S. 578—Irregularity affecting merits.—

Even after the evidence is heard, if the Court finds that a suit is undervalued, it ought to return the plaint under S. 57, and not to dismiss it. An order of dismissal was an irregularity affecting the merits of the case and the Appellate Court can deal with it under S. 578.

Bhudeshwar Chowdhry v. Gauri Kant Nath, 8 Cal 834.

Notes: Fol. 10 Mad 211.

(25) Institution of suit in wrong Court.

280—Concurrent—Jurisdiction of Munsif and Subordinate Judge.—

Per Petheram, C. J. and Brodhurst, Mahmood and Duthoit, JJ.—The object of ss. 19 and 20 of the Bengal Civil Court's Act, 1871, was to create in the District Judge, Subordinate Judge, and Munsif concurrent jurisdiction up to Rs. 1,000. *Per* Petheram, C. J—S. 15 of the Civil Procedure Code is a proviso to those sections. The word "shall" in that section is imperative on the suitor. The word is used for the purpose of protecting the Courts. The suitor shall be obliged to bring his suit in the Court of the lowest grade competent to try it. The object of the Legislature is that the Court of the higher grade shall not be overcrowded with suits. Whenever an act confers a benefit, the donee may exercise the same or not at his pleasure. The proviso is for the benefit of the Court of the higher grade, and it is not bound to take advantage of it. If it does not wish to try the suit, it may refuse to entertain it. If it wishes to retain the suit in its Court, it may do so; it is not bound to refuse to entertain it.

Per Duthoit The words in s. 15 of the Code of Civil Procedure, "shall be," are an instruction which the Court is bound to follow; and they are therefore a restraint upon jurisdiction. The effect, therefore, of the concurrent jurisdiction of Subordinate Judges and Munsifs is not to allow to a Subordinate Judge discretion as to accepting or not accepting for trial by himself suits cognizable by the inferior tribunal.

Brodhurst and Mahmood, JJ.—S. 15 of the

Appellate Court-*Contd.*

5 Errors affecting or not, merits of case —*Contd.*

Code of Civil Procedure is a rule of procedure, not of jurisdiction, and whilst it lays down that a suit shall be instituted in the Court of the lowest grade, it does not oust the jurisdiction of the Courts of the higher grades. 22 W R 301 25 W R 219 followed.

Per Oldfield. J—S. 15 of the Code of Civil Procedure is a provision entirely of procedure as distinct from jurisdiction, and its effect on s. 19 of the Bengal Civil Courts Act, is that the jurisdiction of the District Judge and Subordinate Judge extends to all original suits cognizable by the Civil Court, subject, in its exercise to a certain procedure. namely, that the suits be instituted in the Court of lowest grade competent to try them.

Held, therefore, by Petheram, C J and Oldfield, Brodhurst, and Mahmood, JJ—Where a Subordinate Judge had tried a suit which a Munsif, a Court of a lower grade, might have tried, that the Subordinate Judge had not acted without jurisdiction. The plaint in such suit had been in the first instance presented to the Munsif, who had returned it, to be presented to the Subordinate Judge.

Per Duthoit, J—The decree of the Subordinate Judge would not be liable to be reversed in appeal for want of jurisdiction, for jurisdiction was there, though it ought not to have been exercised. This view of the matter was consistent with the received canon of construction, that unless the Legislature uses negative words, or words showing an intention to treat the observance of a rule of procedure as essential, the rule will ordinarily be treated as a direction only. Under the circumstances, therefore, the District Judge had, in appeal, correctly refused to entertain the plea of defect in jurisdiction.

Per Mahmood J—The institution of a suit in a Court of higher grade than the Court which is competent to try it, is not a question either as to the jurisdiction or affecting the merits of the case. It is a question of the kind provided for under s 578 of the Code of Civil Procedure,and the irregularity is not one which affects, " the merits of the cases or the jurisdiction of the Court " within meaning of that section. The plea of want of jurisdiction can be entertained for the first time at any stage of a suit, provided there is on the record sufficient material to subordinate it. **Nidhi Lal v Mazhar Husain. 7 All 230=5 W N 1.**

Appellate Court-*Contd.*

5 Errors affecting or not, merits of case —*Contd.*

Notes Ap. 12 Bom 155 Fol. 9 M L J 263; 15 Mad 241, 28 Mad 367. Ref. 14 Mad 183; 23 Bom 22; 8 All 438 F B. Dist. 8 Bom L R 516.

281.—Institution of suit in Subordinate Judge's Court instead of Munsif's Court—Civil Procedure Code, 1882, s. 578.

The words "not affecting the jurisdiction of the Court " in s. 578 of the same Code mean " not affecting the competency of the Court to try." The error in instituting a suit in a Subordinate Judg's Court instead of in that of the Munsif is not an error which affects the jurisdiction of the former Court within the meaning of s. 578. **Matra Mondal v Hari Mohun Mullick *alias* Mothura Mohan Mullick.**

17 Cal 155.

Notes.—Fol: 9 M L J 263; 5 C W N 509; 28 Cal 324; 15 Mad 241; 23 Mad 367. *Ref.* 14 Mad 183; 8 Bom L R 516, 31 Cal 849; 8 C W N 705.

(26) Suit brought on behalf of minor without authority.

282.—Civil Procedure Code, 1882, s 37—Minors Act, Bombay (Act XX of 1864).

In a suit brought by the Political Agent, Southern Mahratta country, as administrator of the estate of the Chief of Madhol, who was described in the plaint as being 19 years of age, to eject the defendants from certain lands belonging to the Chief situated in the Satara district, it was found, on preliminary objections taken by the defendants, that the Political Agent had no authority to institute the suit, he being neither a certificated guardian of the Chief under the Bombay Minors Act XX of 1864 nor a " recognized agent" under s. 37 of the Civil Procedure Code. *Held*, also, that the irregularity of the Political Agent's suing for the Chief without authority was one affecting the merits of the case, though not the jurisdiction of the Court. If the Political Agent was not properly representing the Chief, he had no *merits*, no rights as against the defendants. The District Judge was, therefore, right in reversing the decree of the first Court,—s. 578 of the Code of Civil Procedure having no application to the present case. **Venkatrav Raje Ghorpade v Madhavarav Ramchandra**

11 Bom 53.

Appellate Court-*Contd.*

5 Errors affecting or not, merits of case —*Contd.*

283.—C P. C. S. 99 (1882 S. 578)—Minor appellant—Death of guardian pending appeal—Non-appointment, mere irregularity.

Held, where the next friend of a minor appellant died during the pendency of an appeal and the appeal was decreed in his favour without any person being appointed to act as his next friend, the omission to make such appointment was a mere irregularity, and as no one was prejudiced thereby, the decree passed should not be disturbed. **Bholai Ram v Ajudhia Prosad. 3 A L J 81.**

(26A) Want of formal order of appointment of guardian ad litem in a suit against minor.

283A.—C. P. C. O. 32 rr. 3 (1) 4 (1882 S. 443)—Minors—Suit—Guardian *ad litem*—Recording a formal order of appointment—Summons non-service of-Irregularity—Procedure.

A defect in following the procedure prescribed by S. 443 of the Civil Procedure Code is not necessarily fatal to the proceedings.

Where, in a suit against the minors, the minors are represented by their mother though no formal order appointing her to be their guardian is drawn up, and no attempt is made to serve the summons upon the minors personally or upon their mother, a *pardahnashin* lady, before serving it upon the only adult male member and the *karta* of the family, these defects in procedure, if they have not caused any prejudice to the minors, are irregularities which, under S. 578 of the Civil Procedure Code, would not have furnished grounds for reversing the proceedings in the former suit, if they had been raised upon appeal in that suit; much less, could they furnish any ground for reversing the proceeding by a fresh suit. **Must. Bibi Walihan v Banke Behari. 5 Bom L R 822=7 C W N 774=30 Cal 1021=30 I A 182 P C.**

Notes.—*Dist:* 28 All 137=2 A L J 615=(1905) W N 229=5 C L J 434=29 All 675=A W N (1907), 225. *Fol.* 29 Mad 58=16 M L J 14. *Ref:* 7 O C 234=10 O C 263=10 O C 321=11 O C 159.

(27) Omission to appeal from order.

284.—Civil Procedure Code, 1882, s. 591.

Appellate Court-*Contd.*

5 Errors affecting or not, merits of case —*Contd.*

S. 591 of the Code enables the Court, when dealing with an appeal from a decree, to deal with any question which may arise as to any error, defect, or irregularity in any order affecting the decision of the case, though an appeal from such order might have been and has not been preferred. 7 Cal 148, referred to. **Har Narain Sing v Kharag Sing. 9 All 447.**

Notes.—Fol: 14 Bom 232. Dist: 12 All 200. Ref: 15 Bom 145; 10 All 223 F B; 12 All 510 F B.

(28) Permission to relative, to sue proof of.

285.—Act XL of 1858, s. 3—Civil Procedure Code, Ss. 440, 578.

In a suit conducted on behalf of a minor by a relative, the absence of the certificate of guardianship required by s. 3 of the Bengal Minors Act (XL of 1858) is not a fatal defect; and the fact of the Court allowing such a suit to proceed must be taken as implying that the necessary permission has been given. Even if such permission has not in fact been given the irregularity is covered by s. 578 of the Civil Procedure Code. 14 Cal 159 followed. **Parmeshar Das v Bela 9 All 503**

(29) Declaratory decree.

286.—Exercise of discretion.

Held that an improper exercise of the discretionary power (e g., giving a decree though there does not appear to be a sufficient cause of action) conferred by s. 42 of the Specific Relief Act, by a Court of first instance, does not in itself constitute a sufficient ground for the reversal of a decree which is not open to any objection upon the ground of jurisdiction or of the merits of the rights of the parties. **Muhammad Mashook Ali Khan v Khuda Buksh. 9 All 622=7 W N 226 Sant Kumar v Deo Saran. 8 All 365=6 W N 129.**

(30) Allowing assignee of decree to go on with execution though he has made no formal application for execution.

287.—Where the Court allows the assignee of a decree to proceed with the execution even if he has omitted to make a formal application for execution, it is an error of procedure and not one

Appellate Court-*Contd.*

5 Errors affecting or not, merits of case —*Contd.*

affecting the merits of the case. **Dwar Buksh Sirkar v Fatik Jali. 26 Cal 250=3 C W N 222.**

Notes.—Fol: 27 Cal 670, 25 Mad 529; 28 Mad 87=14 M L J 474. Ref: 6 A L J 71 F B=31 All 82 F B.

(31) Exclusion of evidence

288.—Ground for reversal of decision—Civil Procedure Code, 1882, s. 578.

The exclusion of evidence in the lower Court is not sufficient ground for reversing that Court's decree, unless the Appeal Court comes to the conclusion that the evidence refused, if it had been received, ought to have varied the decision. **De Souza v Pestanji Dhanjibhay. 8 Bom 408.**

289.—S. 99 (1882 Sec 578)—Prejudice—Document, refusal of prayer to send for.

Omission by a Court to send for a document and to give an opportunity to a party to prove the same is not sufficient to set aside a decision, unless such omission has prejudiced the party who wanted the document to be proved. (3 Bom 159; 5 Mad 6; 11 Mad 213: 11 Cal 486; 18 All 168 Ref: 22 All 149 (P C) Dist:) **Gopal Singh v Laloo Lall. 10 C L J 27=2 Ind Cas 953.**

(32) Error in rejecting documents already admitted.

290.—Order of remand—Civil Procedure Code, 1882, s. 578.

Where in a suit to recover the amount due on three khatas, the first Court found they were bonds and admitted them on payment of Stamp Duty, but at a subsequent stage of the suit his successor in office was of opinion that they were promissory notes, and that, therefore, they, not being stamped, could not have been legally admitted in evidence, and accordingly dismissed the suit; and the District Judge held that, after they had once been admitted in evidence on payment of the penalty, the question of their admissibility could not be raised, and remanded the suit for trial on the merits.—*Held* that, under s. 578 of the Code of Civil Procedure (Act XIV of 1882), the High Court could not interfere with the order of remand, as it was not one which affected the merits of the case or the jurisdiction of the Court. **Devachand v Hirachand Kamaraj. 13 Bom 449.**

Notes.—*Fol:* 8 M L J 66; 18 Bom 737.

(33) Execution of document by a pardanashin lady.

291.—Civil Procedure Code (1882) Ss. 383, 390 and 578—Perdanashin lady—Refusal of Commission—Irregularity not affecting the merits of a case—Proof of Execution of a document by her.

In a suit on a mortgage-bond the defendant denied in her written statement the execution of the deed. She then applied for the issue of a commission to take evidence, which was rejected by the Court of first instance. There was a concurrent finding of both the lower Courts to the effect that there was sufficient evidence of the execution of the document by the defendant with full knowledge of its contents. It is apparent in the judgment of the Subordinate Judge that if the defendant had been examined and had given evidence in support of her written statement, he would not have believed it, and in their Lordships' opinion it could not reasonably have prevailed against the evidence given by the plaintiffs. *Held* that the refusal to take evidence by commission was not a valid ground of appeal and even if it had been taken, it would not have affected the merits of the case within S. 578 of the Civil Procedure Code (1882). **Akikunnissa Bibi v Rup Lal Das. 25 Cal 807=2 C W N 566**

Notes.—Dist. 28 Cal 37.

(34) Refusal of Court to summon witnesses.

292.—S. 159 C. P. C.—Refusal of Court to summon witnesses.

Where an application to a Civil Court for witnesses to be summoned has been refused on the ground that the applicant has negligently or with intention to delay the hearing postponed the making of his application for a summons until a time when it would be impossible to obtain the attendance of the witnesses at the hearing, and the refusal is made one of the grounds of appeal against the decree in the suit. *Held* that s. 578 would apply if the irregularity in refusing the

Appellate Court-*Contd.*

5 Errors affecting or not, merits of case- *Contd.*

application did not affect the merits of the case. if it did affect the merits of case, the ground of appeal would be a good one. **Bhagwat Das v Debi Din. 16 All 218.**

Notes.—*Fol*: (1904) W N 93; 26 All 517.

(35) Execution of decree against representative of debtor.

293—Civil Procedure Code (1882), ss. 234, 248, and 578—Application by decree-holder for execution of decree by substitution on death of the judgment-debtor to the Court where the decree has been transferred.

A decree was transferred to another Court for execution. Pending the proceenigs one of the judgment-detors died On an application to that Court by the judgment creditor to execute the decree against the legal representative of the deceased judgment-debtor, a notice was issued under s. 248 of the Code of Civil Procedure. The legal reprtsentative objected that the Court had no jurisdiction to entertain the application, and that the application should have been made under s. 234 of the Code to the Court that passed the decree. H*eld* that, even assuming that an application under s. 234 to the Court which passed the decree was a necessary preliminary to proceedings under s 248 by the Court executing the decree, the omission to make it was only an irregularity which did not affect the merits of the case, and, under s. 578, the order of the Court of first instance should not have been reversed on account of such irregularity.

Sham Lal Pal v Modhu Sudan Sircar. 22 Cal 558

Notes.—Ref: 12 M L J 24; 9 C L J 443, 13 C W N 533. Dist: 27 Cal 488. Not Fol: 28 Mad 468 F B=15 M L J 116.

(36) Illegal order of remand.

294—Civil Procedure Code (1882), S. 578—Irregularity affecting the merits.—

Where a District Court reversed the District Munsif's decree and remanded the case for a revised finding on the merits:—*Held*, that this procedure was *ultra vires* and illegal, and that, as the irregularity might have affected the merits

Appellate Court-*Contd.*

5 Errors affecting or not, merits of case- *Contd.*

of the case, s. 578, Civil Procedure Code, was inapplicable. **Mallikarjuna v. Pathanenj, 19 Mad 479.**

Notes:—Ref: 28 Cal 324; 5 C W N 509; 28 Mad 437=15 M L J 236=32 Mad 83.

295—S. 99 (1882 s. 578)—Remand—Irregularity. Where an order of remand by the lower appellate Court was not strictly in accordance with s. 562. Held this was an irregularity such as was covered by s. 578. **Trailokya Mohini Dasi v Kali Prosanna Ghose, 11 C W N 380.**

296—S. 99 (1882 Sections 564 and 578)—Remand when decision was not on a preliminary point—Consent and waiver.

Where a remand is made in a case when the suit had not been disposed of on a preliminary point, the remand is, not merely irregular but is also illegal and all proceedings after remand are void. The doctrine of consent or waiver giving jurisdiction, considered. 18 Mad 427 & 19 Mad 479 App: & Fol: 28 Mad 430. Ref: 24 Mad 61 (PC). Fol: 28 Mad 437 Discussed: 18 Mad 421 Fol.

Palni Chetty v. Rangiadoss Naidu, 4 M L T 479=32 Mad 83=1 Ind Cas 746.

297—S. 99 (1882 S. 578)—Improper remand when cured.

S. 578 of the Code cures the defect in an irregular order the remand made by an appellate Court unless the merits of the case are shewn to have been affected in any way by the order. 5 C L J 71 ref. to. **Debendra Nath Bhattacharjee v Basanta Kumar Chakravarti, 5 C L J 328.**

298—Where a District Judge wrongly made a remand order and expressed his view therein about a material point in the case, and the issues were tried and findings returned, *held* that section 578 covered the irregularity as the District Judge had been changed and there was no reason to suppose the defendant would be prejudiced by the new Judge adjudicating the cause.

Shettyapa v. Yellapa, 1894 P J 190.

Appellate Court-*Contd.*

5 Errors affecting or not, merits of case-*Contd.*

(37) Jurisdiction of a Court where a decree has been transferred for execution to substitute the name of the transferee of the decree.

299—Civil Procedure Code s. 232—application by a transferee of a decree for execution, made to a Court to which the decree was transferred for execution—interpretation of section 232—

Order passed without jurisdiction, whether cured by section 578 of the Civil Procedure Code. Having regard to the provisions of section 232 of the Code of Civil Procedure an application for execution of the decree by the transferee, after substitution of his name, could be entertained only by the Court which passed the decree and that the Court to which the decree had been transferred for execution had no judisdiction to entertain it. The cases in (1870) 14 W R 65, (1872) 9 B H C Rep 46; (1879) 2 All 283 support this view.

When according to the above veiw no Court other than the Court which passed the decree can in the exercise of its discretion determine whether a transferee of a decree should be allowed to execute the decree, if any other Court determines that matter, it acts without jurisdiction and its order could be set aside on appeal in spite of the provisions of section 578 of the Civil Procedure Code. The case of (1895) 22 Cal 558 distinguished. **Amarchandra Banerjee v Guru Prosunno Mukerjee, 27 Cal 488.**

Notes—Ref 25 All 443; 28 Mad 466 F B= 15 M L J 116; 13 C W N 533, 9 C L J 443, 1 C L J 315. Rel; 12 M L J 24.

(38) Court taking action under wrong section.

300—s. 335—Court taking action under wrong section—

Where a Court executing a decree on complaint made by the decree-holder took action under s. 331 of the Code of Civil Procedure instead of under s. 315, which was the section applicable to the facts of the case, it was *held* that the action of the Court would not be covered by s. 578 of the Code. **Jhamman Lal v Haidar Baksh, 18 W N 79.**

Appellate Court-*Contd.*

5 Errors affecting or not, merits of case-*Contd.*

(39) Judgment-creditor appearing by an agent holding a power of attorney.

301—S.37—Where the judgment-creditor appeared in the Court of First Instance by an agent holding not a general power-of-attorny as required by S 37 but one for the particular case only without objection, *held* that the irregularity was one not affecting the merits of the case or the jurisdiction of the Court, and the order of attachament given by the Court of First Instance should not on that account have been set aside on appeal. **Charles Palmer v Sorabji. 1886 P J 63.**

(40) Application to stay execution of decree not made absolute-

302—S. 99 (1882 S. 578)—Sale in execution—Mortgage decree directing the sale of the mortgaged property—Decree nisi not absolute—Application to stop the execution—

After an order was passed for sale of the mortgaged property in execution proceedings taken under a mortgage decree directing the sale of the mortgaged property in default of payment by the mortgagor within a certain time, an application was made by the mortgagor to stop the execution on the ground that there was no decree *absolute* and that therefore his right of redemption was not extinguished.

Held, (1) that all the conditions of s. 89, Transfer of Property Act, 1882, having been complied with except that in the application for the order for sale the word "absolute" did not appear, the application must fail:

(2) that even if there had been an error, it was of the most technical description and one manifestly covered by s. 578 of the Civil Procedure Code, 1882. **Mancherji v Thakordas. 5 Bom L R 389.**

(41) Appeal against order absolute for sale.

303.—S 99 (1882 S 578).—Order absolute for sale—Appeal as from order—Error immaterial.

Where an appeal was preferred against an order absolute for sale treating it as an appeal against an order and not from an original decree (erroneously according to the court), *Held* that the error was covered by s 578. **Pramatha Chandra v Khetra Mohan 29 Cal 651.**

Appellate Court-*Contd.*

5 Errors affecting or not, merits of case-*Concld.*

Notes:—Fol: 10 C L J 91; Ref: 10 C L J 115.

(42) Re-opening execution proceeding under wrong section.

304.—Ss 47, 99; S 114; O 47 r 1 (1882)—ss. 244, 578, 623—Petition to-open execution—Review.—

Where such an application was made by the decree-holder referring to both ss 244 and 623 C P C, and the first court thought that the latter section was inapplicable and re-opened the proceedings under s 244.

Held-That even if s 623 only was applicable, the order of the first Court could not, having regard to sec 578, C P C., be interfered with on appeal.

Nilratan Khasnobish v Ram Rutton Chatterji 5 C W N 627.

(43) Disposing of suit on Sunday.

305.—S 99 (1882 s 578)—Irregularity—Disposal of a suit on a Sunday.

Held, that the disposing of a civil suit on a Sunday is a mere irregularity which is covered by the provisions of s 578 of the Code of Civil Procedure. 9 All 366 and 16 W R C R 230 ref to.

Sheo Ram Tiwari v Thakur Prasad 1907 A W N 168=29 All 562=30 All 136.

(44) Appeal heard before the hour fixed for hearing cases

305A.—Appeal heard before the hour fixed for hearing cases—Court refusing to hear pleader on his appearance—Material irregularity.—

Held, that where an appellate Court disposes of an appeal, before the hour fixed for hearing cases, and refuses to hear Appellant's Counsel, on his appearing in time, it acts with material irregularity and its order is liable to be set aside on revision. **Chand v Devi Ditta 14 P W R 1907.**

Appellate Court—Reversal of decree by-See Judgment—Language of Judgment.

L B R 1872-1892, 953

Appellate Court-See Practice & Procedure **1 L B R 38**

Appellate Court-*Contd.*

6 INTERFERENCE AND POWER TO VARY ORDER OF LOWER COURT.

(1) Power of, on appeal exparte.

306—Power to raise points in absence of Respondents—Act XXIII of 1861 s 37.

An appellate Court, hearing an appeal *ex-parte* in the absence of the respondent, cannot, *suo motu*, raise points in favour of the respondent, but must confine its decision to the questions raised by the appellant. **Durga Prasad v Khairati. 1 All 545.**

2 Making different case for appellant from that which he makes for himself in first. Court.

307—Practice.

A Judge is not permitted to make, on appeal, a different case for the appellant from that which he alleged for himself in the Court of first instance. **Kachubhai v Krishnabai. 2 Bom 635.**

308—A Court should not make a new case or another defence for defendant. **Vithoba v D. Anna Rozario Mendosa. 1888 P J 212. Govardhandas v Lilachand. 1889 P J 81 Hirasing v Rupaji. 1890 P J 166 Vighneswarbhat v Vithalbhat 1888 P J 256 Narayan v Sakharam. 1889 P J 42**

309—Partition suit—Preliminary order for partition—Final decree—Appeal—In appeal both can be questioned—Practice—Pleadings.

It is open to an appellant, in an appeal against the final decree in a partition suit to question the correctness of the preliminary order or decree for partition when no appeal was preferred against such order within the time allowed by law.

It is not open to an appellate Court, to make out a new case for first time in appeal contrary to the pleadings in the first Court. 29 Cal 758, Fol

Mulla Abdul Hai v Khatija Begam 10 Bom L R 514

(3) Travelling beyond record.

310—An Appellate Court should not ordinarily travel beyond the record, or take up points which are not the subject of appeal before it.

Kashinath Roy Chowdhry v Roy Dwarkanath Chuckerbutty. 7 W R 61.

Appellate Court-*Contd.*

6 Interference and power to vary order of Lower Court—*Contd.*

Notes—Ref 24 All 67.

311— S. 96 (1) (2)=540—Judge making new case.

Where the plaintiff's claim was for a declaration that a certain wall was his property, and for damages for injury to the wall, and no other case was attempted to be made, by either of the parties in both the Courts: *held* that the Judge on appeal had no right to make a new case for the plaintiff and grant him relief on the ground that he had an easement or right to have the wall maintained as a dividing wall. **Mahadev v Waman. 1890 P J 126.**

312—Reversal of decree in favour of person not party to appeal.

In an appeal against only one of the successful parties the decree in favour of the other succesful persons who are not joined as respondents cannot be reversed. **Ramchandra v Mor. 1887 P J 348.**

313—C P C O 41, r.1=541—Point not raised by parties in both Courts, Court of appeal raising *proprio motu*.

It is illegal for a Court of appeal to raise of its own motion a point not raised by any of the parties in any of the pleadings in the Court of first instance as well as before itself. **Varadhbhai v Bhaiji. 1891 P J 191.**

314—C.P.C. O. 41, r. 2-ss 542, 574. Objection as to cause of action—Appeallate Court raising *proprio motu*.

An objection that there was no cause of action when the suit was instituted not raised by the defendant either in the Court of first instance or in his memo of appeal ought not to be raised by the Appellate Court. **Nasarvanji v Gangadas 1891 P J 102.**

314A—Jurisdiction to go into point not taken in lower Courts.

The second appellate Court has no jurisdiction to go into the point as to which the parties have neither joined issue nor discussed in either of the lower Courts. **Veerakatasubramania Vathiyar v Subramania Iyer. 3 M L T 314.**

Appellate Court-*Contd.*

6 Interference and power to vary order of Lower Court—*Contd.*

(4) Decision of case on issue not raised in Court below.

315—A lower Appellate Court is not justified in determining an appeal on an issue which was not raised between the parties in the Court of first instance. **Ustoorun v Mohun Lall 21 W R 333.**

Prankishore Deb v Mahomed Ameer 21 W R 338.

Rukmini Burmonia v Foodun Koomaree Burmonia. 23 W R 408.

315A—Allegations—Decision on these allegations—New cases in appeal not allowed.

A litigating party can only succeed *secundum allegata et probata*, and the Courts should check the tendency of defeated litigants to evade their defeat by devising a new case which was never set up when it should have been set up. It is, therefore, not open to a Court of appeal, to expose a party after he has obtained his decree to the brunt of a new attack of which he had never had any notice during the hearing of the suit.

Nathu Piraji Marwadi v Umedmal Gadumal 10 Bom L R 768.

316—S. 53—Ejectment—Alternative case—New case in appeal-Failure to prove lease alleged—Amendment—Change of form of suit.

Where a plaintiff sues to eject a defendant on the ground that he is holding under a lease which has expired and fails to prove the lease, the Appeallate Court cannot go into the question of title and give the plaintiff a decree on that ground, but must limit the plaintiff to the case made in the plaint. **Venkoba v Naigana 1874 P J 237.**

317—S 28-Pleadings-Mortgage-Redemption suit—Cause of action—Procedure—Dismissing suit as against some defendants.

Plaintiff sued to redeem a mortgage as assignee of G, the heir of B, the mortgagor, defendants 2—4 being joined as tenants of the mortgagee in possession. Defendants 2—4 denied the tenancy, claimed to be heris of B, and alleged to have redeemed the mortgage. The Sub—Judge found G was B's heir and that defendants 2—4 had not redeemed, and decreed for plaintiff. *Held*, that the District Judge was wrong, on appeal by defend-

Appellate Court-*Contd.*

6 Interference and power to vary order of Lower Court—*Contd.*

ants 2—4 alone, in raising an issue as to the *bona fides* of G's assignment to plaintiff, as the fact of the assignment was admitted by the defendants 2—4, who claimed adversely both to plaintiffs and G. *Held*, further, that the Sub Judge would have exercised a sound discretion in dismissing the suit as against defendants 2—4 when he found that the cause of action alleged against them was not proved. **Keshav v Waman 1889 P J 61.**

(5) Decision on issue not taken in Court below.

318—Want of evidence for decision.

No issue was taken in the Court of first instance on the question whether an agreement was void for champerty. An issue was raised on this question by the Appellate Court, and (no evidence being taken) was decided in favour of the defendant. *Held*, on special appeal, that unless it was manifestly apparent on the face of the proceedings that the agreement was against morality or public policy, the Appellate Court ought not to have held it void. **Ramrav Khanderav v Govind Pandshet 6 B H C 63.**

Notes—Ref: 11 All 128.

319—Appeal—New point.

A point can be raised for the first time in appeal if it is purely one of law and does not involve any disputed question of fact. **Hiralal v The Thana Municipality 1891 P J 84.**

(5-A) Right of Appellate Court to adjudge on questions, not the subject of an issue.

319A—Pleadings—Suit for money-Objection to maintainability of suit—Defendant's consent while giving evidence to plaintiff's recovering the amount, whether validates suit—Issue not framed—Right of Appellate Court to adjudge on questions, not the subject of an issue.

Where, in a suit for money, an issue is framed as to plaintiff's right to maintain it, the mere consent of the defendant, while being examined as a witness, to plaintiff's recovering the amount, will not be sufficient to entitle the plaintiff to maintain the suit

Where no issue on a matter is raised by the pleadings and the Court of first instance has not dealt with it, it is not competent to the Appellate Court to entertain the question in appeal. **Malaikolandu Chettiar v Peria Pillay. 10 Ind Cas 351.**

Appellate Court-*Contd.*

6 Interference and power to vary order of Lower Court—*Contd.*

(6) Raising issue wtthout cross appeal.

320—Appeal from decree partly in favour of appellant.

When a decree gives title to land to defendant and right of way to plaintiff, and plaintiff alone appeals, the Appellate Court must not raise an issue as to right of way without cross-appeal from defendnat **Sookhanundamoyee Debia v Baney Madhub Mookerjee 1 W R 73.**

Notes—Ref: 12 W R 489.

320 A—Decree in favour of plaintiff-Appeal by plaintiff alone-Appellate Court not to modify decree so as to affect plaintiff.—Dismissal, proper course—

Where the plaintiff, in whose favour a decree had been passed, prepared an appeal and the defendant did not appeal, it was not competent to the Appellate Court, on finding that the plaintiff was not entitled to so much of the relief as had been granted by the first Court to modify the decree of the first Court so as to affect the plaintiff prejudicially, but it could only dismiss his appeal. **Lal Bhai v Deochand, 4 C P L R 111**

320 B—Appellate Court—Appeal of the defendant—Decree in favour of plaintiff-respondent who has not appealed against another respondent—Civil Procedure Code, sections 544 and 561.—

There is no rule of Procedure which would Justify an Appellate Court, on the appeal of one defendant, in decreeing in favour of a plaintiff-respondent against another respondent who was also a defendant in the first Court, in the absence of any appeal or cross-objection by the plaintiff filed in the Appellate Court.

The general rule is then an Appellate Court can only modify a judgment or decree so far as it affects the appellant, without interfering as to parties who do not appeal: the Code of Civil Procedure provides at least two exceptions to this rule, which are contained in Sections 544 and 561 of the Code.—**Ram Ditta v Mohkam. 46 P. R. 1892.**

321-Ss 561, 542.—Objection not taken -Reduction in interest.

It is not competent to an Appellate Court to lower the rate of interest awarded by the Court

Appellate Court-*Contd.*

6 Interference and power to vary order of Lower Court—*Contd.*

of First Instance, and to which no objection is taken in appeal. **Sadashiv v Bhivji. 1886. P. J. 10.**

(7) Giving relief not asked for.

322—Civil Procedure Code, 1859, s. 334—

An Appellate court exceeds its authority in giving a plaintiff relief for which he does not ask, although, under Act VIII of 1859, s. 334, the Court may decide an appeal before it on other grounds than those stated in the memorandum of appeal. That section does not entitle the court to go beyond the subject-matter of appeal. **Sharoda Soonduree Dabee v Gobind Monee *alias* Brojo Soonduree Dabee. 24 W R 179**

Notes—Ref: 26 Cal 114.

323—561, 542.—The Lower appellate Court is is not justified in setting aside an order of the Court of First Instance awarding compensation when no question was raised about it in appeal. **Narayen v Yamunabai. 1889 P J 136.**

324—A District judge should not reverse an order on a preliminary ground of an irregularity not complained of by any one. **Balaji v Govind 1885 P J 31.**

325—Relief not asked for in plaint—Varying of decree in appeal to prejudice of persons not before Court.

It is not competent to a Judge to award a relief not asked for in the plaint. A decree cannot be varied in appeal so as to prejudice persons who, though parties to the original suit, were not joined as respondents in appeal. **Anant v. Ramchandra. 1885 P J 223.**

326—562, 542-Where the Court of First Instance decree redemption of a particular land to the plaintiff and on appeal by the defendant the Appellate Court decreed redemption to the plaintiff of other land in addition to that land; *held*, that as the original decree was not objected to by the plaintiff, the Appellate, Court was wrong in varying it in the manner it did. **Bapu v Jankibai. 1886 P J 50.**

(8) Alteration of decree on appeal.

327—Defendant not objecting to decree on appeal—

Appellate Court-*Contd.*

6 Interference and power to vary order of Lower Court—*Contd.*

Where the defendant does not appeal against or object to the amount awarded by the first Court to the plaintiff, it is not open to the Appellate Court to reduce it. **Nayanchandra v Naryan. 4 Bom 293.**

328—Appellate Court reversing part of decree not appealed against—Alternative claim—Res Judicata.

Where plaintiffs had in a previous partition decree against the defendants were awarded lands A but were unable to execute the said decree as the lands were in possession of mortgagees, and the plaintiffs thereupon sued the defendants for possession of lands A or in the alternative of lands B that in certain other procedings between other co-sharers were allotted to the plaintiffs and the Court of first instance awarded the plaintiffs lands A and the plaintiffs did not appeal but the defendants appealed and the Appellate Court reversed the decree awarding lands A but awarded lands B, *held* that if the mortgage was redeemed by any of the defendants plaintiff could make a further attempt to recover lands A by the execution of the original partition decree but that they could not bring a fresh suit, that the first Court's decree awarding those lands in this suit was therefore rightly reversed but that as that portion of the first Court's decree which rejected the alternative claim for lands B was not appealed against by the plaintiffs, the appeallate Court had no power to award that claim **Sidasavant v Balasavant. 1893 P J 64.**

329—Appeal remanded for retrial, the appellate Judge making a case not put forth by defendant. Plaint construed. **Panji v Jania. 1896, P J 405**

330—S. 96 (1) (2)=540 Where a defendant did not appeal from a Subordinate Judge's decree, *held* that the District Judge ought not to have altered it in his favour when determining the appeal of the plaintiff. **Ahelaji v Gaju. 1892 P J 99.**

(9) Improper procedure.

331—Suit by raiyat for rent,

In a suit by a raiyat against a zamindar for rent, the Court of first instance gave plaintiff a decree for a part of his claim. The plaintiff appealed against the disallowance of the residue. The

Appellate Court-*Contd.*

6 Interference and power to vary order of Lower Court—*Contd.*

Judge an appeal reversed the decree and dismiss ed the suit, although no objection was made by the defendant to the judgment of the Court below, merely saying that a claim for rent by a raiyat against a zamindar was absurd. On appeal to the High Court, the decree of the Judge was reversed, and the original decree established. **Hem Chunder v Ahmed Reza. Marsh 332: 2 Hay 429.**

(10) Rejection of appeal.

332—Rejection of appeal —

Quere—Whether,after registering and admitting an appeal, and causing notice to be served, an Appellate Court can reject the appeal as not being filed within the prescribed time.

Secretary of State for India in Council v. Mutu Swamy, 4 B L R Ap 84= 13 W R 245.

Notes:—See 13 W R 243.

(11) Raising question on second appeal

333—Act VIII (B C) of 1869, Sections 5, 27, 28, 29, 30, 58—Limitation—Execution of decrees in Rent suit.

Application having been made in December 1877 for the sale of moveable property of the judgment-debtor which had been attached in execution of a decree passed in June 1876 in a rent suit under Act VIII (B C) of 1869, it was, on the 13th march 1878, directed that the judgment-creditor should proceed against the tenure in respect of which the decree had been made. and on the 15th March the attachment was withdrawn. Although the amount of the decree and the costs were under Rs 500 the judgment creditor, on the 19th Angust 1879, again applied for execution, treating the decree as for an amount exceeding Rs. 500, the costs of an appeal being added to the costs originally directed by the decree.

Held, distinguished the cases of 3 C L R 189, and 3 C L R 261 that the application was barred under Act VIII (B C) of 1869, Section 58, the attachment and execution proceedings not having been allowed to subsist. *Held*, further that the costs of appeal could not be added to the costs under the original decree so as to bring the case within the latter portion of section 58 of that Act. **Kadumbini Dabya v Koylash Chunder Pal Chowdhry 6 Cal 554=8 C L R 19.**

(12) Exparte decree passed when summons had not been served in sufficient time

334—Where an *ex-parte* decree was passed against the defendant and it appeared that the writ of summons had not been served upon him in sufficient time to enable him to appear and answer the Appellate Court reversiug the order of the Court of first instance, directed the ex-parte decree to be set aside and ordered a new trial.

Chanbasappa Bin Sangappa v Mainba Bin Mahadshet. 7 Bom H C 138

(13) Grounds of appeal

335—Contention abandoned in lower Court.

An appellant in regular appeal may not, at the hearing , raise a contention of law expressly abandoned by him in the Court below, and not contained in the memoraudum of appeal.

Pabitra Dasi v. Damudar Jana 7 B L R 697=24 W R 397 note

(14) Finding of Court not appealed against.

336—A finding of the first Court not appealed against cannot be interfered with by the Appellate Court **Kalee Das Roy v. Khiroda Soonduree Debia 16 W R 300**

336 A— s. 542—Power of Court to modify part of decree not appealed from.

The appellants sued for arrears of rent and obtained in the Court of first instance a decree for Rs. 116-12-8 a portion of what they claimed. The respondent did not appeal. The appellants appealed from that part of the decree which dismissed a portion of their claim. The lower appellate Court reduced the amount awarded to the appellants to Rs. 46. *Held* that as the award of Rs 116-12-8 to the appellants by the Court of first instance was not a subject of appeal to the lower appellate Court, that Court was not competent to interfere with it. **Sita Ram v. Banno Bibi. 1 W N 40.**

336 B—Probate—Will attacked as forgery—Question whether testator was in sound, disposing state of mind not raised in the written statement

Appellate Court-*Contd.*

6 Interference and power to vary order of Lower Court—*Contd.*

or issues—Whether Court can go into it and decide the case on that point—Lower Court's finding—Such finding not to be easily reversed on appeal.

In a suit for probate, it is open to the Court to require from the plaintiff strict proof that the testator was of a sound testamentary capacity when he executed the will, and to dismiss the suit if such proof is not forthcoming though the plea was not raised either in the written statement or in the issues, the only point taken by the defendants being that the will was a forgery.

Further *held*, an appellate Court ought to be extremely chary in interfering with a finding of fact, where that finding is based upon the ground that the Judge who heard the evidence and saw the demeanour of the witnesses did not believe them. 32 Mad 400 appl. **Marmayula Venkata krishnaiah v Annapurni Amma 2 M W N (1911) 330=10 M L T 304.**

(14 A) Interference with part of decree not appealed against

336 C—Interference with part of decree not appealed.

An Appellate Court should not interfere with a part of a decree not appealed against. **Ma Ton v Maung Lu. U B R 1892-1896 vol II, 7**

(15) Presumption of correctness of judgment of lower Court.

337—Grounds for interference with.—

An Appellate Court ought not to interfere with the judgment of the lower Court until perfectly satisfied that the conclusion arrived at by the Court below is erroneous. It is a presumption of law that the judgment appealed against is right until the contrary is shown; and when there is a doubt about it, the benefit of that doubt should be given by the Appellate Court to the respondent. **Tayubunnissa Bibi v. Kuwar Sham Kishore Roy, 7 B L R 621= 15 W R 228.**

(16) Judgment of lower Court.

338—Grounds for reversal of—Defect in investigation—Insufficient finding.—

An Appellate Court should find some sufficient and significant facts before it reverses a judgment of the lower Court, and should show a proper basis for its conclusions. **Anisul Futwa v. Chando, 8 B L R Ap 3.**

339—Case of full ownership—Relief based on limited interest.—

When the plaintiff sued to recover an encroahment on certain land alleging that he was full owner of it and the Judge found against the plaintiff as to the ownership but awarded his claim, *held*, that as no other case but that of full ownership was put forward in the plaint and the pleadings, plaintiff's suit ought to be rejected. **Manjabhat v. Devarbhat, 1890 P J 278.**

340—Suit for possession—Money award—Appellate Court reversing decree wholly on plaintiff's appeal for possession—Waiver—Pleader's statement.

Where in a suit for possession of land on a sale-deed the Court of First Instance held that the transaction was really a mortgage and awarded the plaintiff a certain amount and in appeal the plaintiff appellant's pleader urged that he must have possession of the land or nothing and thereupon the Court reversed the whole decree, *held* that the pleader's statement was not a waiver of his client's right to the money and that therefore that portion of the decree which was in plaintiff's favour should not have been reversed. **Bapu v. Pira, 1893 P J 231.**

341—Grounds for reversal.—

An Appellate Court is bound to state its reasons for reversing the decision of a lower Court. **Mahadeo Ojha v. Parmeswar Panday, 2 B L R Ap 20.**

Lalla Sooklall Sing v. Bussoodhun. Noor Ally v. Lalla Sooklall Sing, W R 1864, 347.

341A—Procedure—Will—Probate-Appreciation of evidence—When an appellate tribunal will disturb the finding of the Lower Court on a pure question of fact—Judge approaching evidence with strong pre-possession and pre-conceived theories—Erroneous procedure.

Where the questions at issue depend entirely on the proper appreciation of the evidence of the witnesses examined in the case, it is an obvious duty of the appellate tribunal not to

Appellate Court-*Contd.*

6 Interference and power to vary order of Lower Court—*Contd.*

disturb the conclusion of the Court of trial, unless it is satisfied that the Judge of First Instance who had the witnesses before him has, in dealing with the evidence, adopted an erroneous procedure and has decided against the clear weight of the evidence.

Where the District Judge approaches the evidence in support of the will with strong pre-possession against its authenticity, based on what he considers to be suspicious circumstances connected with its appearance and the tenor of its contents, and rejects that evidence mainly on certain pre-conceived theories of his as regards the general credibility of witnesses belonging to a certain class, the method adopted by the District Judge in dealing with the case is clearly wrong.

Ramaswami Chettiar v. Karuthalachi, (1911) 2 M W N 495.

342—As G had not legal notice of the plaint, the Appeal Court allowed his appeal. The right course in the appeal would have been to reverse the decree and send back the case for retrial after a summons had been issued and served properly.

Mor v. Govindrao, 1889 P J 330.

343—Where although the plaint stated no cause of action against certain defendants, they claimed to be in possession as mortgagees, and the question of plaintiff's right as against them was tried by the lower Court; *held* that the Appellate Court ought not *proprio motu* to have objected to the trial of this question in this suit against another defendant for specific performance.

Gopalacharya v. Lakshman. 1889 P J 129.

344—Ss. 561, 542—Part of decree not appealed against—Right to reverse.

An Appellate Court has no right to reverse that part of a decree against which no objection is raised either by the memo of appeal or cross-objections.

Krishna v. Subramanaya, 1890 P J 208.

(17) Appeal on Full Court fee from decree dismissing Suit in Part—Remand of whole Case, though no cross appeal or objections preferred.

345 Civil Procedure Code ss.562, 578-Practice

Appellate Court-*Contd.*

6 Interference and power to vary order of Lower Court—*Contd.*

-Dismissal of whole suit on remand—High Court competent in second appeal to consider validity of remand order not specifically appealed-Civil Procedure Code, ss. 544, 561.

A plaintiff whose suit had been decreed in part appealed from so much of the first Court's decree as was adverse to him, and stamped his memorandum of appeal with a stamp which would have covered an appeal from the whole decree. The defendant did not appeal or file cross-objections. The lower Appellate Court remanded the whole case to the first Court under s. 562 of the Civil Procedure Code, the plaintiff not appealing under s. 588 (28) from the order of remand. The first Court then dismissed the whole suit, and, on appeal by the plaintiff, the lower Appellate Court confirmed the decree. On a second appeal to the High Court, *held* (i) that the High Court was competent to consider the validity or propriety of the order of remand, though it had not been specially appealed against; (ii) that the order of remand was *ultra vires*, so far as it related to that part of the first Court's decree which was favourable to the plaintiff, the lower Appellate Court not having jurisdiction, in the absence of any appeal or objections by the defendant, to disturb that part of the decree; (iii) that the order of remand was not made valid by the subsequent appearance of the plaintiff before the first Court or by the appeal from the first Court's decree on the remand; and (iv) that the case was not covered by s. 578 of the Code. Per Mahmood,J. —S, 544 had no application to the case, that section relating only to cases where one or more of the parties arrayed on the same side appealed against a decree passed on ground common to all, and not cases where either of two opposite parties appealed from a part of the decree upon a Court-fee sufficient for an appeal from the whole. 2 Moore's I A 283. 10 Moore's I A 340 and 12 Moore's I A 157 referred to.

Cheda Lal v Badullah. 11 All 35.

(18) Application to set aside sale in execution of decree-Court reversing lower Court on evidence taken before necessary party was added.

346—Superintendence of High Court—Civil Procedure Code, s. 622.

A person, alleging himself to be the undivided

Appellate Court-*Contd.*

6 Interference and power to vary order of Lower Court—*Contd.*

brother and as such the legal representative of a deceased judgment-debtor, applied to have set aside a sale of certain property alleged by him to be joint family property, which had taken place in execution of the decree. He did not make the purchaser a party to such application. The Court of first instance dismissed the application. On appeal, the Appellate Court made the purchaser a party to the proceedings, and, holding that there was irregularity in conducting the sale, reversed the order of the Court of first instance *Held* that the Appellate Court was wrong in so holding upon evidence recorded by the Court of first instance when the purchaser was not a party to the proceedings, and the order of the Appellate Court was set aside under s. 622 of the Code.

Subbarayadu v Pedda Subbarazu 16 Mad 476.

Notes:—Ap: 23 Bom 450; Dist: 22 Mad 68 F B Ref: 19 Mad 167.

347—Sub-Judge discharged J from liability.

Held, that the District Judge was wrong in allowing execution against J who was no party to the appeal. **Jagannath v Vinayek. 1889 P J 185.**

(19) Want of cause of action.

348—Grounds for rejecting plaint-Civil Procedure Code (1877) s. 53.

A suit was brought for confirmation of possession and declaration of title. The plaint did not disclose any facts from which it could be said that the defendants denied the plaintiff's title, but from the proceedings in the lower Court, it was established that, before the suit was brought, there was a dispute existing between the parties as regards the title, and that a decree in favour of the plaintiffs had been passed by the Court of the first instance on the merits of the case:—*Held* that, the although under s. 53 of the Civil Procedure Code, the Munsif might have rejected the plaint on the ground that it did not disclose any cause of action, still the Appellate Court could not reverse the decree solely on that ground, unless it is satisfied that no such cause of action was established on the evidence **Shah Ahmed Sujad v Taraa Rai. 7 Cal 343.**

Notes:—Fol: 2 C L J 534.

Appellate Court-*Contd.*

6 Interference and power to vary order of Lower Court—*Contd.*

(20) Power of the Court of Appeal to vary decrees appealed from in consequence of circumstances occurring subsequently to the date of such decrees.

349—Partition suit—Death of a co-parcener pendent lite.

When the decree of a Subordinate Court is under appeal to the High Court, it is open to the High Court to vary it either in points in which it is erroneous or in respect of matters occurring subsequently to the date of such decree which are admitted. The plaintiff obtained a decree in a partition suit in the Sudordinate Judge's Court for his share in certain joint family property in the possession of the defendants(his co-parceners). The decree was affirmed on appeal. The defendants filed a second appeal in the High Court, but before it was decided, one of the defendants died. The plaintiff at the hearing of the second appeal claimed a larger share in the family property than he had been awarded by the decree of the Courts below. *Held* that he (plaintiff) was entitled to a share in that of the co-parcener who died *pendente lite*, and that the decree appealed from ought to be varied accordingly. **Sakharam Mahadev Dange v Hari Krishna Dange 6 Bom 113**

Notes:—Diss: 19 Mad 345. Fol: 1 Bom L R 718; Dist: 21 Mad 288. Ref: 19 Bom 532; 25 Bom 606; 28 Bom 201; 11 C W N 732; 6 C L J 74.

350—Duties of—Power to take notice of subsequent fact transpiring during pendency of appeal—Discretion.

As a general rule, a Court of appeal, in considering the correctness of the judgment of the Court below, will confine itself to the state of the case at the time such judgment was rendered, and will not take notice of any facts which may have arisen subsequently.

(12 Mad 136; 21 Mad 238; 21 Bom 701; Ref)

But the Court will, in exceptional cases, depart from this rule, specially where, by so doing, it can shorten litigation and best attain the ends of justice, by preserving the rights of both parties. It is not only in the power, but it may sometimes be the duty, of a Court of appeal to take notice of events which have happened

Appellate Court-*Contd.*

6 Interference and power to vary order of Lower Court—*Contd.*

during the pendency of the appeal, and such events when not appearing on the record may be proved by extrinsic evidence.

(6 Bom 113; 16 Mad 350, 1 Bom L R 218; 15 Bom 606=11 All 148; 41 C C A 585, 101 Fed Rep Ref.)

Ram Ratan Sahu v Mohant Sahu 6 C L J 74=11 C W N 732.

Notes—Fol: 6 C L J 102, 662. Expl: 13 C W N 815.

351—Sale, setting aside—Second appeal—Order, passing of, event happening after,—Duty of Appellate Court—Ex parte decree—Sale—Application to set aside ex parte decree, pending-Court, discretion of.

It is only competent to a Court of appeal, but it may be its duty to take notice of events which have happened since the order challenged in appeal was made.

When a sale has been set aside on the ground that the decree, in execution of which the sale took place, has been nullified by an *ex-parte* decree in a regular suit, and an appeal has been preferred against the order setting aside the sale, if, during the pendency of the appeal, the *ex-parte* decree is set aside and the original decree restored, the appeal ought to be allowed and the sale restored. 27 Cal 810 and 31 Cal 499, Ref 6 C L J 92 and 6 C L J 74, Fol: **Ramyad Sahu v Bindeshwari Kumar Upadhay 6 C L J 102**

351A—Varying of

It is open to the High Court to vary the decree under appeal not only for error, but also on grounds which have come into existence since it was passed. **Rustomji v Purushotamdass 3 Bom L R 227.**

351B—Court's process, abuse of—Wrong done by order of Court—Court's inherent power to rectify—Events happening after the filing of appeal.

When there has been a wrong done by an order of Court which has been set aside on appeal the Court executing the decree without express authority of law is competent to put the parties in the position which they occupied before that order.

It is not only competent to a Court of appeal, but it may be its duty, under certain circumstances, to take notice of events which have happened since the order challenged in appeal was made. 6 C W N 710, Ref. **Udit Chobey v Rashika Prasad Upadhya. 6 C L J 662 =3 M L T 41.**

(21) Power to vary decree as made in the lower Court.

352—Decree confined to rights in issue between parties—S. 565 of the Code of Civil Procedure, 1877.

After the trial of issues raising the question whether the plaintiff was, or the defendants were, entitled to zamindari rights in certain mehals, a decree was made affirming the title of the plaintiff, the evidence in support of the defendant's case being discredited, and the latter were declared by the decree to be the "plaintiff's under-tenure-holders of the said mehals." This was modified on appeal by the declaration that "the defendants are patnidars of the same mouzahs." *Held* that it was unnecessary on this appeal to consider whether the Appellate Court was right in its conclusion that the defendants were patnidars; because, upon the case which had been set up for the defendants, and upon the issues framed and tried in the lower Court, the Appellate Court could not properly make such a declaration: the defendants could not be in a better position than they would have been in had they claimed to be patnidars, in which case an issue as to that title would have been framed and tried S. 565 of Act X of 1877 does not enable an Appellate Court to declare a right in favour of one of the parties, where no issue has been fixed on the point, and the right has not been set up in the lower Court. **Official Trustee of Bengal v Krishna Chandra Mozumdar. 12 Cal 239 : 12 I A 166.**

(22) Refusal of Appellate Court to hear appeal on issue of title raised & decided in first Court.

353—Ejectment suit based on long possession—Issue as to title raised decided in First Court—Refusal of Appellate Court to go into title.

In a suit brought by plaintiff to recover certain land alleging dispossession by defendant after their long possession, an issue as to their

Appellate Court-*Contd.*

6 Interference and power to vary order of Lower Court—*Contd.*

general title was raised and decided in their favour. In appeal the Judge rejected the plaintiffs' suit on the ground that they having failed to prove their claim through long and exclusive possession, cannot fall back upon their title : *held*, that as parties in the First Court went to trial on the issue of title the Appellate Court should have heard the appeal on that issue.
Babaji v Mahadu. 1890 P J 331.

(23) Sufficiency or insufficiency of evidence, no ground of interference.

353A—Tenant owner of materials of house in town—Transfer of house by tenant—Re-entry by landlord, right of—Second appeal—Finding of fact—Sufficiency or insufficiency of evidence, no ground of interference—Practice.

In second appeal, a Court cannot go into the question of sufficiency or insufficiency of the evidence adduced in proof of a particular matter, and if there is evidence on the record to justify a finding on the point, it will not be interfered with.

A tenant, who is the owner of the materials of a house in a town, can sell not only the materials but also the right to occupy the house, in the absence of special contract or custom to the contrary, and such sale does not give the ground landlord a right of re-entry. S C A No 202, (1898) Ref.) **Banwari Lal v Raina. 9 Ind Cas 427**

(24) Interference with Lower Court's decree in absence of appeal on a point.

354,—Appeal—Power of appellate Court-Interference with Lower Court's decree in absenc of appeal on a point—Jurisdiction.

An appellate Court has no power to interfere with the decree of the first Court, with regard to matters with respect to which there was no appeal preferred to the appellate Court. **Dwarka Nath v Mohima Charan 9 Ind Cas 121.**

354A.—C P C O 41 r 22—Appeal-Powers of Appellate Court.

The Original Court found in favour of defendant on the first issue, but against him on the second issue, and, therefore, decreed against him On first appeal, the lower Appellate Court reconsidered the first issue, and decided against defendant, it, therefore, dismissed the appeal. It was urged in second appeal that the lower Appellate Court erred in law in going behind the original Court's finding of fact on the first issue when there had been no cross objection or cross-appeal filed against such finding.

Held, that this contention must fail, in view of the provisions of O XLI, r. 22, which allowed a respondent to support a decree on any of the grounds decided against him by the Court below. (17 I A 97, 17 Cal 809 Fol.) **U Lu Gale v Mg Po Kin. 12 Ind Cas 20.**

354B.—S. 53—Order under old Code—New Code different rule—Appellate Court—Not to reverse.

Appellate Court cannot reverse an order of the lower Court passed under an Old Code, on the ground that, since that, a different rule has been enacted by the new Code.

S. 53, C. P. C. provides the course to be followed in such cases. **Salem Town Bank by Secretary G. Gurumoorthi Naidu v. Varadappa Chetti. (1911) 2 M W N 386.**

354C.—C P C O. 41, R. 31 (S 571)-Judgment appellate—Not in accordance with the section—Appeal—Practice—Procedure.

Where there has been failure by the appellate Court to comply with requirements of S. 574, C P. C, the proper form of the order to be made by the second appellate Court is to set aside the decree and remand the case to the first appellate Court for disposal according to law. If the judge of the first appellate Court happens to be the same individual who heard the appeal originally, he need re-hear the appeal, only if he is of opinion that he cannot properly dispose of it without a rehearing; and where he is not the person who originally heard the appeal he should always re-hear it. **Saravana Pillai v Sesha Reddi. (1907) 18 M L J 34=31 Mad 469, F. B.**

(25) Decree in appeal under Land Acquisition Act.

254D.—Ss. 8, 11—Appeal under land Acquisition Act, suit under-Valuation of memorandum of appeal—Decree limited to it.

Appellate Court-*Contd.*

6 Interference and power to vary order of Lower Court—*Contd.*

In cases under the Land Acquisition Act (1 of 1894), the decree awarded in appeal must be limited to the amount for which Court fee has been paid on the memorandum of appeal; for such cases do not come within s. 11 of the Court-fees Act. **Mahomed Ali Amjad Khan v. Secretary of State for India. 30 Cal 501.**

Notes:—Ref: 53 P R 1906=103 P L R 1906.

(26) Decree for a larger amount than that claimed in the memorandum of appeal.

354 E—Court Fee—Decree—Memorandum of appeal, amendment of—Civil Procedure Code, Ss.53,582—Court Fees Act VII of 1890-Generally, an Appellate Court cannot pass a decree for a larger amount than that claimed in the memorandum of Appeal, unless, before the judgment is pronounced, an amendment of the Memorandum of Appeal is allowed, and the additional court fee paid in. **Percival v Collector of Chittagong. 30 Cal 516.**

(27) Decree in appeal against the defendant against whom the suit was dismissed.

354 F.—Suit against two defendants—Decree against one—Appeal by the defendant made liable—No appeal against the other defendant—Appellate Court's finding against the defendant against whom the suit was dismissed.

Plaintiff brought a suit to recover money against A and K. The first Court held that A was liable. A appealed against that decree only against the plaintiff but did not implead K. The lower appellate Court held that A was not liable, but that K was. *Held* that, in spite of this finding, no decree could be passed against K, the decree of the first Court dismissing the suit against him having become final. **Nizam-ud-din v Abdul Aziz. 6 A L J 643=2 Ind Cas 552.**

(28) Power of Appellate Court to deal with findings of fact by the Commissioner.

354 G.—C P C O. 26, rr. 11, 12 (1882-Ss 394, 395)—Report of a Commissioner—Order confirming the report, appeal from—Appeal Court, power of, to deal with findings of fact by the Commissioner.

In an appeal from a judgment and from a judgment and order confirming the report of a commissioner appointed under S 394, C.P. C., it is open to the Court of Appeal to deal with the report on matters of fact, and its power are not limited to questions of principle when examining such report. (6 Bom. H. C. 149; 6 Mad. H. C. 36 Ref.)

The Court whether of first instance or of appeal must be satisfied with the proceedings of a commissioner before it accepts them and the fact that the judgment of first Court is an affirmance of the report of a commissioner does not affect the powers of the Court of Appeal. (4 C W N 808 Dist.; L R 1 I A 346 Ref.)

Per Prinsess, J.—The report of a commissioner requires affirmance by an order of Court to make it operative and cannot be regarded as a judgment of a Court.

Per Hill, J.—Under S. 395, C.P. C, the report of a commissioner accepted by the Court is only evidence in the suit of facts found by him, but is not a decision upon it, nor can it be treated on the same footing as the verdict of a jury. (4 C W N 808; 19 Q B D 155 Ref.)

Per Maclean, C. J.—If there has been a fair investigation of the matter by the Registrar and his finding has been confirmed by the Judge of first instance, the Court of Appeal ought not to interfere except on the strong ground of manifest error or manifest abuse. It should not interfere merely on the ground that if the matter was *res integra* it would have been disposed to attach more weight to this or that particular piece of evidence. **R. M. S Chetti v Mahomed Essa Sahib. 5 C W N 692.**

(29) Power to reverse decree in a suit tainted by misjoinder of parties and causes of action.

354 H.—O. 2 rr. 4, 5; rr. 3, 6 (1882 Ss. 44 and 45) Misjoinder of parties and causes of action—Mortgage suit—Joinder of persons claiming adversely to mortgagor—Appellate Court.

A suit to enforce a mortgage, in which the adverse claims of persons not privy to the mort-

Appella.e Court-*Co ıtd.*

6 Interference and power to vary order of Lower Court—*Contd.*

gage and setting up a title paramount to that of the mortgagor and mortgagee are sought to be investigated, is open to objection on the ground of misjoinder and multifariousness under Ss 44 and 45 C. P. C. The rule (contained in Ss. 44 and 45) is not one of convenience merely and the fact of the question of such title being determined by the Court of first instance in breach of the rule does not preclude a Court of appeal from reversing the decree. 2 C L J Ref. **Jajneshwar Dutt v Bhuban Mohan Mitra. 3 C L J 205=33 Cal 425.**

(30) Omission to hear parties in support of or against an application.

354 I.—Practice—Omission to hear parties in upport of, or against an application.

Held, that, where the 1st Court passes an order accepting or rejecting an application made by a party, without calling upon the parties to urge what they have to say for or against it, the Appellate Court should set aside that order and remand the case for fresh decision after hearing the objection and evidence of both parties.

Narpat Rai v Devi Das. 17 P W R 1912.

(31) Want of jurisdiction to award costs of one successful defendant against another unsuccessful defendant.

354J.—Appeal—By one of several unsuccessful defendants-Want of jurisdiction in Appellate Court to decree claim against successful defendant in absence of appeal by plaintiff—Costs.

Held, also, that a Court has no jurisdiction to award cost of one successful defendant against another unsuccessful defendant in plaintiff's claim. 46 P R 1892 Fol. **Jowahir Singh v Amin Chand. 57 P W R 1908.**

(32) Power of Appellate Court to declare liability of another defendant upon appeal by one of the defendants.

354K.—Appeal by one of the defendants-Appellate Court, power of, to declare liability of another Defendant—Appeal—Jurisdiction-Contribution Suit—Civil Procedure Code (Act XIV of 1882), S. 544.

In a suit for contribution Plaintiff asked for relief against all the defendants separately. The

Appellate Court-*Contd.*

6 Interference and power to vary order of Lower Court—*Contd.*

Suit was decreed for particular sums against defendants Nos 1 and 3 separately. Defendant No. 1 appealed making Defendant No. 2 a party Respondent and it was held in the appeal that Defendant No. 2 was liable and not Defendant No. 1 and a decree was given accordingly.

Held—That in such a suit for contribution as the present although the plaintiff does not appeal the Appellate Court could, upon the appeal by one of the Defendants, alter the decree so as to make another Defendant liable.

Rup Jan Bibee v Abdul Kader Bhuyan. 8 C W N 496=31 Cal 643.

Notes:—Com: 28 Mad 229=15 M L J 212.

(33) First Court's findings not to be disturbed in ordinary circumstances.

354 L—First Court's finding on evidence not to be disturbed on appeal except where it omits to consider some evidence.

Where a Court of first instance has upon the evidence of witnesses examined before it came to a conclusion of fact, the Court of appeal ought not to disturb that finding unless it is satisfied that the lower Court had either omitted to consider material evidence or some cardinal fact or had given undue weight to some evidence or fact which is of little or no importance.

Bai Gulabbai v Shri Datgarji. 9 Bom L R 393.

(34) Caution to be used by Court of appeal in reversing a first Court's finding of fact

354M.—Caution to be used by a Court of Appeal in reversing a first Court's finding of fact on oral evidence.

If, in the Court of first instance, there was clear and distinct evidence upon the one side, and possible evidence which the appellant might think to be as clear and distinct upon the other side, nevertheless, if the Judge, in his discretion, having the opportunity of seeing the witnesses, and of observing their demeanour, has come, on the balance of testimony, to a clear and decisive conclusion, those who undertake to reverse that conclusion on the ground that the judge has erred in giving credence to the one class of witnesses

Appellate Court-*Contd.*

6 Interference and power to vary order of Lower Court—*Contd.*

rather than to the other, undertake an almost impossible task. (L R 2 P C 345, Fol.)

Tan Aung Ri v Ram Chandra De.
L B R 1872—1892, 314

Notes.—R L B R 1893—1900, 64, 209, L B R 1872—1892, 416.

(35) Power of High Court to consider propriety of order of Lower Court as to costs.

354N.—Appeal—Costs—Power of the High Court on second appeal to consider propriety of order of Lower Court as to costs.

It is competent to the High Court on second appeal to interfere with that portion of an appellate decree which relates to costs. (A W N 1893, 110, Ref.) **Dungar Mal v Ram Chundar.**
A W N 1898, 130.

(36) Power of Appellate Court to reverse finding of facts.

354 O.—When appellate Court should reverse finding on facts.

In regular appeal, the appellate Court is as much a Judge of the facts as the original Court and is bound to give its judgment on the facts with reference to the recorded evidence, independently of the decision of the Court of first instance; and it is at liberty to reverse such decision although there is no glaring mistake of the effect of the evidence in the Court below.

Mohunt Radika Das v Bhugwan Das.
7 P R 1874. But see
Bagh Singh v Fatta **28 P R 1873.**

354 P.—Conditions for appellate Court to reverse finding on facts.

The Appellate Court cannot reverse the finding of the Lower Court, unless it is clear that the finding of the Lower Court is entirely against the evidence. **Bagh Singh v Fatta.**
28 P R 1873. But see—**Mohunt Radika Das v Baugwan Das.** **7 P R 1874.**

(37) Power to reverse whole decree on appeal by one defendant.

354 Q.—Appeal by one defendant—Power to reverse whole decree.

Appellate Court-*Contd.*

6 Interference and power to vary order of Lower Court—*Contd.*

On an appeal by one defendant, the Appellate Court need not confine itself to that part of the case concerning the appellant but may reverse the whole decree. **Bhupa v Chetu.**
26 P R 1881.

(38) Power to reduce decretal amount on appeal from partial decree by plaintiff.

354 R.—Appeal from partial decree by plaintiff—Power of appellate Court to reduce decree further.

Where a decree was passed allowing a certain amount and disallowing the remainder, and the plaintiff appealed from the decree disallowing a portion, and the defendant did not appeal. *held* that it was not competent to the appellate Court to further reduce the amount, as the defendant had not appealed. **Sita Ram v Banno Bibi.**
A W N 1881, 40.

(39) Finding as to a fact not touched by the lower court.

354 S.—Concurrence of two Courts—S. 353, Civ. Pro. Code, 1859—Per Campbell, J.

If two Courts had not concurred as to the facts relating to a particular issue, only one Court having determined it, the Chief Court should accept the defendant's appeal, in order that the lower Appellate Court might remand the case to the original Court for a finding on the point left undecided by the latter Court. An appellate Court cannot find as to a fact not touched by the lower Court but should refer an issue to the lower Court, and on the return of the finding should either concur in or dissent from that finding. In the latter case, a second regular appeal would lie; in the former, the finding as to the fact would be conclusive. *Per Boulnois* and *Lindsay, JJ.*—The procedure of the lower Appellate Court could not be disturbed under s. 353, Civ. Pro. Code, 1859, such Court could come to a finding upon a fact left untouched by the original Court, provided there was sufficient evidence on record; and Act IX of 1873 (Punjab Appeals Act) did not change the procedure.
Ganda Singh v Harsa Singh. **79 P R 1876.**

40. Appellate Court not empowered to decree more to plaintiff than was decreed by lower Court.

354T.—Practice—Suit decreed in part—Appeal

Appellate Court-*Contd.*

6 Interference and power to vary order of Lower Court—*Concld.*

by defendant only—Appellate Court whether decree more to plaintiff than was decreed by lower Court.

Where a suit decreed in part, and the plaintiffs accept the decree and do not appeal but the defendants prefer an appeal, the appellate Court cannot pass a decree giving to the plaintiffs more than was decreed in their favour by the original Court because the appellate Court is not seized of the whole case and cannot pass any such order as will place the appellants-defendants, in a worse position than they were in when the decree of the first Court was passed. **Ishri Mal v Bhagwan Mal. A W N 1887, 214.**

(41) Disturbing a finding of fact by lower Court.

354U—Lower Burma Courts Act.

It is improbable that a trader would have lent so large a sum of money on a verbal deposit. Caution to be used by a Court of civil appeal in disturbing a finding of fact by a Court of first instance. **Bux Ally v Lall Mahomed L B R 1872—1892, 416.**

Notes.—Ref: L B R 1893—1900, 209.

7 OBJECTIONS TAKEN FOR FIRST TIME ON APPEAL.

(a) GENERAL CASES.

(1) Objection allowed to be raised and overruled.

355—As a general rule, objections not taken in the lower Court ought not to be allowed to be set up in the Appellate Court ; but where the Judge in appeal had allowed such an objection to be taken and had overruled it, the High Court allowed it to be raised in special appeal, and, being of opinion that it was a valid objection, reversed the decision of the Court below. **Dindayal Paramanik v Surendranath Roy. 3 B L R A C 78 note=10 W R 77.**

355A—Ss 42, 43—Objection raised in the Court of Appeal—Cause of action for a suit for divorce—Cause of action for a suit for partition Whether it is necessary to claim partition in the suit for a divorce—*Buddhist* Law Husband's suit for divorce– Wife's denial of allegations of misconduct.

The appellant and the respondent were Burmese Buddhists and husband and wife. The appellant filed a suit against the respondent for dissolution of the marriage on the ground that respondent had, by sundry fraudulent devices, stolen certain jewels which were the property of the appellant, and prayed for a decree on that ground. The respondent filed her written statement denying the allegations as to her misconduct and asking that the suit be dismissed. Witnesses were summoned, but on the day fixed for hearing, the respondent abandoned her defence and, although continuing to deny her guilt, consented to a divorce. Judgment was thereupon given for a decree "as prayed for." Afterwards the appellant brought the present action for the recovery of his property which he alleged his divorced wife still fraudulently kept in her possession, and for a partition of their joint property. The respondent contended that the divorce had been by consent and had not been granted by reason of her fault. The first Court decreed the suit. The respondent appealed and, some time after she filed her memorandum of appeal, raised for the first time the point that the present suit of the appellant was barred under the Code of Civil Procedure (Act XIV of 1882), Ss. 42 and 43 as he had failed to ask for a partition of the joint property in the previous action for divorce. The Court of appeal dismissed the suit on that ground alone.

Held, that the proceedings at law disclosed, not an agreement between husband and wife, but a claim by the husband on a specific ground to which the wife in effect submitted, and that the divorce was granted on the ground of a matrimonial offence on the part of the wife :

Held, also, that the objection founded upon the Code of Civil Procedure (Act XI of 1882), Ss. 42 and 43, should have been treated as a preliminary point, and as no notice of it was given by the respondent in the present action either in her defence, or at the trial, or in the grounds of appeal as first delivered, she was too late to raise the point in the Court of Appeal, except upon terms which would have indemnified the appellant for the omission to raise it at the proper time.

Held, further, that the cause of action for the divorce was the misconduct of the wife, but the cause of action for the suit for partition was the divorce of the wife founded on that misconduct, and that the present suit was not barred by Ss. 42 and 43 of the Code of Civil Procedure.

Appellate Court–*Contd.*

7 Objections taken for first time on appeal *Contd.*

Held, lastly, that partition might no doubt be treated as relief consequential upon the divorce, and therefore dealt with in the same suit, but there was not necessarily any hardship on the defendant in severing the two matters, and, if the Court should be of opinion that a petitioner had unnecessarily severed his claim for a partition from his claim for a divorce, it might, of course, punish the plaintiff by the exercise of its discretion as to costs, but such a severance did not come within the mischief aimed at by Ss. 42 and 43 of the Code of Civil Procedure, so as to bar the claim for partition which might be founded on the decree for divorce itself. **Maung Pe v Ma Lon Ma Gale, 8 A L J 739 (P C).**

355B—Evidence, admissibility of—Copy of map—Original not produced and not accounted for—No objection in first Court—Objection, if entertainable in appellate Court.

An objection as to the admissibility in evidence of a copy of a document which is relevant should be taken at the earliest possible stage before the Court of first instance.

Where no objection was taken to the report of the Commissioner (which was based upon a copy of map) before the trial began, four months after the filing of the report, it was not open to the party, against whom the copy was sued, to contend in the appellate Court that the non-production of the original was not duly explained. **Basir Gazi v Grija Nath Chowdhury 13 C L J 18 =9 Ind Cas 211.**

355C—Non-joinder of parties-Objection taken for the first time in appeal—Duty of appeallate Court–Procedure.

Where an objection that a particular person ought to have been made a party is taken for the first time only in appeal, the appellate Court ought to direct such a person to be made a party to the appeal and then dispose of it, or if necessary remit the suit to the first Court for re-trial, and it ought not merely to dismiss the suit **Venkanna v Chinna Subba Rao 9 M L T 503.**

356—Cause of action.

The plea of non-existence of cause of action may be raised for the first time on appeal. **Basaumal v Lachman Das. P R 41 of 1873.**

Appellate Court–*Contd.*

7 Objections taken for first time on appeal *Contd.*

(2) Plea sought to be raised that was not taken in the memorandum of appeal.

357.—Civil Procedure Code. s 542,

S 542 of the Code of Civil Procedure was intended to confer upon the Court a power exercisable by it alone, it was not intended to enable an appellant to take the respondent by surprise by urging matter of which he had no notice. **Bansidhar v Sita Ram 13 All 381.**

358.—Court of its own motion raising the objection that an agreement sued upon is void.—

Plaintiff sued the defendant upon an agreement admitting the latter as a partner in a contract for which plaintiff had already tendered to supply wheat to the Commissariat Department, for his share of the losses incurred in such contract and for damages. It was admitted that plaintiff was aware that defendant was at the time in the employment of the Commissariat Department and that in tendering for the contract he had to state that no one connected with the department was at the time of the tender, nor should afterwards be admitted as a partner with him. The lower Appellate Court dismissed the suit on the ground that the agreement sued upon was void.

Held, that the lower Appellate Court could of its own motion take the objection that the said agreement was void, though this was not pleaded by the defendant, and dismiss the suit upon that ground, as if it becomes apparent on the face of the proceedings that an agreement is not enforceable by law, the Court cannot be asked to enforce it, whether the plea is put forward or not. P R 114 of 1879 cited. **Sahib Ram v Nagar Mal P R 63 of 1884.**

(3) Objection to procedure.

359.—The errors of procedure of the Court of first instance are not to be remedied when they have not been made a ground of complaint before the lower Appellate Court. **Anurup Chandra Mukhopadhya v Hiramani Dasi 3 B L R Ap 38.**

Onooroop Chunder Mookerjee v Heera Monee Dossee 11 W R 418

360.—Civil Procedure Code, S 30—Question of procedure.

Appellate Court-*Contd.*

7 Objections taken for first time on appeal *Contd.*

The question whether the plaintiffs were precluded from suing without consent of the Court first obtained as required by S 30 and which is one merely of procedure when not raised in Lower Court, ought not to be entertained in first appeal. **Sakharam v Byharilal 1885 P J 92.**

(4) Objection based on Full Bench ruling.

361.—An objection that the judgment of the Court of first instance is erroneous under a ruling of the Full Bench of the High Court not taken before the lower Appellate Court will not be allowed to be taken in special appeal. **Narattam Dass Chowdhry v Kosopyari Chowdhrain 3 B L R A C 271.**

362.—*Held* that a fresh ground could not be taken in appeal which had not been taken below, though based upon a Full Bench ruling.

Kasi Muddi Khandkar v Nadir Ali 2 B L R A C 265: 11 W R 164.

But See **Hyes v Moneerooddeen Ahung 24 W R 6.**

Bonomalee Bagadar v Kylash Chunder Mojoomdar 24 W R 72.

(5) Objection based on point of Law.

363.—Hindu Law—Adoption—Adoption by a mother after the death of her son who has left neither child nor widow—Adoption by a grandmother without the consent of her daughter-in-law—Objection taken for the first time in appeal-Practice.

Under the Hindu Law a mother is competent to adopt when her son dies leaveing no widow or other heir nearer than herself.

A Hindu of the Shudra class died, leaving him surviving his mother and a paternal grandmother. After his death his grandmother adopted the defendant. Subsequently to this adoption the deceased's mother adopted the plaintiff. Thereupon both plaintiff and defendant claimed the deceased's estate.

Held, that the plaintiff was entitled to succeed. The deceased's mother having succeeded as heir to her son, her mother-in-law could not by any adoption divest her of her rights as such heir without her consent. The defendant's adoption was, therefore, invalid.

Appellate Court-*Contd.*

7 Objections taken for first time on appeal *Contd.*

An objection based upon a point of law, may be made in second appeal, provided it does not involve the taking of any additional evidence on matters of disputed facts. **Gavdappa v Girimallapa P J 1894, 155 = 19 Bom 331.**

Notes.—Ref: 23 Bom 327 = 25 Bom 202; 306 = 28 Bom 461.

(6) New point.

364.—Discretion of Court.

On second appeal the appellant should not be allowed to raise an entirely new point, if it is one for the right determination of which it is necessary to go into evidence which has not been produced in the lower Courts, or unless it is a pure point of law going into the question of the jurisdiction of the lower Courts and capable of being determined without the consideration of any evidence other than that on the record; and even if it fall within the above exception, it is purely discretionary with the Court whether to consider it or not. **Fakir Chand Audhikari v Anunda Chunder Bhuttacharji 14 Cal 586.**

Notes:—Dist: 26 Cal 845.

365.—C P C O. 41, r.2-S 542—Enhancement, cash-rent and grain rent—New point in appeal—Notice to parties where Court held in Camp.

Held, that where an occupancy tenant's *khata* (holding) consists partly of cash-rented fields each separately assessed to rent, and partly of grain-rented lands, the landlord's suit for enhancement upon the cash-rented fields need not necessarily be dismissed as inadmissible on the ground that all the fields of the *khata* have not been included in it. *Held*, also, that when a point is for the first time raised in appeal by either party or taken by the Court, the provisions of s 542 of the Civil Procedure Code must be strictly observed, and the Appellate Court should not rest its decision upon that point without allowing the opposite party a sufficient opportunity of contesting it. *Held*, also, that when a Court is held in Camp, a party failing to appear should not be treated as absent unless due notice of the place where, and time when, the case is to be heard, has been given to him and due time allowed to him to appear. **Sheikh Mohammad Husain v Umrao S D 9 of 1893.**

Appellate Court-*Contd.*

7 Objections taken for first time on appeal-*Contd.*

366.—Where the frame of the issues and judgment of the Court of First Instance proceed on the assumption that a particular claim was included in the plaint and the parties went to trial on that claim and the defendant did not in his appeal take the objection that that claim was not included in the plaint; *held* that it was not open to the Court of Appeal to take the technical objection of its own motion, even if a well founded one, that the plaint did not include that claim. **Ahmadsaheb v Jairam 1887 P J 54.**

366A.—Appeal—Point not taken in lower Courts

It is not open to an appellant to raise in second appeal a point which has not been taken either in the Court of first instance and not found against or in the grounds of appeal to the lower Appellate Court. **Pedda Obi v Chinna Reddi 5 M L T 79=2 Ind Cas 618**

366 B—S 42—Declaratory relief sought against tenant—Possession, prayer for—Under proprietary rights, acquisition by prescription of—Second appeal, new pleas first taken in.] The plaintiff's suit against J for arrears of rent having failed, they sued him in the Civil Court for a declaration that he had no proprietary or under-proprietary right in the land in dispute. J alleged that he was not in possession of the land and that it was in the possession of H and C who were made defendants. They pleaded that the land had been in their possession as Zamindars from the time of native rule The Court of first instance decreed the suit and granted the declaration prayed for, and the Court of first appeal dismissed the defendant's appeal In second appeal it was contended by the defendant that the provision to s 42, Indian Specific Relief Act, barred the declaration given by the Court of first instance inasmuch as the plaintiffs could have sued for possession of the land and not merely for declaratory relief. This plea was not taken in the memorandum of appeal. *Held*, that as the suit was originally brought, the plaintiffs inasmuch as they alleged that J was a tenant, could not have claimed possession. When H and C were joined as defendants they did not plead in the lower Courts that the plaintiffs should sue for possession of the land, and it was too late to take such a plea in second appeal. *Held*, further that, if the defendants, as they contended, had been in possession of the land for 12 years, claiming to be the under proprietors of the same, and adversely to the plaintiffs, the plaintiff would not be entitled to the declaration granted inasmuch as the defendants would have acquired under-proprietary rights by prescription. **Harnandan v Raja Bhup Indar Bikhram Singh 4 O C 207.**

(6A) Alteration of plea for first time in second appeal.

366 C—Alteration of plea for first time in appeal—Alienation of joint family property—Objection to alienation by co-parcener not party to alienation.—

Four out of five joint owners of an ancestral house united in selling a portion of it to the respondent. The fifth owner, the appellant-defendant, resisted the vendee's claim to possession on the single ground that the property was separate and belonged not to him or to any of the four vendors, but to one M who had sold it absolutely and exclusively to him Issue was taken on these pleadings, and both Courts found in favour of the respondent For the first time, it was pleaded in second appeal that, on the finding that the house was joint property of the appellant and the vendors to the respondent, the sale was bad, as the vendors were incompetent to deal with joint estate without the concurrence of the appellant. *Held*, that even if the appellant should otherwise be allowed to alter radically his defence as maintained hitherto in the suit, he still should not be allowed the benefit of that plea, for, he had himself dealt with the property without the consent or concurrence of his co-sharers, and adversely to their interests in the property, by taking a sale-deed of it himself, and that it would not lie in the mouth of such a person to claim the avoidance of the transfer to the respondent on that ground, and that all the equities were in favour of the respondent. **Pati Ram v Amba Prasad. A W N 1886, 88.**

(7) Objection, which, if taken, might have been cured.

367—An objection which, if taken, might have been cured and which has not been taken

Appellate Court-*Contd.*

7 Objections taken for first time on appeal- *Contd.*

in the Court below, cannot be taken in the Court of appeal. **Dhurm Dass Pandey v Shama Soondery Debia 6 W R P C 43 3 Moore's I A 229.**

(8) Objection taken too late

368—A point not taken in either of the lower Courts was disallowed as being too late when taken for the first time at the hearing of the special appeal. **Mahadaji v Vyankaji Govind. 1 Bom 197.**

Ramabai Saheb Patvardhan v Appa. 12 B H C 13

Chundee Churn Roy v Ram Coomar Dutt. 7 W R 413.

Bunsee Lall v Aoladh Ahsan 22 W R 552.

Notes—Ap: 7 Bom 123; 2 Bom 489. Fol: 6 All 335. Dist: 8 All 108 F B; Ref: 1 Bom 190; 24 Bom 609.

369—Widow's power in binding reversioner

The plaintiff claimed to eject B. S. was plaintiff's brother's widow. B. alleged payment to S. of six year's assessment in advance under an arrangement to occupy it free from assessment for twelve years. *Held*, that such an arrangement by the widow would not bind the plaintiff after her death. *Held*, also that an objection, *viz*, that the plaintiff's *inam* was only an alienation of land revenue and not of the land itself so as to enable him to eject B., which formed no part of B's case as made out in his written statement, was too late being made in appeal, and was properly rejected. **Bhana v Wagarsing. 1885 P J 16.**

370—The objection that the Court of first instance had exercised a wrong discretion in permitting plaintiff to sue for a declaratory decree having been taken for the first time on second appeal, the chief Court refused to interfere in the matter.

Held, further, that a plea to the jurisdiction may be taken at any stage of the suit if the facts on which the plea rests are patent on the face of the record; but a party is not entitled, on a second

Appellate Court-*Contd.*

7 Objections taken for first time on appeal- *Contd.*

appeal, to have evidence taken to support a plea as to the want of jurisdiction of the first Court to entertain the suit.— **Baikunt Das v Hukam Das. P R 55 of 1877.**

(9) Allowing objections.

371—High Court allowed objections to be taken by a defendant which had not been taken in either of the lower Courts. **Bhuban Chandra Shome v Ramdyal Shamanta 5 B L R Ap 62: 14 W R 55**

Ramtarak Karati v Dinanath Mandal 7 B L R 184: 24 W R 414 note.

(10) Objection apparent on pleadings.

372—The High Court can raise and adjudicate upon certain points in special appeal when they are apparent on the face of the pleadings, even though the parties to the suit are silent. **Enaet Hossein v Kureemoonissa. 3 W R 40**

(11) Objection involving point of mixed law and fact.

373—Second appeal—An objection involving a a point of law as well as of fact if not taken in the Court below, cannot be entertained in second appeal **Vasanji Haribhai v Lallu Akhu. 1884 P J 4=9 Bom 265.**

Notes—Foll: 14 Bom 558. Ref: 15 Bom 290: 28 Bom 125; 6 Bom L R 864; 28 Mad 84 =14 M L J 468.

(12) Question of mixed law and fact raised for first time in appellate Court.

374—It is doubtful whether appellate Court ought to allow a question a mixed question of law and fact, to be raised when it was never raised in the Court of first instance.

Umrao Bibi v Mahomed Rojabi 27 Cal 205 =4 C W N 76.

Notes—Ref 13 C W N 949.

(18) Objection not taken on cross appeal

375—Remand—An objection not taken in cross-appeal before the lower Appellate Court cannot be taken in special appeal; but if the case be remanded for new trial, such objection may

Appellate Court-*Contd.*

7 Objections taken for first time on appeal- *Contd.*

then be taken before the Court of first instance.

Durgaram Roy v Narsing Deb.
2 B L R A C 254.

Doorgaram Roy v Nurosingh Deb.
11 W R 134.

(14) Omission to prefer appeal against remand order.

376—Objection to its legality on special appeal.—The omission of a party to prefer an appeal against an order of remand does not preclude him from questioning its legality when it comes up in special appeal from the subsequent decision passed after remand.

Magaram Ojha v Nilmonee Singh Deo
13 B L R 198=21 W R 326.

(15) Objection taken but not pressed.

377—Where an objection taken in the grounds of appeal is not pressed at the hearing of the case, it cannot be raised again in special appeal.

Nobokristo Sircar v Kalachand Doss.
12 W R 470.

Soorjo Kant Banerjee v Kristo Kishore Poddar. **14 W R 423.**

(16) Want of opportunity to raise objection.

378—A defendant is entitled to take in the Appellate Court an objection which he had no opportunity of taking until the case was heard in appeal. **Lowa Jha v Bisseshur Singh.**
11 W R 6,

Notes:—Ref: 13 W R 303.

(17) Objection by pro-forma defendant.

379—A *pro forma* defendant cannot be allowed to raise in appeal objections which he neglected to raise in the suit. **Deokeenundun Roy v Kalee Pershad.** **W R 1864 Mis., 34.**

As to taking objections for the first time, See also **Manirudeen Ahmed v Ram Chand.** **2 B L R A C 341**

Naimudda Jowardar v Scott Moncrieff
3 B L R A C 283

Nyemoddee Jowardar v Moncrieff.
12 W R 140

Nanoo Roy v Jhoomuck Lall Dass.
12 B L R 292 note : 18 W R 376.

Appellate Court-*Contd.*

7 Objections taken for first time on appeal- *Contd.*

Gour Kishore Dutt v Akbur
22 W R 489

Sheo Gobind Rawut v Abhay Narain Singh
5 B L R Ap. 17.

(18) Objection as to absence of cause of action.

379A—Legal objection, when can be raised.

An objection to the plaintiff having no cause of action may be taken at any stage of the suit. (6 B L R App 73, Rel on). The House of Lords in England has decided that a legal question may be raised even in the ultimate Court of appeal, which has not previously been taken.

Champa Kuar v Mina Mal.
A W N 1887, 1.

(b) SPECIAL CASES.

(1) Adoption.

380—Objection to invalid adoption.

An objection (that an adoption was invalid, because the party adopted was the eldest son of his natural father) was rejected in special appeal, because not urged in the lower Courts at any stage of the trial, and not specially taken in the petition of special appeal. **Joy Tara Dossee Chowdrain v Roy Chunder Ghose.**
1 W R 136

380A—Adoption—Adopted a married man at the time of the adoption—Objection as to validity of adoption cannot be taken for first time in second appeal.

An objection which involves a mixed question of law and fact, in respect of which there is no finding in the Courts below, cannot be entertained in second appeal, Consequently, an objection that an adoption is invalid, because the adoptee was a married man at the time of the adoption, is not allowable for the first time in second appeal. (1 W R 136, 9 Bom 285, 22 Cal 483, 27 Cal 205 Fol; 17 Bom 303, 19 Bom 331, 18 Bom 679, 11 C P L R 56, 11 M I A 475, 12 M I A 475, 14 Cal 586, Ref.) **Kanhaya Lal Kurmi v Mt Satiya.** **1 N L R 1**

381—Omission of performance of ceremonies.

Held that, as no objection to the omission of any of the usual ceremonies of adoption or to the age of the adopted son was taken before the low-

Appellate Court-*Contd.*

7 Objections taken for first time on appeal-*Contd.*

er Court, its decision was not open to those objections when taken on appeal. **Duryao Singh v Karun Singh. 1 Agra 31**

Notes.—Fol: 6 N W P 293,

(2) Objection to share taken on adoption.

382—Hindu Law—Inheritence—Share of adopted son where a son is subsequently born—Western India—Mitakshara—Vyavahar Mayukha—Point taken by appellant on second appeal not raised by him in his first appeal—Practice.

In Western India, both in the districts governed by the Mitakshara and those specially under the authority of the Vyavahar Mayukha, the right of the adopted son, where there is a "legitimate son" born after the adoption, extends only to a fifth share of the father's estate.

In a suit by an adopted son to recover his share in his adoptive father's estate, a son having born to the adoptive father subsequently to the plaintiff's adoption, the Court of first instance awarded the plaintiff a fourth share of the property in dispute. The defendant appealed to the District Court, but in appeal raised no question as to the extent of the share awarded to the plaintiff. On second appeal to the High Court it was contended that, in any event, the plaintiff was only entitled to a fifth share.

Held, that under the circumstances and having regard to the nature of the question, the point might be taken in second appeal on behalf of the defendant, and the High Court varied the decree by awarding the plaintiff a fifth share instead of a fourth share, but ordered the appellant (defendant) to bear his own costs of the appeal. **Giriapa v Ningapa P J 1892, p 65 =17 Bom 100**

Notes:—Ref: 17 Bom 303 ; 1 C L J 388 ; 27 Bom 452.

(3) Alienation.

383—Alienation by member of Mitakshara family—Invalidity of alienation—Proof of consideration.

A father having executed a deed conveying certain ancestral property to two persons (D and B), who alienated it to several others, his son to have the conveyances by D and B set aside on the ground that the deed given by the father was benami, and that D and B never had possession. The suit was dismissed by both the lower Courts *Held* that, as plaintiff went to trial in the Courts below upon one issue only, *viz.*, whether D and B were ever really in occupation, he was not entitled in special appeal to complain that evidence had not been taken as to the passing of consideration-money. *Held* that as no issue was raised in the lower Courts which could have been the foundation for a declaration of right, the non-decision of a claim to such a declaration could not be made a ground of special appeal. *Held* that where the question whether the alienation of certain property by the father without the son's consent was valid under the Mitakshara law was not raised in the lower Courts, such invalidity could not be admitted as a ground of objection in special appeal, for it necessarily involved an issue of fact. **Puriag Dutt v Brojo Koonwar. 9 W R 503.**

Benode Patnaik v Doyanidhee Bullior Singh. 9 W R 493

(3A) Plea going to the very root of the case can be raised for the first time in second Appeal.

383A—Cause of action—Pleadings—Practice—Plea not taken in the lower appellate Court—Hindu Law—Mitakshara-Joint family property-Mortgage by father—Sons not made parties to suit for foreclosure—Suit for redemption.

Where a plea goes to the very root of the case, involving as it does a plea that the plaint does not disclose a cause of action, *held*, that the plea may be raised in second appeal, though it was not raised in the lower appellate Court.

Where property belonging to a joint Hindu family governed by the *Mitakshara* has passed out of the family, whether by private sale in satisfaction of or by an auction sale in execution of a mortgage decree, or by virtue of a decree absolute for foreclosue, the sons in such a family are bound by virtue of their liability to pay their father's debt not tainted with immorality, so that they cannot sue to set aside an alienation which has become final except on some ground which would relieve them from liability to pay the debt which is the consideration for the sale, and they cannot succeed on the sole ground that they were not made parties to the suit on the mortgage. (21 A l

Appellate Court *Contd.*

7 Objections taken for first time on appeal-*Contd.*

341, Appl. 33 All 7, 8 A L J 216, Fol ; 30 All 256, not Fol.) **Sheo Dayal v Jagar Nath. 8 A L J 922.**

383B—Practice-Plea taken for the first time in second appeal—Joint Hindu family—Share in joint family property not alienable without consent of co-parceners or until partition.

Where in second appeal there was raised for the first time a plea, based upon the findings of fact of the lower Appellate Court, that an alienation of certain joint family property, the subject of the suit, was bad in law as having been made without the consent of one of the co-parceners, the Court refused to allow the plea to be taken, on the ground *inter alia* that the objecting co parcener had on a previous occasion himself alienated a portion of the joint family property. (A W N 1886, 88, Fol.) **Mohan Lal v Madan Mohan Lal. A W N 1899, 221.**

(4) Appeal.

384—Objection that no appeal lies.

The High Court refused to entertain an objection (not taken till the close of the appellant's argument) that, the amount in appeal being less than Rs. 5,000, no appeal would lie. **Chunder Nath Misser v Sirdar Khan 18 W R 218.**

(5) Attachment.

385—Invalidity.

An objection as to the invalidity of attachment, on the ground of not conforming to the formalities required by s. 239 of Act VIII of 1859, was not allowed to be taken for the first time in appeal. **Ram Krishna Dass Surowji v Surfunnissa Begum. 6 Cal 129.**

(6) Award.

386—Arbitration to administer—Validity of award based on evidence taken on oath.

The matters in dispute in a suit were by the desire of the parties to the suit referred to arbitration. During the investigation of these matters by the oath of the defendant administered on the *Koran*. The defendant agreed to take such oath, and such oath was accordingly administered to him by the arbitrators, and his evidence taken, and an award made, based on the evidence so taken. On special appeal to the High Court by the plaintiff, he objected for the first time, the objection not having been taken in his memorandum of special appeal, that the arbitrators were not legally competent to administer such oath, and the evidence so taken could not form a valid basis of an award, and the award was therefore void. *Held* per Pearson, J., Spankie J., dissenting:—with reference to the legal competency of the arbitrators to administer the oath, that objection was good and that arbitrators had no power to administer the oath.

Per Pearson. J Spankie J., doubting:—that as the objection was one which vitally affected the procedure of the arbitrators, it could not be ignored, although it was not preferred in the lower Courts, and was not to be found in the memorandum of special appeal.

Per Pearson J:-that the statement of the defendant made on an oath illegally administered could not form a valid basis of an award, and the award was void, and should be set aside.

Per Spankie, J:-that the plaintiff having offered to be bound by the oath and the defendant having agreed to take it. the plaintiff was bound by the evidence given on such oath, and that as the arbitrators had, by law and consent of parties, authority to receive the evidence of the defendant, the substitution by them of an oath on the Koran for an affirmation did not, under the provisions of s. 13 of Act X of 1873, invalidate such evidence, and consequently render the award based on such evidence void.

Waliulla v Gulam Ali. 1 All 585.

387.—*Held*, that there must be an express order extending or enlarging the time for delivery of the award. The mere fact that the Court has passed a decree in accordance with the award cannot be taken as affording a presumption that an extension of time was given.

Chuma Mal v Hari Ram. 8 All 548=6 W N 179

Raja Har Narain Singh v Chaudhrain Bhagwant Kuar. 13 All 310 P C.

Har Narain Singh v Bhagwant Kuar. 10 All 137=8 W N 82.

Appellate Court-*Contd.*

7 Objections taken for first time on appeal *Contd.*

Notes:—Ap : 13 All 300 P C ; 26 All 105. Fol : 30 All 169=(1908,) W N 59=5 A L J 144.

388.—Further Appeal—Objection taken for the first time—Cause of action—Suit based on non-existent cause of action—Novation—Consent of parties.

Held, that a plea that the suit is based on a non-existent cause of action should be taken at the first hearing, and that ordinarily a party, who has allowed a case to be decided in two Courts on the merits. should not be heard to raise such a plea as this on further appeal.

A cause of action cannot be said to have been superseded by a new agreement, when the latter has not reached the stage of completeness and the parties have not finally consented to its terms.

Bhup Singh v Jiwan Singh. 2 P L R 1911=9 Ind Cas 385= 28 P W R 1911.

(7) Coverture.

389. Plea of coverture——Execution of decree.—

The plea of coverture not allowed to be raised against a decree-holder, because not taken when she first sought to execute the decree.

Kirkby v Dillon. 1 N W. Ed 1873, 243.

(8) Custom

390.—Objection as to custom against inheritance.—

In a suit by a Hindu widow for possession and declaration of title,—*Held* that defendant could not be allowed to come in and urge for the first time on appeal that by a family custom or koo lachar, females were excluded from inheriting.

Doorga Pershad Singh v Doorga Koonwaree. 13 W R 10= 9 B L R 306

Notes:—Ref: 20 W R 155.

(9) Damages, measure of.

391.—Mode of declaration of damages.

Held that, as the defendant had made no objection to the manner in which the plaintiff had calculated damages in the Courts below, the question could not be gone into on special appeal.

Mc Donald v Rajaram Roy. 3 B L R Ap 28: 11 W R 371.

(10) Decree, Form of.

392.—An objection as to the form of a decree not allowed to be taken in the first time on special appeal. **Mohessur Buksh Singh v Mathoorapershad. 8 W R 515.**

392A.—Ss. 43, 45—Sikkim, Political Resident's Court at —decree if may be executed in British India—Question for fact not raised in first Court if may be urged on appeal.

The Governor-General-in-Council having declared by notifications that S 229 A of the Civ. Pro. Code of 1882 (now S. 45) should apply to the Court of the Political Agent Sikkim.

Held,—That this showed that the Court of the Political Agent at Sikkim was a Court established or continued by the authority of the Governor General in Council within the meaning of S 43 of the Code, and a decree of that Court can be executed by the Court of the Subordinate Judge at Darjeeling.

The qnestion whether the decree could " be executed within the jurisdiction of the Court by which it was passed " was one of fact, and the plea that it could, not having been raised in the lower Court, the High Court refused to entertain it. **Jamil Ahmad v His Highness the Maharaja of Sikkim. 15 C W N 992.**

(11) Defence not raised in the lower Court—Declaratory decree-Suit for.

393.—Decree, Suit for—Objection to declaratory decree.

B J, a Hindu widow, made a will disposing of property, of which under an award she had only the use during her life, and to which the plaintiff, her son, was entitled after her death. While she was still living, the plaintiff filed this suit, praying that the will might be declared invalid. The defendants were the testatrix and those who took under the will. While the suit was pending, the testatrix died. The Subordinate Judge passed a decree in plaintiff's favour, and declared the will invalid. The defendants ap-

Appellate Court-*Contd.*

7 Objections taken for first time on appeal-*Contd.*

pealed, and contended for the first time in appeal that the allegations in the plaint, *viz* that the will was in their favour, and that they (the defendants) were interested in denying the plaintiff's title as reversioner. did not constitute a case in which, in the exercise of a sound judicial discretion, a declaratory decree ought to be made. *Held* that, as the objection was taken for the firet time in appeal, it would be unjust to allow the defendants to benefit after they had failed to resist G's claim on the merits. **Maganlal Purshottam v Govindlal Nagindas. 15 Bom 697.**

See Bombay Burmah Trading Corporation v Smith. 17 Bom 197

Notes:—Ref : 26 All 238.

(19) Enhancement.

394.—Waiver of objection.

In a suit for enhancement of rent, where defendant pleaded Bengal Act VIII of 1869 section 4 plaintiff referred in both the lower Courts to a chittee to prove variation of rent ; but it was found that the terms of the chittee barred enhancement. *Held* that it was not open to plaintiff in special appeal to object that the chittee had not been proved. **Lalla Banee Pershad v Lalla Dabee Pershad. 24 W R 435**

Notes:—Ref : 2 Bom 19.

395.—Service of notice.

In a suit for enhancement of rent it was objected on behalf of the defendant in special appeal that service of notice had not been proved. *Held* the question was one of fact, and the objection ought, therefore, to have been taken in the Court of first instance. **Dumaine v Uttam Singh. 5 B L R Ap,44=13 W R 462.**

396—Objection to want of notice of enhancement.

An objection that no notice of enhancement had been served, though not taken in the Court below, was allowed to be taken on appeal.

Thekmee Beldar v Ram Kishen Lall. 15 W R 71.

But not a technical objection to the form of notice.

Shree Gopaul Mullick v Dwarkanath Sein 15 W R 520.

Appellate Court-*Contd.*

7 Objections taken for first time on appeal-*Contd.*

Shama Soonduree Debia v Degumburee Debia 21 W R 368

though See **Wooma Churn Dutt v Grish Chunder Bose 17 W R 32**

Ram Ruttun Ghose v Prosunno Nath Bhuttacharjee. 20 W R 203.

Notes:—Dist. 9 Cal 72

397.—Informality of notice of enhancement.

Where a notice of enhancement, though informal was sufficient to inform the raiyat of the landlord's intention to increase the rent to the rates paid for similar lands in places adjacent, and the notice was accepted by the raiyat, and treated by him in the lower Court as a notice under cl. 1, s. 17, Act X of 1859, it was held that the informality could not be objected to for the first time in the High Court in special Appeal. **Kasheenath Deb v Shibessuree Debia. 8 W R 503.**

398.—Suit to contest enhancement—Irrigation expenses.

Held that in a suit for enhancement the plea of increased expense on account of irrigation cannot be admitted for the first time in special appeal. **Kunchun Singh v Sheoraj. 1 Agra Rev 7**

399.—Objection not taken before as being unnecessary.

A suit for enhancement of rent was defended on two grounds, the first of which was overruled but the second succeeded, and the suit was dismissed. Plaintiff appealed, and the second ground having been overruled in appeal, the respondent (defendant) again put forward the objection which had been overruled by the first Court. Held that, under the circumstances, it was not too late for him to take that objection.

Taree Mahtoon v Ram Sahoy Singh. 25 W R 110.

(13) Evidence

400—Time for objection to evidence.

It is the duty of the party who wishes to object to evidence to object in the first instance, and not to delay doing so until the case is before the High Court in special appeal. **Seetul Pershad Mitter v Junmejoy Mullick. 12 W R 244.**

Appellate Court-*Contd.*

7 Objections taken for first time on appeal-*Contd.*

401—Objections to evidence as not being the best.

Objections to evidence as not being the best evidence should not be allowed to be taken on special appeal. **Ayudh Beharee Singh v. Ram Raj Tewaree 18 W R 105**

Lochun Singh v Het Narain Singh 24 W R 232.

402—Objection to mode of recording evidence.

The objection that the depositions of the witnesses were not taken in the manner prescribed by the Code of Civil Procedure, but only notes of the evidence, is not one which can be taken in special appeal. **Lall Mahomed v Peer Nuzur 18 W R 112**

403—Evidence—Judgment in a former suit. Relevant evidence--Living witnesses, their depositions recorded in a subsequent suit—Practice and procedure.

The judgment in a previous suit where the creditors of defendant I claimed to attach certain property as being that of defendant I and defendants 2 and 3 relied on a partition deed to prove that defendant I had given his share up to them is if not conclusive at least relevant evidence in a subsequent suit, where the plaintiff claimed the property as the purchasers from defendant I and the defendants 2 and 3 set up the same partition deed in proof that the defendant I had no title inasmuch as in both the cases the point at issue namely, the genuineness of the partition deed was the same, and the parties also the same, namely the defendant I by his creditors and assignees on the one side impeaching the deed and the defendants 2 and 3 on the other contending for the deed.

When the parties to a suit in order to save delay or expense or any other reason refrain from calling persons who are alive and agree or do not object to the admission of evidence given by them in same former proceeding, the evidence is not strictly admissible but if the Court of first instance allow this to be done, the Court of appeal must accept the evidence and it is too late for it to take any objection to the procedure **Lakshman v Amrit 2 Bom L R 386= 24 Bom 591**

Notes—Ref 31 Bom 143; 2 Bom L R 651.

Appellate Court-*Contd.*

7 Objections taken for first time on appeal-*Contd.*

403 B—Grounds of appeal—Objection as to admissibility of documents taken in appeal-Deposit of cash—Limitation Act 1859 s 1 cls 10 and 16.

An objection as to the admissibility of a document if not taken in the first Court cannot be allowed in second appeal. The article governing a suit for return of cash deposited under a written engagement is either s 1 cl (10) or s. 1 cl (16) of Act XIV of 1859. **Ganeshi Lal v Chunni Lal 74 P R 1882**

Notes.—Ref 95 P R 1885.

403 C—Objection to irrelevant evidence not taken in first Court, but only on appeal—Objection by party who relied on the evidence

Where a party did not object to irrelevant documentary evidence in the first Court, but in his written statement actually relied on such evidence. *Held* that he could not object to its relevancy in appeal. 19 All 70; 23 I A 105 dist.

Hridoy Krishna Das v. Prasanna Kumari Chowdurani 28 Cal 142

Notes—Fol 15 C P L R 123.

404—Objection as to admissibility of evidence.

It being objected in special appeal that the decision of the lower Appellate Court was based on documents, which were neither admissible as legal evidence nor had any bearing on the point to be decided,—*Held* that, though the objection to the admissibility of the evidence ought to have been taken in the Court in which the evidence was tendered, yet coming in such a shape as it did, it could not be got over. *Held* also (Mitter *J dissentiente*) that, as defendant has succeeded in special appeal on an objection which he should have taken before, he ought to pay his own costs in this appeal even should he succeed ultimately (the case being remanded); and that it is not the exclusive duty of a Court but that of pleaders also, to see whether evidence tendered is legally admissible. **Munrakhun Roy v Juggut Doss 10 W R 124.**

405—Objection as to admissibility of evidence.

The reception of papers and documents by the lower Appellate Court, unless objected to at the time, cannot be made a ground of special appeal. **Rash Behari Singh v. Nabayi Poddar 3 B L R A C 99: 11 W R 465.**

Notes.—See 11 W R 301.

Appellate Court-*Contd.*

7 Objections taken for first time on appeal —*Contd.*

406—Objection as to admissibility of evidence.

Where no objection had been taken as to the admissibility of documentary evidence—viz a decree and other proceedings in regard to that decree, which had been made use of by the opposite party,—an Appellate Court has no jurisdiction to exclude it. Where defendant allows, without objection, a purchaser of a plaintiff's interest in the suit to substitute his name on the record under an order of Court, he cannot afterwards contend that the suit is thereby abated. **Bir Chandra Roy Mahapatter v. Bansi Dhar Roy Mahapatter 3 B L R A C 214.**

406 A—admissibility of evidence—Objection to the admisssibillity of evidence—Improper proof—Objection in appeal. If no objection be taken in the first Court to the admissibility of evidence on the ground of improper proof, such objection cannot be raised in appeal. 6 Cal 666; 11 Bom 320 & 28 Cal 142 ref 10 & fol. **Dalchand v. Ganga Singh. 15 C P L R 123.**

406 B—Evidence—Documentary evidence—conduct amounting to tacit waiver of proof—Necessity for formal proof.

Where the genuineness of a document relied on by a party was not disputed by the opposite party, and the only question was as to its binding character, the opposite party must be deemed to have tacitly waived its proof by consenting to its admission in the first Court and could not be permitted to question its admissibility for the first time in the appellate Court. **Viraraghava Aiyangar v. Ramaswami Aiyangar. 10 M L J 242.**

407.—Evidence received without objection.

Where a deposition made in another suit, to which special appellant was not a party, was admitted and used by the first Court without any objection on the part of the special appellant, it was held that he could not be allowed to object to it in special appeal Where the lower Appellate Court's judgment is good, and its adjudication of a plaintiff's right has been based on a sound principle, the High Court will not allow a new point to be taken in special appeal which was not taken in either of the Courts below. **Wazeer Jemadar v Noor Ali 12 W R 33.**

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Appellate Court-*Contd.*

7 Objections taken for first time on appeal —*Contd.*

Notes.—*Con* 21 W R 133.

407A.—Evidence—No objection taken to admissibility of document in first Court—Competency of appellate Court to raise or entertain objection.

No objection was taken in the Court of first instance to the admission of the copy of a document. In an appeal from the decree of the first Court, the appellant contended that the copy was not admissible in evidence in the absence of any satisfactory explanation for the non production of the original. *Held* that it was not competent to the appellate Court to raise or entertain the objection to its admissibility. But there was nothing to prevent the appellate Court from considering what weight was due to the document as evidence in the absence of the original. **Ittichiri Ammah v Kaliani. 5 M L J 81.**

408.—Objection to validity of document.

Before an objection to the validity of a document filed as evidence in a case can be admitted as a ground of special appeal, it must be shown to have been made at every stage in the Courts below. **Joykishen Mookerjee v Rajkishen Mookerjee. 12 W R 315.**

409.—Where party in the first Court raises the question that a document is not genuine, it is open to him to take in the Appellate Court any ground in support thereof, although the same may not have been taken in the first Court. **Haimabati Dasi v Govinda Chandra Ghosh, 2 C W N 695.**

410.—Objection to evidence wrongly received.

An objection to the effect that the Court of first instance had given judgment on the strength of a document which ought to have been registered, was not admitted in special appeal, as it had not been raised either in first Court or in the lower Appellate Court. **Joygopal Mozoomdar v Thakomonee Dabee. 11 W R 381**

411.—Evidence wrongly received without objection.

Objection as to reception of evidence not be-

Appellate Court *Contd.*

7 Objections taken for first time on appeal —*Contd.*

fore objected to disallowed on special appeal.

Godayi Joyardar v Mears. 10 W R 50.
Rughoonath Pershad v Huree Mohun 10 W R 37.
Chadee Singh v Beharee Tewaree. 10 W R 91.
Mukdoomunnissa v Nokhy Singh. 24 W R 296.
Anar Mollah v Hills 10 W R 139.
Kissen Kaminee Dossee v Ram Chunder Mitter. 12 W R 13.
Protap Chunder Borooah v Collector of Gowalpara. 22 W R 216.

(14) Objection to unregistered document.

412.—Regular appeal.

Held that the Court is bound in regular appeal to entertain an objection that a document is invalid for want of registration, even though no objection may have been raised to its admissibility in the Court below. **Basawa Gurbasawa v Kalkapa.** 2 Bom 489.

Notes:—Ap: 7 Bom 123. Fol: 6 All 355, Dist. 9 All 108 F B. Ref: 4 Bom 235; 19 Bom 36; 24 Bom 609; 2 All 554; 33 Cal 613=10 C W N 551=3 C L J 576.

413.—*Held* that, as the plea as to the inadmissibility of a document as evidence for want of registration was not specially taken in the Court below, it could not be allowed in a special appeal. **Grish Chandra Roy Chowdry v Amina Khatun.** 3 B L R Ap 121.

414.—Costs.

Whether the lower Appellate Court wrongly gave effect to an unregistered bond which, by reason of its being unregistered, was not admissible in evidence, no objection being taken by the parties to its being admitted.—*Held* that the objection must prevail when taken for the first time in special appeal, but the party taking it was not entitled to the costs of the appeal

Oomatool Fatima v. Ghunnoo Singh. 19 W R 22

(15) Objection that document is improperly stamped.

415.—The plaintiff appealed to the Judge against a dismissal of his suit, who reversed the decision of the Court below, and gave the plaintiff a decree. The defendant thereupon appealed to the High Court on the ground that a document had been admitted in evidence in support of the plaintiff's case, which did not bear a proper stamp. *Held* that the defendant, having omitted to take the objection before the Judge, could not appeal on this ground. **Rambrem Lal v. Abluckh Singh** Marsh 267: 2 Hay 148.

415A—Unstamped document—Penalty levied and document admitted in evidence by original Court.

After the penalty has been levied and a document admitted in evidence, no objection that the plaintiff should be non-suited, as it was founded on a deed of gift insufficiently stamped, can be raised in special appeal.

Sudama v Kesho. 102 P R 1879.

Notes.—Ref, 116 P R 1888, 121 P R 1882, 51 P R 1904, 126 P R 1884, 157 P R 1882, 120 P R 1891; Fol., 26 P R 1882.

(16) Objection to document as evidence not raised in lower Court.

416.—If no objection is taken in the Court of first instance to the reception of a document in evidence, it is not within the province of the Appellate Court to raise or recognize it in appeal. **Chimnaji Govind Godbole v Dinkar Dhondev Godbole.** 11 Bom 320.

Notes.—Ap. 13 Mad 189. Fol: 21 Cal 190; 5 M L J 81. Ref: 11 Bom 325; 18 Bom 534; 24 Bom 591; 32 Bom 577=10 Bom L R 927.

416A-416B.—Not objected to in the lower Court.

Where no objection was taken as to the admissibility of a document in the Court of first instance, it is not allowable to take the objection in appeal. **Ram Prasad Roy v Lala Sham Narain.** 6 C L J 22.

(17) Refusal to examine witnesses.

417.—A Court of first instance, being satisfied that plaintiff's case could not be established, refused to examine defendant's witnesses. The

Appellate Court-*Contd.*

7 Objections taken for first time on appeal —*Contd.*

lower Appellate Court, differing from the Munsif, gave plaintiff a decree. *Held* that although the Munsif had committed a great irregularity still as that point was not raised in the lower Appellate Court it could not be taken in special appeal. **Gooroo Dass Akhoolee v Poran Mundle. 12 W R 363.**

418.—An objection that the Court has refused to examine witnesses, if not brought before the Appeal Court, cannot be raised on special appeal. **Osman Singh v Chummun Mahtoo 15 W R 87.**

Notes.—Fol. 21 Cal 213. Ref. 26 Cal 739.

419.—It is too late to make an objection, for the first time in second appeal, that a certain witness, for whose evidence no application had been made in the Courts below, ought to have been examined by the Appellate Court. **Somashekhara v Subhadramaji. 6 Bom 524.**

Notes.—Ref: 11 Mad 43: 24 Bom 367 F B; 9 All 253.

419A.—Plea first raised in second appeal—Plea going to root of suit—Fresh evidence.

Although speaking generally, questions which have not been raised either in the Court of first instance or in the lower appellate Court, and more particularly questions of law which involve findings of fact should not be allowed to be raised in second appeal before the High Court, yet where the question goes directly to the root of the plaintiff's title to maintain the suit and is a pure question of law arising upon admitted facts, the High Court should not, because it was not raised in the Court below, refuse to consider it in second appeal. **Dharam Das v Nand Lal Singh. 9 W N 78.**

(18) Refusal to take evidence.

420.—Where the Court refuses to take evidence offered, that fact should be made the ground of regular appeal, and not first set up in special appeal. **Lalla Debeeden v Sheo Ghoolam Singh. 2 N W 206.**

(19) Execution of decree

421.—Mode of execution-Discretion of Court. When the mode of execution has not been specifically objected to in the Court below, the

Appellate Court-*Contd.*

7 Objections taken for first time on appeal —*Contd.*

High Court will not interfere. **Dwarkanath Das Biswas v Unnoda Churn Dass. 8 W R 318.**

Notes:—Dist. 18 W R 520.

422.—Objection that decree cannot be executed in portions.

A decree cannot be executed in aliquot parts, but where it was objected for the first time in second appeal that a person seeking execution of a portion of decree was not entitled to execution, the High Court refused to allow the objection. **Goodur Sahoy v Dhunneshur Koer. 7 C L R 117.**

422A.—Execution of decree-Non-compliance with formalities required in execution——When objection to be raised.

An objection to the execution of a decree on the ground that the requisite formalities have not been complied with by the decree-holder should be taken in the lower Courts so as to afford the decree-holder an opportunity to show that they have been complied with. **Venkatappiah v Jagannadha Rao. 12 M L J 24.**

(20) Form of suit.

423.—Madras Local Boards Act (Madras Act V of 1884), s. 27.

An objection that the suit was not properly framed was not allowed to be taken for the first time on second appeal in a suit brought under the Madras Local Board Act. **President of the Taluk Board v Narayanan. 16 Mad 317.**

Notes:—Ref: 16 Mad 474; 3 M L J 223; 22 Bom 289 F B; 636, 25 Bom 142: 32 Mad 371 F B; 19 M L J 333 F B. Dist: 28 Mad 551.

(21) Fraud.

424.—Omission to allege fraud.

Held that defendant could not be allowed in special appeal to object that the lower Court had not determined the *bona fides* of plaintiff's purchase, unless he (defendant) had not only alleged fraud, but shown the way in which the fraud was intended to be carried out. **Boikunto Nath Sett v Russick Lall Burmono. 10 W R 231.**

Appellate Court-*Contd.*

7 Objections taken for first time on appeal —*Contd.*

Notes.—Diss: 12 W R 217.

424A.—Fraud—Pleading—Question of fraud not to be raised first in appellate Court—Practice.

A question of fraud cannot be allowed to be raised in the Appellate Court when it was not alledged in the written statements and no issue raised regarding it. **Pandit Prayag Raj v. Goukaran Pershad Tewari. 6 C W N 787.**

(22) Guardian.

425.—Objection as to due appointment of guardian.

Where plaintiff claimed as his inheritance what had been sold to defendants by his mother to liquidate debts due by his late father, it was held, first, that it was too late in special appeal to raise doubts as to his mother having been plaintiff's guardian when the objection had not been taken below at any stage of the proceedings. **Kool Chunder Surmah v Ramjoy Surmona. 10 W R 8.**

426.—Want of certificate—Maxim "Omnia præsumuntur rite esse acta."

On a suggestion taken for the first time in special appeal that a guardian has not obtained a certificate, it will not be assumed for the purpose of reversing the decree that such is the case. It will be presumed rather that the proceedings in the Court below have been regularly conducted until irregularity be shown. **Thummun v Golab Rae. 2 N W 89.**

(22A) Grounds advanced for first time in second appeal.

426A.—Second appeal—Grounds advanced for first time in second appeal

Where the points urged in the memorandum of second appeal were not raised in the Court of first instance or in the lower apppellate Court, *held*, that those points could not be allowed to be raised for the first time in second appeal.

Bhadorin v. Lachman Singh. A W N 1882, 103.

(22B) Grounds urged for the first time at hearing of appeal.

426B.—Grounds urged for the first time at hearing, admissibility of.

Appellate Court-*Contd.*

7 Objections taken for first time on appeal —*Contd.*

In an appeal against a decree in a suit based on *hundis* the appellant petitioned the appellate Court for the first time to be heard on two additional grounds viz., (1) that the suit did not lie because the presentation of the *hundis* for payment was not proved and (2) that no interest ought to have been allowed. *Held*, neither of the grounds was allowable at the hearing of the appeal. **Ram Das v Mathra Das. 6 P L R 1905,**

(23) Issues.

427.—Omission to raise issues

Where appellant satisfies the Court that he has been substantially injured by no issues being framed by the Judge previous to his decision, effect will be given to such objection.

Sah Koondun Lall v Makhun Lall 1 N W, 168, Ed. 1873, 247.

(24) Jurisdiction.

428.—The defendant objected to the jurisdiction of the first Court, but took no objection to the jurisdiction before the lower Appellate Court. *Held* that objection to the jurisdiction was waived.

Mahomed Hossein v Akaya Narayan Pal. 2 B L R Ap., 42 · 18 W R 37 note Harish Chunder Roy v Poorna Soonduree Debee. 18 W R 35.

429.—Suit brought in Court without jurisdiction—N. W. P. Rent Act. XVIII of 1873, s. 206.

As the plaintiff's claim, instituted in the Civil Court to eject the defendant, a quondam tenant, and to recover mesne profits, could not be entertained in any suit in any Court, the provisions of s. 266 of Act XVIII of 1873, that the objection that a suit was instituted in the wrong Court shall not be entertained by the Appellate Court, unless such objetcion was taken in the Court of first instance, were not applicable. **Ram Autar Rai v Talimundi Kuar. 7 N W 49.**

430.—Summary suit for possession.

A and *B* obtained a decree for possession of land against *C*. On their proceeding to execute their decree, *D*, who was in possession, presented a petition to the Munsif, complaining that they were thereby attempting unlaw-

Appellate Court-*Contd.*

7 Objections taken for first time on appeal - *Contd.*

fully to interfere with his possession. The case was tried, on remand from the Judge, as a suit under the provisions of s. 229 of Act VIII of 1859. *Held*, *per* Jackson, J., that, as the decree-holder had not complained that the officer of the Court had been obstructed or resisted by the claimant, the case did not fall within s. 229 of Act VIII of 1859; and, therefore, the Court had not jurisdiction to take summary cognizance of the case. Per Mitter, J.—This objection, taken for the first time on special appeal, did not affect the merits of the case or the jurisdiction of the Court.

Buhal Singh Chowdry v Behari Lall.
1 B L R A C 206=10 W R 318.

431—Objection to suit for mesne profits as being matter for execution—Civil Procedure Code (Act XIV of 1882), s. 244

A landlord sued his tenant for arrears of rent, and obtained a decree for a certain amount and a declaration that, if the amount were not paid within fifteen days, the tenant should be ejected under s. 52, Act VIII of 1869. The amount was not paid, and the landlord executed the decree and obtained possession. The tenant appealed, and succeeded in getting the decree set aside, and the amount found due from him for arrears by the first Court was reduced and a decree made directing that, if the reduced amount were not paid within fifteen days, he should be ejected. He paid the amount found due by the Appellate Court within the fifteen days, and recovered possession of his holding. He then brought a suit in the Munsif's Court to recover mesne profits from his landlord for the time he was in possession after the execution of the first Court's decree. It was contended on second appeal that the suit would not lie, as the matter might and should have been determined in the execution department under s. 244 of the Civil Procedure Code. *Held* that, as the suit was instituted in the Munsif's Court and the Munsif, under the circumstances of the case, was the officer who, in the first instance, would have had to determine the matter in the execution department, there was at most only an error of procedure and no exercise of jurisdiction by the Munsif which he did not possess, and that upon the authority of the decision in 19 W R 90, this could not be made a ground of objection on appeal. Held also that

Appellate Court-*Contd.*

7 Objections taken for first time on appeal —*Contd.*

the point being one that was not raised in the pleadings or before either of the lower Courts, and being a point which went exclusively to the jurisdiction of the Court, it could not be raised on second appeal. **Azizuddin Hossein v Ramanugra Roy. 14 Cal 605.**

Notes—Foll: 22 Cal 483. Ref: 18 All 106; 8 C W N 49; 5 C L J 328; 28 Mad 425.

(25) Objection affecting jurisdiction.

432.—Want of proper certificate—Suits under Dekkan Agriculturists Relief Act.

Held that an objection taken to a suit under the Dekkan Agriculturists Relief Act on the ground that a proper certificate had not been obtained could be taken for the first time on second appeal, as it was an objection affecting the jurisdiction of the Courts below. **Nyamatula v Nana Valad Faridsha, 13 Bom 424.**

Notes.—*Fol*: 14 Mad 96. *Ref*: 23 Bom 22.

(26) Jurisdiction objection to.

433—Objection apparent on face of plaint —Where the objection was not taken in the Court below, but was apparent on the face of the plaint and had reference to the jurisdiction of the Court, the Court *held*, they must consider it. **Ramayya v. Subbarayudu. 13 Mad 25.**

Notes—*Ap*: 22 Bom 315 *Ref* 2 Mad 289.

434—Mortgagee.

Held that a suit by the *zamindar* to eject the representative of a mortgagee in possession of an occupancy holding being in fact a suit for the ejectment of a mere trespasser, the mortgage being illegal, was cognizable by the Civil Courts and the rules of limitation appropriate to civil suits were to be applied thereto. 6 All 378 approved. **Madho Lal v Sheo Prasad Misr. 12 All 419=10 W N 162.**

Notes.—*Diss*: 15 All 219 F B. *Ap:* 14 All 223.

(27) Question of jurisdiction taken for first time on appeal.

435.—Civil Procedure Code, Secs. 409 and 413—Application for leave to sue in forma pauperis—Refusal of such application a bar to subsequent application in the same right—Jurisdiction—Plea of jurisdiction.

The plaintiff applied for leave to sue as a

Appellate Court-*Contd.*

7 Objections taken for first time on appeal —*Contd.*

pauper for the redemption of a mortgage. As he did not proceed with the application, it was rejected with costs on 29th November, 1858.

On the 4th February, 1890, plaintiff again applied for leave to sue as a pauper for the redemption of the same mortgage. There being no opposition, the application was granted, and was registered as a suit.

On the 20th September, 1893, when the suit had been heard nearly to the end, the Government Pleader intervened, and applied that it should not be allowed to proceed further until the plaintiff had paid the costs incurred by Government in opposing the first application, which had been rejected. But the plaintiff refused to do so, and thereupon the Subordinate Judge dismissed the suit with costs under Sec. 413 of the Code of Civil Procedure and ordered the plaintiff to pay the Court-fees under Sec. 412.

Held, on appeal, (1) that the order rejecting plaintiff's first application was an order under Sec 409 of the Code of Civil Procedure; (2) that both the applications were made in respect of the same right to sue; (3) that the order rejecting the first application operated as a bar under Sec. 413 of the Code to the entertainment of the second application; and (4) that such bar being one to the jurisdiction of the Court, the Subordinate Judge was not only competent but bound to take notice of it at any stage of the suit. **Ranchod Morar v Bezanji.** **P J 1894. 418; 20 Bom 86**

436.—Jurisdiction.

The question of jurisdiction may be taken for the first time on appeal, if the defect is patent on the record. **Kishen Shah v. Gurmukh.** **P R 40 of 1870**

Sheikh Nizamudin v Government. **P R 54 of 1871.**

(28) Jurisdiction Miscellaneous.

437.—Suit for property wrongly taken in execution of decree—Separate suit brought where proceeding should have been in execution.

Where a suit for the recovery of lands taken by the decree-holder in excess of his decree has been held not to lie under s. 244 of the Civil Procedure Code, but the suit had been instituted in the Court which had jurisdiction to execute the decree, the plaint may be regarded as an application to that Court for determining the question whether the lands are covered by the decree, and the suit does not therefore fail for want of jurisdiction. 19 W R 90, 14 Cal 605 referred to and followed. Held, also, that in such a case it is incumbent upon the defendant to raise the plea of jurisdiction in the Court of first instance, the question being not a pure question of law, but a question which would depend upon facts. **Biru Mahata v Shyama Churn Khawas.** **22 Cal 483.**

Notes.—*Diss*: 5 Bom L R 1036. *Fol:* 22 Mad 347; 22 All 121. *Ref*: 32 Mad 425; 22 Mad 494; 9 M L J 37; 18 All 106; 22 All 376; 8 C W N 49; 28 Mad 64; 5 C L J 328; 8 C L J 20.

438.—Objection to jurisdiction on the ground of wrong valuation of suit—Suits Valuation Act (VII of 1889), s. 11.

The High Court held that it was not at liberty to entertain an objection that the suit was not within the pecuniary limits of the District Munsif's jurisdiction, as it appeared that the appellant had not been prejudiced on the merits. **Muthusami Mudaliar v Nallakulantha Mudaliar.** **18 Mad 418.**

438A.—Jurisdiction—Civil Court—Value of property—Value mentioned in plaint—Trial in Court which would have no jurisdiction if the value was correct—Parties raising no objection to trial—In appeal jurisdiction cannot be questioned—Evidence Act (I of 1872), S. 58.

The plaintiffs filed a suit in the Court of the First Class Subordinate Judge for partition of a certain property. In the plaint the market value of the property stated was such as to make the suit triable only by the First Class Subordinate Judge. The Judge, however, made over the trial of the suit to the Joint Subordinate Judge at Thana, who had no jurisdiction to try it, if the property was correctly valued in the plaint. Neither party raised any objection on the ground of jurisdiction, and no issue was raised relating to it. The trial proceeded on merits and the Subordinate Judge passed a decree for partition in fa-

Appellate Court-*Contd.*

7 Objections taken for first time on appeal-*Contd.*

vour of plaintiffs. The defendants in their appeal to the District Court raised for the first time the question of jurisdiction on the strength of the market values stated in the plaint. The objection having been overruled, they appealed to the High Court.

Held, that as neither party raised any question as to want of jurisdiction arising from the allegation in the plaint, and as they by their conduct and silence treated the market value to be of the amount sufficient to give jurisdiction to the Court, they dispensed with proof on the question by their tacit admissions, and thus the principle of law laid down in S. 58. Evidence Act. came into opration and prevented the result of the statement of market value in the plaint.

The market value stated in the plaint *prima facie* determines the jurisdiction. It is not conclusive and binding on the plaintiff so as to estop him from disputing its correctness or seeking its amendment merely because he has stated it in the plaint. When the trial commences, it is open to the defendant, if he is so minded, to rely on the statement in the plaint and dispute the jurisdiction of the Court. If he does not, and allows the trial to go on, he cannot subsequently dispute the jurisdiction.

As a rule, parties cannot by consent give jurisdiction where none exists. This rule applies only where the law confers no jurisdiction. The law does not prevent parties from waiving inquiry by the Court as to facts necessary for the determination of the question as to jurisdiction, where that question depends on facts to be ascertained. **Jose Antonio Barreto v Francisco Antonio Rodrigues. 12 Bom L R 712.**

439—Limitation Act XV of 1877, Sch II Art 144—Right of purchaser to have lands registered in his name in revenue records—Collector's books—Suit for declaration of such right—Limitation—Limitation applicable to such suit—Such right not an interest in immoveable property—Cause of action in respect of such right-Declaratory decree—Jurisdiction—Objection taken for first time in second appeal—Practice.

Plaintiffs having purchased certain lands in 1867 brought this suit in the year 1890 to obtain a declaration of their right to have the land registered in their name in the revenue records. The Lower Court dismissed the suit as barred under Article 144, Schedule II of the Limitation Act XV of 1877.

An objection having been raised, in second appeal, that the Court had no jurisdiction to entertain the suit, as the plaintiffs had not previously asked the Collector to place them on the register.

Held, that this circumstance was not necessary to give jurisdiction, although it might be a reason for treating the suit as premature. That objection, being taken for the first time in second appeal, was disallowed. **Bhikaji Baji v Pandu P J 1893 p 554. 19 Bom 43.**

Notes.—*Ref*: 20 all 35; 1 C L J 73.

(28A) Plea of jurisdiction when entertainable in appeal.

439A—Jurisdiction—question of, when entertainable in appeal—Civil Court's jurisdiction when ousted. If the question of jurisdiction depends for its determination upon facts not found by the lower Courts, an appellant cannot ask the High Court to find them: the appellant must substantiate his contention if he can, on the facts already found. If he is unable to point to any facts in respect of his plea, that plea must fail.

The ordidary Civil Courts cannot be ousted of their jurisdiction in the absence of an express provision of law to that effect. **Purkhit Panda v Ananda Gaontia. 8 C L J 116= 12 C W N 1036.**

439B—Plea first raised in revision—

A suit for Rs. 219-5 0 was brought in the Munsif's Court and decreed. On appeal the lower appellate Court affirmed the decree of the first Court. The defendant applied to the High Court for revision and for the first time objected that the Munsif had no jurisdiction inasmuch as at the time of the institution of the suit, neither the defendant was actually and voluntarily residing, nor did the cause of action arise, within his jurisdiction *Held*, that this was a question that could only be decided upon evidence, and for this reason also should have been raised in the Courts below. **Shyam Sundar v Mendhai. 6 W N 188.**

Appellate Court-*Contd.*

7 Objections taken for first time on appeal-*Contd.*

(29) Kabuliat suit for.

440—Failure to prove case.—

Where, in answer to a suit for a kabuliat at a specified rent, defendant pleaded in the Court below, not that plaintiff was not entitled to any kabuliat at all, but that he was not entitled to a kabuliat at the rates he claimed—*Held* that defendant could not be allowed in special appeal to take advantage of the full Bench ruling in B L R Sup Vol 974: 10 W R F B 14 and ask for the suit to be dismissed. **Gholam Ali v Adgur Ali. 11 W R 105.**

441—Failure to prove case.—

In a suit for a kabuliat at an enhanced rate, the Court of first instance gave a decree for an amount less than that of the claim. No objection was taken before the lower Appellate Court, that, under the Full Bench ruling in B L R Sup Vol 974; 10 W R F B 14, the suit was liable to be dismissed. This objection was taken for the first time in special appeal. *Held* that the objection could not be entertained. **Nizamut Ali v Romesh Chandra Roy. 3 B L R A C 78: 11 W R 430.**

But **See Hamed Ali v Affeeoodden. 1 B L R S N 14=10 W R 213.**

442—Omission to tender pottah—

The lower Appellate Court ought not to have entertained the objection of the defendant that no pottah had been tendered before the institution of the suit, as the objection had not been taken before the first Court. That issue was not essential to the right determination of the suit upon the merits. **Ramanath Rakhit v Chand Harri Bhuya. 6 B L R 356.**

Note:—See 14 W R 432.

443—Omission to tender pottah—

In a suit for a kabuliat objection cannot be raised on appeal for the first time that a pottah had not been tendered. **Doorga Kant Mozoomdar v Bisheshur Dutt Chowdhury. W R 1864 Act X, 44.**

(30) Land-lord and tenant.

444—Suit to have pottah cancelled.

Where a plaintiff sued to have the defendants' pottah cancelled on the ground of fraud, to restrain them from felling trees, and for a declaration that a certain shola was Government property—*Held*, that, having failed to establish the grounds upon which relief was claimed, the plaintiff was not entitled to object on appeal, for the first time, that the defendant were merely tenants from year to year. **Secretary of State for India v Nunja. 5 Mad 163.**

Notes—Ref 20 Mad 299.

(31) Limitation.

445—Limitation—Possession.—

Where a defendant in the lower Court pleaded limitation, but placed that issue upon the simple fact that he himself had possession for twelve years and upwards, which issue was found against him,—*Held* that it was too late for the defendant in special appeal to object that finding did not dispose of the issue of limitation. **Kisto Mohun Kurmokar v Noyan Tara Bossee. 10 W R 389.**

446—Minority—Right of member of family to alienate—

A plaintiff obtained a decree to set aside an alienation of ancestral property effected by his father during his minority. Defendant objected in special appeal, first, that the suit was barred by lapse of time since plaintiff attained his majority; and, secondly, that, under the Mitakshara law, the father had a right to alienate a share of the property. *Held* that, as the first of these objections was entirely a matter of fact, and as the second, though essentially a matter of law, went to the substance of the plaintiff's claim, they should have been urged in the lower Courts, and could not be admitted for the first time in special appeal. **Benode Putnaik v. Doyanidhee Bullior Singh. 9 W R 493**

447—Settlement.—

In the first Court an issue was raised whether or not the hearing of this suit was barred by the law of limitation. One of the grounds of appeal to the Judge was, that the Principal Sudder Ameen ought to have held the suit barred as regards the diaras under the special limitation of three years from the date of the Collector's settlement. The Judge did not notice this ground in his judgment. The same ground of appeal was repeated in special appeal to the High Court

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7 Objections taken for first time on appeal- *Contd.*

but that Court refused to entertain it, for the reason that it did not appear to have been raised in argument before the Judge or in the first Court

Raj Kunwar alias **Sheomurat Kunwar v Inderjit Kunwar. 5 B L R 585, 13 W R 52**

448—Guardian and Ward—Minority.—

A sued *B* to recover possession of a hereditary jote, of which he alleged he had been dispossessed by *B* during his minority *B* raised the defence of limitation and relinquishment by A's grandmother and guardian. The Munsif held that the suit was not barred on the ground that it had been brought within three years from date on which *A* had attained his majority, but decided against *A* on the merits. On appeal, the question of limitation was not raised, but on the merits the Judge also found against *A*. On special appeal by *A*, *B* took an objection under s. 348 of Act VIII of 1859 that *A*'s suit was barred. *Held* that *B* could not take the objection at that stage.

Kedernath Mookerjee v Mathuranath Dutt 1 B L R A C 17; 10 W R 59

449—Where an objection that the suit was barred by limitation was not taken into consideration by the lower Appellate Court, and in special appeal the facts necessary to support the plea of limitation were stated in the ground of appeal, but for another reason and in another form than those for which it was raised before, the High Court allowed the objection to be taken and to prevail, and dismissed the suit **Bissonath Surma v Shoodamookee. 11 B L R Ap 1. 20 W R 1**

450—Setting aside ex-parte case—

A Munsif entertained a petition by a defendant under s. 119 of the Civil Procedure Code, and set aside his former judgment given *ex-parte* in favour of the plaintiff, and dismissed the plaintiff's suit. The plaintiff. On appeal before the Judge, did not raise the objection that the Munsif ought not to have entertained the petition of the defendant, as it had not been presented in due time. It was held to be too late to raise the objection on special appeal. **Boro Khasia v Jata Sirdar. 8 B L R 78=15 W R 315.**

451—Limitation.—

Where the question of limitation was raised for the first time on second appeal, *held* that it could not be decided against the plaintiff. **Shivapa v Dod Nagaya. P J (1886) 214=11 Bom 114.**

Notes—Fol. 15 Cal 674; 22 Bom 875. Ref. 18 Mad 366; 16 Bom 700; 17 Bom 629; 22 Bom 640; 25 Mad 721; 6 C L J 237 F B; 11 C W N 959 F B; 34 Cal 941 F B.

451A—Criminal Procedure Code S. 146—Attachment—Arrest of time running—Fresh start—Bengal Tenancy Act Sch III Art 3—Limitation which has commenced to run does not cease, nor is a fresh period given by an attachment made under S. 146 of the Criminal Procedure Code. Limitation under Art 3 of Sch III Bengal Tenancy Act, begins to run from the date of the ouster and an attachment under S. 146 Cr P C, does not stop it nor gives a fresh period of limitation. The lower Appellate Court is empowered to take cognizance of the question of limitation under S. 4 of the Limitation Act, and S. 184 of the Bengal Tenancy Act, though it had not been raised as a defence in Court of first instance, if upon the proceedings in the case it was clear that the suit was barred by limitation.

Deo Narain Chowdhry v C R H Webb. 5 C W N 160=28 Cal 86.

451 B—Ground of limitation not taken in lower Courts—Whether arguable in second appeal.

When the appellant neglected to say anything about limitation in the lower Courts, he cannot be allowed to raise the point in second appeal. 2 L B R 238 Dist: **Po Mya and My Myit v. Ma Le 5 L B R 82=3 Ind Cas 711.**

(32) Merger

452—Plea of merger.

A plea of merger cannot be raised for the first time in special appeal. **Ruston v. Atkinson 11 W R 435**

(33) Misjoinder.

453—Misjoinder—of causes of action—Suit or arrears of rent—Separate leases.

The Court refused to admit in special appeal the plea that the lessor should have instituted separate suits to recover the arrears of rent due on each lease as it allowed the objection that the

Appellate Court-*Contd.*

7 Objections taken for first time on appeal- *Contd.*

leases could not be declared forfeited for the aggregate of the arrears of rent and cesses due on both leases, but that the forfeiture of each lease was incurred in respect of the arrears due on it, and that the lower Courts should have therefore determined and declared in their decrees what was the amount of arrears due in respect of rent and cesses on each lease separately. **Golabi Singh v. Rai Normal Chand 6 N W 342.**

454—Misjoinder of causes of action.

An objection that the plaintiff has joined together causes of action which, by s. 44 of the Civil Procedure Code, may not be joined together without leave first obtained, is taken too late for the first time in the Court of Appeal after the case has been already heard on its merits. **Dhondiba Krishnaji Patel v Ramchandra Bhagvat 5 Bom 554.**
Gunesh Persad v Wilson W R 1864 Act X 86.

Notes—Fol: 16 All 130 Ref: 12 All 334 F B; 8 C L J 196.

455—Time for taking objection.

An objection under s. 44 of the Code of Civil Procedure as to misjoinder of causes of action should be taken in the Court of first instance. Where such an objection was raised for the first time in second appeal in the High Court the Court declined to entertain it. **Maula v. Gulzar Singh. 16 All 130=14 W N 11**

456—Misjoinder parties.

Misjoinder of parties is not an objection which can be allowed to be taken in special appeal.

Tiluck Chunder Chuckerbutty v. Muddun Mohun Joogee 12 W R 504
Lall Mahomed v Peer Nuzur 18 W R 112
Luchmee Dhur Pattuck v Rughoobur Singh 24 W R 286.

Notes.—15 B L R 143 Fol: 15 W R 329. Dist 24 W R 306; 1 Cal 133 P C; 26 Cal 285. Ref: 23 W R 174.

457—*Held* that even if there was a misjoinder the plea could not be raised in second appeal as defendants were not prejudiced. **Malaguri Garudiah v Narayana Rungiah 3 Mad 359**
Nujmooddeen Ahmed v Zuhoorun 10 W R 45

Appellate Court-*Contd.*

7 Objections taken for first time on appeal- *Contd.*

Ram Doyal Dutt v Ram Doolal Deb 11 W R 273
Tulsha v Gopal Rai 6 All 632
Contra. **Sreekant Roy Chowdhry v Kitaboddeen Sirdar. 10 W R 49.**

Notes.—*Fol*: 20 Mad 446=35 Cal 276=12 C W N 237. *Ref*: 6 M L J 186=28 Mad 351.

458—Misjoinder of causes of action.

As a general rule, if an objection on the ground of misjoinder of causes is pressed and carried to a decision in the first Court. the High Court will, even upon special appeal upon its being shown to be well founded, give the objector the benefit of it; but if it is not pressed and carried to a decision in the first Court, and if the parties go to trial as if the objection had not been made, then the objection will not be given effect to at a later stage, unless it appears clearly that there was a defect in the orginal trial in consequence of the misjoinder. **Tarinee Churn Ghose v. Hunsman Jha 20 W R 420.**

459—Objection to defendant being made plaintiff.

Where a defendant was made one of the plaintiffs by the consent of the first Court and appealled as one of the plaintiffs, and took no objection until the case came up on special appeal, the objection was not allowed to be taken. **Rakhal Doss Mundle v Protap Chunder Hazrah 12 W R 455.**

(33 A) Pleading of minority

459 A—Minority plea of. raised for the first time in appeal—Remand—Ex parte decree set aside—Civil Procedure Code (Act XIV of 1882), S 108—Suit tried *de novo*.

A brought a suit on mortgage against B, C, L and S. A decree was passed, against which B and C appealed and A preferred an objection. L and S however, were not parties to the appeal. The case was remanded. The Court of first instance again passed a decree in favour of A against all the defendants, the decree being ex-*parte* as against L and S. S died, and so J the representative of S and L applied under S 108 C P C 1882 to get the decree set aside The *ex-parte* decree was set aside and a fresh decree was passed. L and J

Appellate Court-*Contd.*

7 Objections taken for first time on appeal-*Contd.*

appealed. In appeal for the first time, they raised the plea that S was minor at the time of the execution of the mortgage.

Held, that they could not raise the plea of minority at that stage.

Held, further, that, after the *ex-parte* decree was set aside the whole case was re-opened as against the applicants under S 108, and the case had to be tried *de novo*. **Musamat Jey Devi v Mahadeo Prashad. 6 Ind Cas 373.**

(33B) Objection to the frame of suit not taken in the Court of first instance.

459B.—Fraudulent conveyance, suit to set aside—Civil Procedure Code (Act XIV of 1882) Sec. 283—Transfer of Property Act (IV of 1882) Sec. 53—Transfer to defeat or delay creditors—Creaditors, if all should join—"Good faith" meaning and test of Consideration and good faith, if essential to a valid transfer—Creditor, transfer in favour of, for pre-existing debt, if legal. A transfer made gratuitously, the effect of which is to delay, if not to defeat the creditors, may be presumed to have been made with intent to defraud and is voidable at the option of any person who has been defeated or delayed thereby.

A suit to set aside a conveyance alleged to be fraudulent within the meaning of section 53 of the Transfer of Property Act must be brought by, or on behalf of all the creditors.

But where such an objection to the frame of the suit was not taken in the Court of first instance, the Court of appeal may, if it so thinks, allow the plaintiffs an opportunity to amend the plaint, so as to make the suit one on behalf of themselves and all other creditors of the transferor.

In order to establish the validity of a conveyance impeached as fraudulent on creditors, it is not enough to prove that it was for consideration; it must also be proved that it was made in good faith.

The test of good faith is whether the transfer is a mere cloak for retaining a benefit to the grantor or whether it was intended thereby that the grantee should have the property and keep it.

Appellate Court-*Contd.*

7 Objections taken for first time on appeal-*Contd.*

Although a transfer, which is a mere cloak for the retention in the grantee of a benafit in the property transferred, is not a transfer in good faith, the test is by no means exhaustive; there may be cases in which the transferee is intended to take an absolute title in the property, but the object of the transfer is to convert land into money and thus place it beyond the reach of the creditors of the grantor; a transfer of this description cannot legitimately be regarded as a transfer made in good faith.

The rule does not apply to the case in which a creditor takes property in satisfaction of an existing debt, although the effect of the transfer to him is to defeat or delay the other creditors of the transferor. **Lalla Hakim Lal v Mushahar Sahoo, and Kampta Prosad v Mooshahar Sahoo. 6 C L J 410= 34 Cal 999=11 C W N 889.**

(34) Notice of enquiry.

460.—Want of notice of enquiry by Ameen.

A judgment-debtor, who while objecting before the Judge as to what had been done by the Ameen in the enquiry as to the mesne profits, raised no objection as to the want of notice of the Ameen's enquiry, was not allowed to raise the latter objection on appeal. **Sharoda Moyee Burmonee v Wooma Moyee Burmonee. 8 W R 9.**

Notes:—Fol: 18 Cal 188. Ref: 2 M L J 288; 30 Mad 255.

(35) Notice of sale.

461.—Bengal Regulation VIII of 1819, Section 8.

A notice of sale followed the terms of clause 2, whereas the case was one under clause 3 of sec 8 of Bengal Regulation VIII of 1819. An objection as to the form of the notice was taken for the first time in the Court of Appeal, *Held*, that an objection of this kind, fatal to the whole proceedings, and appearing upon the face of the notice itself, was properly raised in the Court. 9 Calc. 656: L R, 10 I A, 25, distinguished, **Ashanulla Bahadur v Hari Charan Mozumdar. 20 Calc, 86= L R 19 I A 191.**

Notes:—Dist: 19 Cal 703. Ref: 20 Cal 746.

Appellate Court-*Contd.*

7 Objections taken for first time on appeal-*Contd.*

461A.-Rent Recovery Act (Mad Act VIII of 1865) S, 4. Pattah containing name of tenant's father and not mentioning tenant—legality of tender to son of tenant on tenant's death—Point not taken in plaint or at settlement of issues—Right to raise it on appeal—

Where the father of the plaintiff was the real tenant during the fasli, a tender of pattah in the name of the father, to the son after the father's death which occurred only after the preparation and signing by the landlord of the Pattah, is valid.

Where a plaintiff in a suit to set aside a sale of land, fails to take the objection, either in his plaint or at the settlement of issues, that the notice of sale prescribed by Section 39 of the Rent Recovery Act had not been served upon him, he should not be allowed to raise it on appeal. **Subbeen v Ramasami Chetti. 26 Mad 363.**

(36) Notice of Suit

462.—Omission to give notice of action under s. 42, Police Act, V of 1861.

In a suit againt a Police officer, the objection under sec. 42, Act V of 1861, that one month's notice has not been given, must be taken in the lower Court: if not taken then, it cannot be made a ground of appeal. **Narain Deen Tewaree v Ram Dass 8 W R 425.**

463—Act XV of 1873, Secs 28, 43—Local Government—Notice of suit—Special appeal.

Where, in a suit against a Municipal Committee, the Magistrate of the District was impleaded as representing the Local Government, the Court refused to allow the plea that the Local Government had not been made a party to the suit, in accordance with the provisions of section 28, Act XV of 1873. The notice previous to suing a Municipal Committee for a thing done by them under that Act required by s. 43 of the Act is only necessary where compensation is claimed for the thing done. The plea that no notice was given as required by section 43, cannot be taken for the first time in special appeal.

Quære—Where a plea that the Local Government had not been made a party to a suit against a Municipal Committee in accordance with S 28 can be taken for the first time in special appeal.

The Municipal Committee of Marodabad v Chatri Singh 1 All 269.

Notes.—Appr. 4 All 102. Fol: 16 Mad 296. Ref; 22 Bom 289 F B; 25 Bom 142. Dist: 28 All 600=3 A L J 341=(1906) W N 107.

(37) Notice to quit.

464.—An objection as to the necessity of notice to quit is one which may be taken on second appeal. **Dodhu v Madhavrao Narayan Gadre. 18 Bom 110.= P J 1893, 67.**

Notes—Fol; 17 All 45; *26* Bom 360. Ref: 18 Bom 256; 20 Bom 759; 24 Bom 426; 36 Cal 927. Con: 13 C W N 949.

465.—Suit for ejectment.

Where notice to quit is a necessary part of plaintiff's title to eject, and when the issues raised the question of plaintiff's right to eject, and no proof was given of notice by plaintiffs, but no objection was taken to the want of notice by the defendant until second appeal—*Held*, that it was competent to the Court to entertain the objection in second appeal, but that the plaintiff should have liberty to meet the objection upon the trial of an issue referred to the lower Court upon that point. **Abdulla Rawutan v Subbarayyar. 2 Mad 346.**

Notes.—Ap. 15 Bom 407. Foll. 12 Mad 353; 18 Bom 110. Dist. 13 Mad 277; 16 Mad 97: 1 M L J 218. Ref 17 Mad 218: 3 M L J 287; 10 Bom 669.

466—Denial of landlord's title through out case—Objection on special appeal that no notice to quit has been given.

Where a tenant denies his landlord's title and persists throughout in a vexatious and aggressive course of conduct towards him, he will not, in a suit for ejectment, be allowed in special appeal to assert that he has not been served with a notice to quit, that objection not having been taken in the Courts below. **Ram Nuffer Bhattacharjea v Dhol Gobind Thakoor. 1 C L R 421.**

Appellate Court-*Contd.*

7 Objections taken for first time on appeal *Contd.*

(38) Parties.

467—Suit by receiver in his own name-Error in frame of suit.

Where the receiver of an estate, appointed by the High Court on its Original Side, received permission to bring a suit on behalf of the parties interested in the estate, and brought the suit in his own name, it was held that, though the frame of the suit was erroneous, yet the error being one of form only, and no objection on the ground of that error having been taken in the Court below, such objection could not be allowed to prevail in the Court of Appeal, which might amend the proceedings without consent of the parties interested, or further notice of appeal. **Juggunnath Pershad Dutt v Hogg. 12 W R 117.**

Notes:—Ref: 34 Cal 305. Dist: 5 C L J 270

468—Defect of parties, Objection as to.

Where a decree for wasilat was given against the manager of an unregistered trading company, and the plea that the company was not a corporate body, and therefore not liable without a disclosure of the names of the parties constituting the company, was not taken until the execution stage,—*Held* that the plea was a technical one, and taken too late to be of any weight in a Court of equity. **Tripp v Nursing Chunder Mitter W R 1864 Mis 7.**

469—Defect of parties, objection as to.

Per Prinsep, J.—The objection as to defect of parties after the case had passed through two Courts is not one affecting the merits of the case so as to be a ground of special appeal.

Boydonath Bag v Grish Chunder Roy. 3 Cal 26.

Notes:—Diss: 6 Cal 815. Disap: 7 Bom 217.

470—Non-joinder of parties—Misjoinder.

Held by Muttusami Ayyar and Brandt, JJ. (Kernan, J., dissenting)—The objection as to non-joinder of parties is not essential, but merely formal, and weight should not be attached to it when it is first taken on second appeal. **Moidin Kutti v Krishnan. 10 Mad 322**

Notes:—Ref: 9 C L J 623.

Appellate Court-*Contd.*

7 Objections taken for first time on appeal *Contd.*

(39) Defect of parties.

471—Non-joinder of parties.

Plaintiff, a member of an undivided Hindu family sued to recover possession of certain land, belonging to the whole family. No objection was taken at the hearing regarding non-joinder of other members of the plaintiff's family. *Held* that in appeal the objection of non-joinder of parties, cannot be raised as being taken too late. The objection must be raised at the earliest possible stage. 7 Cal 594. at p. 603 referred to.

Paramasiva v Krishna. 14 Mad 498,

Notes:—Ref: 22 Bom 624: 32 Mad 242; 9 C L J 623.

471A—C P C O 1 r 13 (1882 S. 34) Civil Procedure Code—Objection for non-joinder not taken at proper time—Disallowed in Appeal.

Where a suit is brought by one member of a proprietary body to eject a trespasser and no objection is taken at the time prescribed by Section 34, Civil Procedure Code, on the ground of the non-joinder of the other members, the objection cannot be raised for the first time in appeal.

Semble—that in such a case the member suing should at least be given a decree for joint possession with the trespasser to an extent corresponding to his share in the property, even if the objection of non-joinder is taken in good time.

13 C P L R 113; 14 Mad 498; 6 Cal 815; 7 Cal 594; 10 C P L R 37 and 40; I N L R 108; 14 Cal 201; 15 Cal 47; 19 Cal 541. referred to.

Daryao Shah Gond v Tiran Shah Gond. 11 N L R 45.

472—Practice—Procedure—Second appeal—Point taken for first time on second appeal—Specific performance, suit for—Parties made defendants who were not parties to the agreement.

Held that an objection that certain of the defendants should not have been made parties to a suit for specific performance, because they were not parties to the agreement, could not be taken for the first time in second appeal, as it only involved a question of practice. **Dodhu v Madhav Rao Narayan Gadre. P J 1893 p 67. 18 Bom 110.**

Appellate Court-*Contd.*

7 Objections taken for first time on appeal *Contd.*

Notes:—Fol: 17 All 45; 26 Bom 360. Ref: 18 Bom 256; 20 Bom 759; 24 Bom 426: 36 Cal 927. Con: 13 C W N 949.

473—The non-joinder in a suit to which Chapter IV of Act No IV of 1882 applies of a person interested in the mortgaged property within the meaning of section 85 of that Act, and of whose interest the plaintiff has notice, is a fatal defect in the suit unless cured by the action of the Court under s. 32 of the Code of Civil Procedure; and where such non-joinder is brought to the notice of the Court, the Court will give effect to the objection and to dismiss the suit, even though such objection be raised for the first time in appeal. [3 All 432; 16 All 478 and 17 All 537 referred to.

Ghulam Kadir Khan v Mustakim Khan. 18 All 109=16 W N 7.

Notes:—Ref: 5 C W N 423=12 C W N 911.

(40) Technical objection.

474—Objection.

In a suit for possession by right of foreclosed mortgage, plaintiff having obtained a decree which was *ex-parte* against one of the defendants, the lower Appellate Court found as a fact, on the appeal of the defendants, that the mortgage transaction was benami and collusive (the defendant A having been a sharer in the fraud), and dismissed the claim. *Held* that plaintiff could not in special appeal be allowed, under the finding of the lower Appellate Court, to urge that his suit should not have been dismissed as against the share of A on the technial ground that A had not appealed.

Ramlochan Soor v Nittya Kallee Debi. 12 W R 210.

(41) Partition.

475—Civil Procedure Code, Act X of 1877, Section 396—General Clauses Act I of 1868, Section 2—Partition—Decree—Execution of—Commissioners.

Per Pontifex J:—Although Section 396 of the Civil Procedure Code directs the appointment of Commissioners to carry out an order for partition, it is quite competent to the Court to appoint one Commissioner for that purpose.

Quære:—Per Field J:—Whether there is not in the context of section 396 something repugnant to the plural "Commissioners" including the singular "Commissioner".

Procedure under Section 396 of the Civil Procedure Code discussed. **Gyan Chunder Sen v Durga Churn Sen. 7 Cal 318. 8 C L R 415.**

Notes:—Ap: 24 Cal 425 F B; Appl: 12 Cal 275. Diss: 6 Bom L R 586.

(41A) Plaint.

475A—Defect in plaint—Dismissal of suit in appellate Court.

Where a suit for possession of a share of certain land purchased at a sale in execution of a decree, in which no boundaries or limits of the lands sued for, were given, was dismissed by the lower appellate Court, *held* that such dismissal was improper as the copy of the sale-certificate filed with the plaint contained all the necessary particulars, and the objection should not have been entertained at all as it was raised for the first time in the lower appellate Court.

Awanda Rai v Naigu Rai. A W N 1882, 242.

(42) Policy of insurance.

476—Jettison.

Where the plaintiffs could not recover on a policy for a partial loss, except as for jettison, and that point was not taken in the Court below, the point could not be raised in appeal. **Mackinnon v Dundas Burke A O C 155.**

(43) Purchase.

477—Suit to enforce sale of religious office.

In a suit to enforce a right by purchase of a priest's office, no objection was taken to the legality of the transaction until second appeal. *Held* that the objection must be allowed. **Kuppa v Dorasami 6 Mad 76.**

Notes:—Fol: 15 Mad 183; 19 Mad 211. Ref: 17 Cal 557; 23 Cal 645; 24 Cal 83: 1 C W N 493; 4 M L J 288; 20 Bom 86; 23 Bom 131; 13 M L J 341; 37 Mad 192.

478—Suit on bond as asset purchased.

Appellate Court-*Contd.*

7 Objections taken for first time on appeal *Contd.*

A plaintiff who had purchased a factory from the Official Assignee sued for the recovery of money on a bond alleged to have been an asset of his purchase, and obtained a decree. In appeal it was objected for the first time that plaintiff had not filed any evidence to prove that the bond formed part of the assets of the factory, and his suit was dismissed. *Held* that the objection ought not to have been allowed to prevail so far as to dismiss the suit, but the plaintiff ought to have an opportunity given him of adducing the requisite proof. **Chunder Coomar Roy v Kuberoodeen. 10 W R 332.**

(44) Rent suit.

479—Rate of arrears of rent.

Where a landlord's claim for arrears of rent at enhanced rates was dismissed *in toto* by the first Court, and in his appeal to the Judge he advanced no claim for arrears at the old rates, he cannot in special appeal object to the Judge's decision on the ground that such arrears were not declared to him. **Beejoy Gobind Bural v Jannobee Burmonya. 8 W R 252**

Notes—Ap : 20 W R 404. Dist : 20 W R 479.

480—Raising new plea on special appeal.

In a suit for enhancement of rent which was dismissed in the lower Court, where the sole issue raised was the genuineness of a pottah pleaded by the defendant,—*Held* that an entirely new plea of misconstruction of the terms of the lease could not be admitted in special appeal when the facts on which alone it could be supported had not been found in the lower Court. **Satooram Majoomdar v Preonath Banerjee. 10 W R 424**

480A—S. 29—Appellate Court—New point involving facts not proved in first Court-Bengal Tenancy Act, S. 29—Proof of enhancement-What rent there was prior to contract.

A lower Appellate Court is not entitled to allow an appellant to raise a new case, which is dependent for its determination on facts which have not been investigated, and to which the parties have not directed their evidence.

In order to attract the provisions o. S. 29 of the Bengal Tenancy Act, it is necessary to show that there was an enhancement of rent, and for that purpose it is necessary to plead and prove what the rent was prior to the contract.

Where, in a rent suit, the case made by the defendant in the first Court was that the *kabulyat* set up by the plaintiff was not executed by the defendant, and S. 29 of the Bengal Tenancy Act was never made a topic of discussion : *Held* that the lower Appellate Court ought not to allow the defendant to change his case and plead that the *kabulyat* was not enforceable in law being in contravention of S. 29. **Kunji Singh v Raj Kumar Singh. 11 Ind Cas 940**

(45) Resjudicata.

481—*Held* that not only may the point of *res judicata*, though not taken in the memorandum of appeal, be entertained in second appeal, under the provisions of s. 542, Code of Civil Procedure, but that even when such point has not been urged in either of the lower Courts, or in the pleas in appeal, if raised in second appeal, it must be considered and determined either upon the record as it stands, or after a remand for findings of fact. **Muhammad Ismail v Chatar Singh. 4 All 69=1 W N 611.**

Notes—Dist : 21 All 446. Ref : 20 Bom 86 ; 31 Cal 428.

482—Although the plea of *res judicata* may be taken at any stage of a suit, including first or second appeal, an appellate Court is not bound to entertain the plea, if it cannot be decided upon the record before that Court, and if its consideration involves the reference of fresh issues for determination by the lower Court. (4 All 69) and (18 W N 104) referred to. **Kanahai Lal v Suraj Kunwar. 21 All 446, 19 W N 164**

482A—Mortgage-Objection to suit not taken in lower Courts, taken for the first time in appeal.

An objection that the appellant ought to have enforced his rights in the previous suit—wher he had been made a party—and, therefo th present suit was barred,—not having been raised in the Courts below, was not allowed

Appellate Court-*Contd.*

7 Objections taken for first time on appeal-*Contd.*

to be taken for the first time in the appeal to the Judicial Committee. **Kedar Lal Marwari v Bishen Pershad.** **31 Cal 332, P C= 31 I A 57=8 C W N 609=8 Sar 599**

(46) Right of Suit.

483—An appellant cannot defeat the suit by objection to the plaintiff's right to sue brought forward for the first time on appeal.

Pareyasami alias Kottal Tevar v Saluckai Tevar alias Oyya Tevar. **8 M H C 157**

Notes:—Con: 22 Mad 383 P C.

484—Objection to, competency to sue.

Incompetency to sue is a defect not admitting of cure or palliation, but that plea being of a material preliminary nature, and involving the plaintiff's *locus standi* in Court was held to be admissible, though pleaded orally for the first time on appeal. **Radha Kishen v Bukhtawur Lall.** **1 Agra 1.**

485—Absence of tender before suit.

Where a party has a good objection, such as an absence of tender before suit, to urge to the prosecution of a suit, his omission to do so in the first instance is fatal to his availing himself of it as in objection on appeal. **Mahomed Ameenooddeen Khan v Mozuffur Hossein Khan** **5 B L R 570 : 14 W R P C 5.**

486—Suit not brought on agreement.

In a suit for maintenance, the amount of which had been fixed by agreement, an objection taken on appeal that the suit should have been fixed by agreement, an objection taken on appeal that the suit should have been brought on that agreement, held taken too late ; the defendant having been made aware of the agreement at the hearing, and not having objected on this ground in the first Appellate Court. **Ahmad Hossein Khan v Nihal-ud-din Khan.** **9 Cal 945: 13 C L R 330.**

Notes:—Ap : 8 Bom 426. Ref: 32 Cal 527.

387—Partnership—Contract Act, s. 342.

An objection taken for the first time in special appeal that the plaintiff had no right to sue under s 342 of the Contract Act was not allowed. **Buddun Sahu v Rampertab Sahu.** **25 W R 511.**

488—Jurisdiction of Civil Court

A party who applied to a Magistrate for the removal of obstruction, having been referred to the Civil Court, brought a suit there and obtained a decree declaratory of his right of way. In special appeal it was objected that the suit was not cognizable in the Civil Court. *Held* that after decree it ought to be presumed that plaintiff had a right to bring the suit in the Civil Court, and the objection was not allowed to prevail. **Trilochun Doss v Gugun Chunder Dey.** **24 W R 413.**

Notes:—Ref : 9 Mad 463 ; 2 Bom 120 ; 9 C W N 303.

489—Competency of agent to sue.

The question of competency of an agent to sue, if not raised in the initial stage of a suit cannot be permitted to be raised in special appeal. **Soorendranath Roy v Rughoobur Dyal Awustee** **15 W R 392.**

490—Insolvency.

Where the defendants for the first time in second appeal objected to the plaintiff's right to sue on the ground of his having taken the benefit of the Insolvency Act, the objection was entertained by the High Court upon admission, by the plaintiff, of the fact of his insolvency. **Sadodin v Spiers.** **3 Bom 437**

Notes:—Dist: 16 Bom 452 Ref: 18 M L J 487=31 Mad 493.

491—Suit for declaratory decree.

An objection urged by the respondents for the first time in special appeal, that inasmuch as it was the plaintiff's own fault that he did not appear before the Collector and make his objection in time, his suit, which was one merely for declaration of title, and therefore was in the discretion vested in the Court by the 15th section of Act VIII of 1859, ought not to be entertained, was not allowed. **Spencer v Puhul Chowdry. Spencer v Kadir Buksh,** **6 B L R 658 : 15 W R 471.**

Contra, Soodhukhina Chowdhrani v Issur Chunder Mojoomdar. **12 W R 24**

Notes—See 15 W R 471.

Appellate Court-*Contd.*

7 Objections taken for first time on appeal-*Contd.*

492—Suit for declaratory decree—Wrongful distraint.

A suit was brought against the plaintiff by his tenants for an illegal distress in attaching crops raised by them on the land let to them by him. The present defendant, in the course of that suit, presented a petition to the Court, in which he stated that he was the owner of the land on which the crops attached had been raised. The plaintiff brought the present suit for a declaration of his title and confirmation of possession, alleging that the defendant's statement affected his (plaintiff's) title by throwing a cloud over it. On special appeal it was objected for the first time that the plaint disclosed no cause of action and the objection was admitted and prevailed. **Jan Ali v Khonkar Abdur Kuhma. 6 B L R 154 : 14 W R 420**

493.—Right of Declration.

In a suit merely for a declaration of right in respect of certain property, the lower appellate Court, considering that the suit was really one for the possession of such property, allowed the plaintiff to make up the full amount of court-fees required for a suit for possession. The plaint in the suit was not amended, and the lower appellate Court eventually gave the plaintiff a declaratory decree. *Held*, on second appeal by the defendant, who objected that a suit merely for a declaratory decree could not be maintained, that such objection ought not to be allowed under the circumstances. **Sarasuti v Mannu. 2 All 134.**

Notes.—Not Fol: 28 Cal 194. Fol: 7 Mad 407: 6 All 329. Ex: 19 Cal 91. Ref: 21 All 99; 32 Bom 562=10 Bom L R 736; 30 All 508=(1908) W N 239=5 A L J 629.

494.—Cause of action.

An objection as to the plaintiff having no cause of action may be taken at any stage of the suit. **Parbati Charan Mukhopadhya v Kali Nath Mukhopadhya. 6 B L R Ap., 73**
Contra, **Kalicoomar Sircar v Bromomoyee Dossee. 1 W R 23.**
Sudakhina Chowdhrain v Rajmohan Bose 11 W R 350.

Notes—Ref 1 All 249

Appellate Court-*Contd.*

7 Objections taken for first time on appeal —*Contd.*

495.—Practice—S. 10.

Where in an appael under s. 10 Letters Patent it was brought to the notice of the Court that the plaint in the suit disclosed no cause of action against the defendant named therein, the Court entertained the plea and dismissed the suit.

The Secretary of State for India v Sukhdeo. 21 All 341=19 W N 151.

496.—Dismissal of suit on the ground that the plaint disclosed no cause of action, although no such ground taken in the written statement.

It is competent to the defendant at the earliest possible stage of the hearing to obtain the declaration of the Court upon the question whether the plaint does or does not disclose a cause of action, even if that question is not expressly raised in the written statement. **Umamoye Dassee v Rajkristo Nundun. 3 C W N 220.**

497.—Cause of action.

In a suit by a purchaser of an estate to have his name registered in the Collectorate and his possession confirmed, which failed in the Court of first instance, but was decreed in the lower Appellate Court, it was held to be too late for the defendant, after contesting the suit in two Courts, to urge in special appeal that the plaint disclosed no cause of action **Buksh Aly Sowdagur v Joyanut Khan. 11 W R 248.**
Soodukhina Chowdhrani v Raj Mohan Bose. 11 W R 350.

498—Objection first urged.-Per Pearson, J., and Straight, J., (Spankie, J., dissenting)—That in disposing of a second appeal, the High Court is competent, under section 543 of Act X of 1877, to consider the question whether the plaintiff has any cause of action or not, although such question has not been raised by the defendant-appellant in the Courts below or in his memorandum of second appeal, but raised for first time at the hearing of such appeal. **Lachman Prasad v. Bahadur Singh. 2 All 884.**

Notes—Con: 3 All 610 F B. Ref: 14 Cal 761.

499—Cause of action—Premature suit.

K sued *N* (his uncle) for partition of the estate of *V* (the father of *N*) in the lifetime of *V*, who was alleged to be of unsound mind. *N* objected to the suit being entertained on the

Appellate Court-*Contd*

7 Objections taken for first time on appeal *Contd.*

ground that V was alive Before issues were settled, V died, and the suit was tried and A obtained a decree. On appeal by V on the ground that, when the plaint was filed, A had no cause of action,—*Held* that the decree could not on this ground be set aside. **Narayena v. Krishna. 8 Mad 214.**

Notes:—Fol: 2 M L J 261. Dist: 2 C W N 197. Ref: 24 Mad 504.

500—Suit for partition of portion of property.

A case is not to be decided in special appeal upon a question which was not raised or tried or considered by the lower Courts: the objection that a suit for a partition of portion of joint property will not be taken for the first time on special appeal was therefore not allowed to prevail. **Shib Sahaye Singh v Nursingh Lall 22 W R 352.**

Notes—Ref: 24 W R 72

501.—Separate suit for question determinable in execution of decree.

Where a question such as is provided for by Act XXIII of 1861, S. 11, instead of being determined by order of the Court executing the decree was made the subject of a separate suit in that Court, it was held that, though the form of procedure was wrong, there was not a want of jurisdiction which could be made a ground of objection in appeal. **Purmessuree Pershad Narain Singh v Jankee Kooer 19 W R 90.**

Notes.—Fol: 14 Cal 605; 22 Cal 483; 18 All 106. Ref: 8 C L J 20. 5 C L J 328. 32 Mad 425.

502.—Delay in bringing suit.

An objection that there had been such delay that the Court in its discretion under s. 27 of the Specific Relief Act would not give relief in a suit for specific performance not allowed to prevail in second appeal. **Mokund Lall v Chotay Lall 10 Cal 1061.**

Notes:—Ap: 18 Mad 415.

(47) Sale, setting aside.

503.—A sale on the ground of fraud, misrepresentation on the part of vendor. Plaintiff brought a suit to set aside or cancel a sale on the ground of fraud misrepresentation or concealment on the part of vendor. It was found that there was no fraud or misrepresentation or concealment. Plaintiff in second appeal set up absence of good and proper title on the part of Vendor under s. 55 clause 2 of the Transfer of Property Act. *Held*, the plaintiff cannot set up this plea in second appeal. This is starting a new case which would involve new issues and a fresh inquiry. **Mahomed v Sita Ram Ayyar. 15 Mad 50.**

Appellate Court-*Contd.*

7 Objections taken for first time on appeal —*Contd.*

503 A—Appeal—Plea of coercion and public policy to avoid sale deed - Neither raised by pleadings nor in the grounds of appeal—Whether entertainable.—

Held, that an appellate Court ought not to decide a case on a plea that a deed was void as it was obtained to hush up crime and was, therefore, against public policy, where such a plea was not raised by the pleading or in the grounds of appeal to that Court. **Bhagwanti v Jagarnath 6 A L J 636=3 Ind Cas 510.**

(48) Service of summons.

504—Objection that suit ought to have been dismissed for non-service of summons on non-payment of costs —

Where the Court did not dismiss the suit under s 5 of Act XXIII of 1861 as it should have done but proceeded with the suit and passed a decree from which the original defendant appealed on the merits to the Assistant Judge, without taking the objection that the suit ought to have been dismissed, it was held that he could not raise the objection for the first time in special appeal. **Abas v Ibrahimji. 5 B H C 119.**

(49) Settlement.

505—Suit for possession.—

I a suit to recover possession, the plaintiff alleging that the land in dispute, from which he had been ousted, had been settled with him by Government in 1835 as part of his zamindari, and the defendant alleging that the land was part of his lakhiraj garden land, which had been released by Government from assessment, the Courts below found that the lands in dispute were part of those which had been settled with the plaintiff,

Appellate Court-*Contd.*

7 Objections taken for first time on appeal *Contd.*

On appeal to the Privy Council. the defendant attempted to show that. assuming the lands in question to have been part of those settled with the plaintiff. that settlement had been improperly made. *Held* that this contention was not open to the defendant upon the record, never having been taken in the Courts below. **Srimati Dasi v. Lalanmani. 2 B L R, P C 64= 11 W R. P C, 27.**

(50) Transfer of case.

506.— Objection to transfer of case for execution of decree.

An objection on special appeal that the transfer of the suit for execution had been made without jurisdiction was allowed to be taken in special appeal. **Hamidooddeen v Bhadoo Sahae. 18 W R 345.**

Notes —Fol: 15 Cal 177.

507.—Objection to transfer from Munsif to Judge.

Although the transfer by the Judge of a case from the file of the Munsif to that of his own Court, and the decision of it upon issues framed by and evidence taken before the Munsif, is improper, yet, if no objection be taken to it at the time, it must be presumed that the parties consented to the action of the superior Court, and they are not at liberty to await its decision and on finding it adverse to them to take exception for the first time to the Court's proceedings on appeal. **Yakoob Ali v Luchmun Dass. 6 N W 80.**

(51) Valuation of suit.

508.—Objection as to valuation of suit.

An objection to the decree of a Subordinate Court, founded on the improper valuation of the suit, is not such an objection as may be entertained when raised for the first time in special appeal. **Kaladdin Guru Bakus v Raghooji 1 B H C 62.**
Kalee Coomar Chatterjee v Kristo Kishore Poddar. 14 W R 196.

509.—Objection to valuation of suit.

Where no question of valuation for the purpose of determining the amount of institution-

Appellate Court-*Contd.*

7 Objections taken for first time on appeal- *Contd.*

fee payable on a suit has been raised, either in the Court of first instance or in the grounds of appeal, the Appellate Court is not competent to raise such question. **Kala Chand Sen v Anund Kristo Bose. 22 W R 438.**

Notes.—Diss 7 Cal 348.

(52) Question of deficiency of Court-fee not raised in the Court of first instance.

510.—Plea as to deficiency in court-fees.

The Plaintiffs suing in respect of certain plots of land by mistake undervalued their claim with regard to the said land and in consequence paid an insufficient court-fee on their plaint. This mistake was not discovered until after limitation had expired, and when discovered. the deficiency was at once made good. *Held* that no plea as to the deficiency in the court-fee having been raised by the defendant before the decision of the suit in the Court of first instance, such plea could not be raisd for the first time in appeal. **Wilayat Ali Khan v Umar Daraz Ali Khan. 17 W N 33=19 All 165.**

Notes.—Ref: 12 C W N 37: 6 C L J 651.

(53) Will.

511.—Transaction treated as gift—Objection to it as an invalid will.

In a suit to recover certain property left by one R, both the lower Courts found that it had been left by R before his death to defendants by way of gift. In special appeal the plaintiffs raised the objection that under the Hindu Wills Act. a verbal will of this kind was not legal. *Held* that, after two Courts had decided unfavourably to plaintiff the only case raised by him there, he could not now turn round and throw out the defendant's case on a technical ground that he alleged gift was really a will. **Radha Bullubh Chuckerbutty v Banee Madhub Chuckebutty. 23 W R 230.**

(54) Withdrawal of suit.

512.—Plea not taken in Court below—Civ. Pro. Code 1877, s. 373.

The plea that the plaintiff had improperly been permitted to withdraw from a former suit with liberty to bring the present one, which had

Appellate Court *Contd.*

7 Objections taken for first time on appeal-*Concld.*

not been taken in the lower Courts, and was not taken in the memorandum of second appeal, was not permitted to be urged at the hearing of the second appeal.

Quære.—Whether under this section the Court ought to permit the plaintiff to withdraw from the suit with liberty to bring a fresh suit on the ground that the defence to the suit was such that the suit must fail if proceeded with.

Zahur-un-nissa v Khuda Yar Khan. 3 All 528

8. APPELLATE COURT (FORUM).

(1) Appeal against order in insolvency lying to the District Court and not to the High Court.

513.—*C. P. C.* (Act XIV of 1882), S. 588, Cl. 17; 589 (a)—Order in Insolvency by Subordinate Court.

An appeal against an order of the Subordinate Judge dismissing an insolvency petition under S. 353, C. P. C., lies to the District Court and not to the High Court, even though the petition was put in the course of the execution of a decree obtained in a suit in which the subject-matter exceeded Rs. 5000. 12 Mad 472 foll. 15 Mad 89; 17 Mad 277 not foll. **Samu Iyer v Vythi Pathar. 19 M L J 68.**

513A.—Appeal lies to the District Judge.

An appeal against an order under s. 351 C P C., by a Court of Small Causes exercising the powers of a Subordinate Judge lies to the District Court and not to the High Court. The appellate forum does not depend on either the value of the decree in execution of which the insolvency order was got or the amount of the scheduled debts. 17 Mad 377 dissented from; 12 Mad 472; 15 Mad 89; 21 Bom 45 ref.to. **Debi Prasad v Jamna Das. 23 All 56.**

Notes:—Ref: 27 Bom 601; 606. Ref: 19 M L J 68.

513 B-513 C.—S. 177—Appeal—Question of proprietary title—Sir holder and his sub-tenant.

Where the plaintiffs sued the defendant for rent of their sir land alleging that he was their sub tenant and the defendant claimed to be the principal tenant. *Held*, that as between the plaintiffs and the defendant there was a question of ownership of the particular land and the question raised was a question of proprietary title and an appeal lay to the District Judge against an appellate decree of a Collector. **Chhitar Singh v Rup Sing. (1906) A W N 247=3 A L J 603**

(2) Effect of Proclamation pending proceeding, on the question of the forum.

513 D-E -Sambalpur-Proclamation No. 2833 of 1905 Act VII of 1905—Act II of 1904—Act XII of 1887—Act I of 1868—Act X of 1897—Pending proceeding—Appeal—High Court—Judicial Commissioner—Central Provinces.

A suit was decided by the Subordinate Judge of Sambalpur on the 8th September 1905. The appeal was preferred to the District Judge on the 17th October, 1905. Meanwhile, the Proclamation, by which Sambalpur was transferred from the Central Provinces to Bengal, came into force on the 16th October, 1905.

Held, that, whether the suit be deemed as a pending proceeding on the 16th October, 1905, or not, the appeal from the decree of the District Judge lay to the Calcutta High Court, and not to the Court of the Judicial Commissioner of the Central Provinces 3 Cal 662; 16 Cal 267 referred.

Mussamat Harabati v Satyabadi Behara. 5 C L J 550=34 Cal 636 on review from **34 Cal 223=5 C L J 192.**

Notes—Ref: 5 C L J 550; 34 Cal 305; 636; 30 All 225=(1908) W N 96=5 A L J 192; 19 M L J 648; 5 C L J 270.

Appellate Court-*Contd.*

8 Appellate Court (Forum)—*Contd.*

(3) Valuation by plaintiff determining the forum of the suit and subsequent appeal.

513F.—Suit for restitution of conjugal rights —Bengal, N. W. P. and Assam Civil Courts Act (XII of 1887), Sec. 21—Suits Valuation Act (VII of 1887), Sec. 21—Valuation of suit—Jurisdiction, purposes of—Valuation by plaintiff—Appeal.

Under section 21 of the Bengal, North Westrn Provinces and Assam Civil Courts Act, appeals from the judgment of Subordinate Judges lie to the District Judge excepting in cases the value of which exceeds five thousand rupees.

The value of a suit for purposes of jurisdiction must be held, in cases which are incapable of satisfactory valuation, to be the value put upon it by the plaintiff, except where it is proved that from improper motives he has placed a wrong valuation upon it.

A suit for restitution of conjugal rights is not capable of money valuation and therefore the value of such a suit must be held to be the valuation put upon it by the plaintiff and such valuation alone will determine the forum of the suit and of the subsequent appeal. 8 C W N 705=31 Cal 849 Diss: 28 All 545; 13 Cal 232; 18 Cal 378 Ref: **Jan Mahomed Mandal v Mesher Bibi. 5 C L J 400=11 C W N 458=34 Cal 352.**

Notes:—Ref: 17 M L J 573 F B; 31 Mad 89 F B. Fol: 11 Bom L R 1352.

(4) Valuation for jurisdiction purposes.

514.—Bengal Civil Courts Act S. 21—Appeal form of—Partition suit—Valuation for jurisdictional purposes.

In a suit for partition, the value of the entire estate sought to be partitioned and not the value of the plaintiff's share in the property is to be taken as the value of the original suit within the meaning of Sec. 21 of Act XII of 1887.

Appellate Court-*Contd.*

8 Appellate Court (Forum)—*Contd.*

Where, therefore, in a suit for partition, the value of the entire estate is above Rs 5,000, but that of the plaintiff's is below that amount, an appeal shall lie, from the decree of the Subordinate Judge, direct to the High Court. **Biraj Mohini Dasi v Chintamani Dasi. 3 C L J 197=10 C W N 565.**

(5) Appeal from decision of First Class Subordinate Judge invested with special jurisdiction.

515.—Practice—Appeal—Special jurisdiction of the First Class Subordinate Judge— Claim reduced subsequently.

An appeal lies to the High Court from the decision of a First Class Subordinate Judge in a suit tried by him under his special jurisdiction, where the claim was orlginally Rs 10,000 although owing to subsequent realisations of sums on account of the defendants, the plaintiffs gave credit to them for the same, and reduced the claim to Rs. 1,786-12. The original claim having given rise to that jurisdiction, the jurisdiction itself continued and could not be ousted by the mere fact of the subsequent reduction. **Nanchand v Mussa. 6 Bom L R 692.**

(6) Valuation by plaintiff determining forum of appeal.

516.—Court Fees Act S. 12—Decision of trying Court as to valuation of suit, if open to question in appeal against decree dismissing suit for non-payment of additional Court-fee on day fixed—Civil Procedure Code (Act XIV of 1882), S. 2—Valuation by plaintiff if determines forum of appeal.

Where the Court in which a suit was instituted held that it had been undervalued, and directed the plaintiff to pay additional Court-fees by a certain date, but the plaintiff having failed to do so, the suit was dismissed.

Held, that an appeal lay against the decree dismissing the suit, and in that appeal the decision of the first Court regarding the valuation of the suit could be questioned, S. 12 of the Court Fees Act notwithstanding.

Held, further that an appeal lay to the Court of the judicial Commissioner, although the Subordinate Judge valued the suit at over Rs. 5,000,

Appellate Court-*Contd.*

8. Appellate Court (Forum)—*Contd.*

inasmuch as the plaintiff throughout contended that the value was below *Rs.* 5,000 as stated in the plaint, (12 C L R 148. 28 Cal 334,) relied on.

Prokash Chandra Sarkar v. Bishambhar Nath Sahi. 14 C W N 343 = 5 Ind Cas 18.

(7) Appeal in suit below Rs.5000 lying to the District Court.

517-518.—Bombay Civil Courts Act S. 16—Claim heard by Assistant Judge under the Land Acquisition *Act* (1 of 1894)——Value of the subject-matter not exceeding Rs. 5000-lies, to District Court and to High Court.

Where, in a compensation case under the Land Acquisition Act, 1894, heard by an Assistant Judge, the amount does not exceed Rs. 5,000 the appeal lies to the District Court and not to the High Court. 10 Bom L R 924 = 32 Bom 634, *Appl.*

Ranchhodbhai Valavbhai v. The Collector of Kaira 11 Bom L R 317 = 33 Bom 371 = 2 Ind Cas 492.

(8) Effect of Act VII of 1905 on the question of forum of appeal.

519.—Appellate Court—Second appeal.

Held by Rampini C. J. and *Sharfuddin J.* (before reference) that a second appeal lay to the Court of the Judicial Commissioner of the Central Provinces from the appellate decision of the District Judge of Sambalpur before Act VII of 1905 was passed and now lies to the Calcutta High Court. 11 C W N 956 ref. to.

Balaram v Mangta Das. 34 Cal 941 = 11 C W N 960; S. B.

(9) Forum of appeal in suit valued at more than Rs. 5000.

520.—Decree of a Subordinate Judge in a suit valued at more than five thousand rupees—Forum for appeal from such decree—Act XX of 1890, s. 40.

An appeal was presented in the Court of the Judicial Commissioner, Oudh, on the 10th February 1891, against a decree of the Sub-Judge, Barabanki, dated 10th December 1890, in a suit the value of which exceeded Rs. 5,000, instituted in July 1890. *Held*, that the appeal does not lie to the Judicial Commissioner, Oudh, but, if

Appellate Court-*Contd.*

8. Appellate Court (Forum)—*Contd.*

cognizable at all, to the District Judge.

Ram Sewak v Sheogovind. S C 187

Notes:—Approved: S C 193; Fol: 211; & Ref. S C 293.

520A—Act I of 1871.

This was a suit for redemption in which the mortgage debt alleged to be Rs. 968 was said to have been satisfied from the usufruct. The defendant's case was that there had been no mortgage but that he was and had been absolute owner. The valuation of the property was admittedly Rs. 8,000. The suit being dismissed by the Subordinate Judge the plaintiffs appealed to the High Court. *Held* following 2 All 778 and 8 All 438, that this first appeal did not lie to this Court.

Ajgar Singh v Barmha Singh. 7 W N 262.

Appellate Court—See—Appeal—Court of appeal. 5 N W P 175, 1 N W P 203, 5 N W P 108, 2 All 148, 2 All 778, 3 All 822.

(10) Jurisdiction in appeal to be determined with reference to claim made & not decision upon the claim.

521.—Jurisdiction—Suit for redemption of mortgage—Course of appeal—Punjab Courts Act, Section 39.

The plaintiffs instituted a suit for redemption of certain property from mortgage, fixing the mortgage debt at Rs. 43-12-0.

While the suit was pending in the Court of a Munsiff, 2nd class, the plaintiffs amended their plaint to one for redemption on payment of Rs. 43-12-0, or such other sum as the Court might determine.

The defendants pleaded that Rs. 681 was the amount of the mortgage debt.

The Munsiff decreed redemption on payment of Rs. 63-14-0.

Held, that the appeal from the Munsiff's decree lay to the Divisional Court and not to the District Judge.

The jurisdiction is to be determined with reference to the claim made, and not to the decision upon the claim, and when once the appeal had been properly instituted in the Divisional

Appellate Court-*Contd*

8 Appellate Court (Forum) *Contd.*

Court, it was immaterial that that Court found less than Rs. 100 to be due, and such finding did not oust its jurisdiction.

The value of the suit was not altered by the plea of the defendants. 169 P R 1888.

Hazara Singh v Lal Singh. 63 P R 1891.

521A.—S. 17—Jurisdiction—"Proceeding in relation to" a case—Transfer of a district from one jurisdiction to another.

Where a certain area is transferred by a Government notification from the jurisdiction of one District Judge, into the jurisdiction of a different District Judge, an appeal preferred, after date on which the notification takes effect, must be received and entertained by the District Judge into whose jurisdiction the area from which the the appeal comes, has been transferred.

Allah Dei Begam v Kesri Mal. A W N 1905, 199=2 A L J 576=28 All 93.

521B.– Jurisdiction of Court—Valuation of suit—Accounts suit for-Course of Appeal—Contract Act (IV of 1872), S. 253 (10)—Partnership-Dissolution of, by death of a partner who is member of a joint Hindu family-Limitation Act (XV of 1877) Sch, II, Art. 106—Accounts, suit for, after dissolution of partnership—Evidence Act (I of 1872) S. 92—Evidence—Oral evidence as to contents of a document.

In a suit for accounts where the plaintiff has valued his claim at a sum not exceeding Rs. 5,000, the appeal against the preliminary decree passed in favour of the plaintiff lies to the Divisional Court and not to the Chief Court.

When, in a case, appeal lies to the Chief Court but is filed in and heard by the Division Court, and a further appeal is filed in the Chief Court, the further appeal may be converted into a first appeal, if this course does not prejudice any of the parties.

In the case of a joint Hindu family carrying on a trading business the ordinary rules of partnership do not apply *in toto*; the concern must be governed also by rules of Hindu Law, and one of such rules would be that the death of one member of the family cannot operate to dissolve the family partnership. But it is equally clear

Appellate Court-*Contd.*

8 Appellate Court (Forum)—*Contd.*

that, where a partnership is composed of certain individual members of a joint Hindu family and out-siders, the relations of the parties are governed by the ordinary law of contract and not by Hindu Law.

Some of the members of a joint Hindu family entered into a partnership. The deed did not show that the members of the family, were acting on behalf of the family. It was contended that, on the death of one of the members of the family, the partnership was dissolved. *Held*, that the contention was valid.

Held, also, that no extraneous evidence was admissible to prove that the members of the family were acting on behalf of the family in the concern and not in their individual capacity.

A suit for accounts after the dissolution of a partnership is governed by Art. 106, Limitation Act (1877).

Copies of documents required by S 78 or S 86 of the Evidence Act to be certified are not admissible in evidence when they are not duly certified.

The Chief Court held that the several acknowledgments relied on by the plaintiffs did not extend the period of limitation as they did not fall within the purview of S 19 of the Limitation Act. 58 P R 1902 and 46 P R 1906=94 P L R 1906; 31 Cal 365, distinguished; 25 All 378: 28 Mad 344 Ref. **Ram Pershad v Rattan Chand. 87 P L R 1909=10 P L R 321.**

521C.—Ss. 19, 26—Munsif invested with functions of District Court—Appeal from his decision—Jurisdiction.

An appeal from an order of a Munsif invested under section 26 with the functions of the District Court lies to the District Judge, and a Subordinate Judge or a Judge of the Court of Small Causes has no jurisdiction to entertain such an appeal. **Huran Bibi v Hingan Bibi. 8 A L J 1300.**

521D —Jurisdiction—Costs—Value of subject-matter—Bengal Civil Courts Act (IV of 1871), s 22.

An appeal from the decree of a Subordinate Judge in a suit, the value of the subject-matter of which exceeded Rs. 5000, was preferred to the District Court merely on the question of costs,

Appellate Court-*Contd.*

8 Appellate Court (Forum)—*Contd.*

Held that the circumstance that the appeal related merely to the question of costs could not alter the original scope of the suit and the appeal would in ordinary course lie only to the High Court. **Hemanchal Singh v H Maxwell. A W N 1883. 134.**

(11) Forum of appeal in a land-suit as defined in the Punjab Tenancy Act. 1887.

522—Share in well for irrigating agricultural land—Land-suit—Course of appeal.,

A suit for a share in a well sunk for the purpose of irrigating agricultural land is a "land suit," and the course of appeal is to the Divisional Court.

The land on which the well is sunk is used "for purposes subservient to agriculture," and the well itself is a "structure on such land," within the definition of "land" in Section 4, sub-section (1), Punjab Tenancy Act, 1887. **Imam Din v Mahku. 62 P R 1891.**

522A.—Land suit Suit to establish title with reference to a mortgage deed of land Course of appeal. Punjab Courts Act, 1884, S. 3, (2).

Held, that the course of appeal in a suit to establish title with reference to a mortgage deed of land, and todeclare it not to be subject to attachment, (which is a land suit) is to the Divisional Court. (43 P R 1896. Cited: 85 P R 1888 Ref.) **Hira Mal v Bhawani Ram. 61 P R 1902.**

(12) Forum of appeal where less sum was accepted by consent decree.

523.—Appeal, forum—Bengal, N W P and Assam Civil Court's Act, Sec. 21—Appeal-Forum-Value of suit--Acceptance of lesser sum by consent decree—Appeal to wrong Court—Power of Court.

When the original value of a suit was over Rs 5,000, and by a consent decree the plaintiff accepted a sum of less than Rs. 5,000; an appeal against an order passed in execution of such decree by the Subordinate Judge lies to the High Court and not to the District Judge.

Quære.—Whether when such appeal is presented to the District Judge he should return the memorandum of appeal to the appellant for presentation before the High Court or he is justified in dismissing the appeal **Jogendra Nath Roy v Sarswati Debi. 6 C L J 38.**

(13) Value of suit determiniug forum of appeal.

524.—Value of suit—Suit for dissolution of partnership and rendition of accounts—Suits Valuation Act, 1887, Sections 8, 11—Course of appeal—Punjab Courts Act, 1884, Section 39.

The plaintiffs sued for dissolution and winding up of a partnership, rendition of accounts by the defendants and a decree for such sums as the plaintiff may be found entitled to against the parties. They valued the claim approximately at Rs. 2,000, but were decreed Rs. 6,410 by the District Judge. The defendants applied to the Divisional Judge, who modified the decree on certain points. On further appeal to the Chief Court it was objected that the Divisional Judge had no jurisdiction to hear the appeal, which lay to the Chief Court—Held, that as the value of a suit means the value of the subject-matter of such suit, which in the present case exceeded Rs 5,000, the appeal lay to the Chief Court, and that therefore the decree of the Divisional Judge was without jurisdiction. 20 Bom 265, 1 P R 1887 F B. 63 P R 1891, 169 P R 1888, 20 P R 1879, and 35 P R 1901, cited. 40 P R 1892, 86 P R 1892. distinguished. **Maman Mal v Abdul Aziz. 58 P R 1902.**

Notes,—Ref. 16 P R 1908=73 P W R 1907; Appr. 46 P R 1906

14 Forum of appeal according to law as it stood prior to the passing of Act XX of 1890

525.—Execution of decree-Proceedings in suit—Act I of 1868, s. 6 (General Clauses Act).

In a suit instituted in the Court of a Subordinate Judge before the passing of the N W Provinces and Oudh Act XX of 1890, a decree was passed in favour of the plaintiff for redemption of certain mortgaged property on payment of Rs. 6,500. In 1893, i.e., after that Act had come into force, the plaintiff applied to the Subordinate Judge to have an alleged payment out of Court recorded as certified. The application was rejected by an order dated Agust 16th, 1893. The

Appellate Court-*Contd.*

8 Appellate Court (Forum)—*Contd.*

plaintiff appealed to the Court of the Judicial Commissioner under the law as it stood prior to the passing of Act XX of 1890, the order was appealable to the Court of the District Judge. Held, that proceedings in execution of decree are part of a suit and are proceedings within the meaning of s. 6 of the General Clauses Act I of 1868. Held, accordingly, that the Subordinate Judge's order having been passed in proceedings commenced before the passing of Act XX of 1890 was appealable to the Court of the District Judge and not to the Court of the Judicial Commissioner. **Chedi Singh v Sheo Dat Singh 10 C 160.**

(15) Forum of appeal in a suit for arrears of maintenance.

526—Act IX of 1887, Schedule II, clause 38—Suit for arrears of maintenance—Punjab Courts Act (XVIII of 1884, and XIII of 1887)—Jurisdiction of District Judge—Unclassed suit.—

Under Act XVIII of 1884, a District Judge was not competent to hear an appeal in a suit for arrears of maintenance, such suit not being cognizable by a Small Cause Court (Clause 38, Schedule II, Act IX of 1887). Act XIII of 1888, has, however, made a change in the law inasmuch as a suit for maintenance is according to it an unclassed suit, and the appeal will, subject to the other provisions of the Act as to value, lie to the District Judge.— **Dhirta v Nihal Devi, 123 P R 1889.**

(16) Forum of appeal in cases under Sec 1 of Act IX of 1861.

527—Act IX of 1861—Custody of children.—

The principal Civil Court of original jurisdiction, referred to in S. 1 of Act IX of 1861, is the Court of the Deputy Commissioner from whose decision an appeal lies direct to the Chief Court, and not to the Commissioner.—

Firoz v Ramditta, P R 106 of 1876.

(17) Amount of claim as found by Court determining the forum of appeal.

528—Suits valuation—Mesne profits—Appeal from—Interest—Court-Fees Act (VII of 1870), Sec 11-Suits Valuation Act (VII of 1887) Sec. 8-

When a plaintiff definitely fixes a certain sum as the amount of his claim, this is the value of the original suit and the appeal lies accordingly: but when he fixes a certain sum as the amount of his claim only approximately or tentatively and prays that the amount of his claim may be ascertained in the course of the suit, the general rule is that the amount found by the Court to be due to him is the value of the original suit for the purpose of determining the forum of appeal.

Per Curiam—When in a suit for possession of a land and mesne profits, which is originally valued at a sum below Rs. 5,000, and which is instituted in the Court of Subordinate Judge, but in which the whole amount actually found due, inclusive of mesne profits payable by the defendant to the plaintiff, is over Rs. 5,000, an appeal lies to the High Court and not to the District Court.

In estimating the value of the original suit, the interest on the amount of mesne profits subsequent to the institution of the suit is not to be taken into consideration.

Per Mookerjee J.—The value of the original suit means the value of the relief claimed in the original suit. The valuation of a suit as made by the plaintiff may, be either definite or approximate. In the latter case, the relief claimed is tentative and not final and such approximate valuation does not determine the forum of appeal. The Court makes an investigation and determines the amount which the plaintiff is entitled to recover. When the plaintiff upon such adjudication accepts the amount determined by the Court, the value of the relief obtained by him which is in substance also the relief claimed by him is the value finally determined. In such a case, if the defendant prefers an appeal, he is entitled to proceed on the assumption, that the real value of the original suit is the value as adjudged by the Court and accepted by the plaintiff. If such value exceeds Rs. 5,000, the appeal lies to the High Court.

The forum of appeal depends not merely upon the value as accepted by the plaintiff after adjudication.

When the plaintiff accepts the decree for the amount of mesne profits found and allowed by the first Court, the original valuation made in the plaintiff. which was approximate and tentative, is altered and the valuation as determined by the first Court becomes the plaintiff's valuation.

Appellate Court-*Contd.*

8 Appellate Court (Forum)—*Contd.*

Where the plaintiff asked for past as well as future mesne profits and paid Court fees on the amount claimed for past mesne profits only, the provisions of section 11 of the Court Fees Act were applicable in respect of the whole suit.

Under section 8 of the Suits Valuation Act, the value of the suit upon which the Court-fee has been assessed and paid without objection, is the value for the purposes of jurisdiction.

Ijjatulla Bhuiyan v. Chandra Mohan Banerji, 6 C L J 255=34 Cal 594=11 C W N 1133

Notes:—Ref: 9 C L J 367=13 C W N 493.

(18) Appeal from decree passed by a Court of Small Causes lying to the District Judge.

529—Decree passed by a Court of Small Causes—Attachment and sale of immoveable property-decree sent for execution to Munsif Court Ss. 27 and 35-Provincial Small Causes Courts Act—Appeal C. P. C., S. 25.

A decree passed by a Court in Small Cause sought to attach and sell immoveable property and was, therefore, sent for execution to the Munsiff's Court under S. 223 Code of Civil Procedure Application having been made for execution in the Munsiff's Court, the judgment-debtor raised certain objections which were overruled.

Held, that the appeal lay to the District Judge, neither the suit nor the execution proceedings having been transferred to the Munsiff's Court, but the decree having been sent under S. 223 of the Code. Had the suit or the execution proceedings been transferred to the Munsiff's Court under S. 25 of the Code or the execution proceedings instituted in the Munsiff's Court under S. 35 Provincial Small Causes Courts Act, the proceedings held in the Munsiff's Court might be regarded as proceedings held by a Court of Small Causes. S 27 of the Small Causes Courts Act has no application to a case of this kind.

Atwari v. Maiku. 5 A L J 612=A W N (1908), 254=31 All 1

(19) Appeal from order of Collector under S. 3 of the Bhagdari & Narvadari Act lying to the Commissioner.

530—Bhag—Narva—Sub-divisions of Narva—Compromise—Collector's action — Appeal to Commissioner.

Where the parties to a suit arrive at a compromise the effect of which is that a *narva* is split up into two portions over one of which one party gives up his right in favour of the other and the division so effected is not a recognised sub-division, the compromise is void under Ss. 3 and 5 of the Bhagdaree and Narwadaree Act, 1862.

Where a transaction is not lawful under S. 3 (1) of the Act, the Civil Court, is bound to adjudicate upon it independently of the question whether the Collector interferes or not under S. 3 (2) of the Act.

An appeal from an order passed by the Collector under S. 3 of the Bhagdaree and Narwadaree Act lies to the Commissioner.

The Collector can, under S. 3 of the Bhagdaree and Narwadaree Act, take action at any time and the plea of adverse possession cannot prevail against any order that he may make.

Jethabhai v. Nathabhai, 6 Bom L R 428=28 Bom 399.

(20) Appeal from order passed by Collector in execution proceedings lying to the Commissioner.

531—Appeal lies to the Commissioner from an order passed by the Collector in execution proceedings transferred to him under S. 320 of the Civil Procedure Code, 1882.

Mancherji v. Thakurdas, 7 Bom L R 682.

(21) Appeal from order in execution in suit other than Small Cause not exceeding Rs. 500.

532—Order in execution by Munsiff in suit other than Small Cause not exceeding Rs. 500—"Decree"—Act XVIII of 1884, Section 39—Civil Procedure Code (Act XIV of 1882), Sections 2, 540.

Where in execution of a decree for Rs. 1,250, payable by instalments, an Extra Assistant Commissioner having the powers of a Munsiff passed an order which was a "decree" within the definition in Section 2 of the Civil Procedure Code, *held*, that under Section 39, Act XVIII of 1884, the appeal from such decree lay to the Divisional Judge, and not to the District Judge, it not being

Appellate Court-*Contd.*

8 Appellate Court (Forum)--*Contd.*

a decree in a suit cognizable by a Court of Small Causes not exceeding Rs 500 in value.
Tulsi Ram v. Gobind, P R 115 of 1886.

(22) Appeal in suits cognizable by Courts of small causes lying to the District Judge.

533—Appeal—Course of, in a suit for mesne profits where the value of the subject matter in dispute is less than Rs. 500—Provincial Small Cause Court Act, 1877, Schedule II. Article 31. *Held*, by the Full Bench, that a suit for damages sustained by plaintiff on account of his having been kept out of possession of two—thirds of a house purchased by him at an auction sale by the defendant (who was owner of the remaining third), and prevented by her from access to it for twenty-five months, did not fall within the purview of clause 31, Schedule II of the Small Cause Court Act, 1887, and was of a nature cognizable by Courts of Small Causes, and that therefore the appeal lay to the District and not to the Divisional Judge. 23 Calc. 884; 22 Mad, 196; 80 P R 1896; 94 P R 1900; cited. 25 Bom, 85; 119 P. R., 1894, disapproved.

Mussammat Kishen Kour v Tulsa Singh 35 P R 1902, F. B.

(23) Appeal to the High Court where real value of property exceeding Rs. 5000.

534—Appellate forum—Court Fees Act S 7—Suits Valuation Act S 8—Bombay Civil Courts Act.

Where an objection was taken that no appeal lay to the High Court on the ground that the claim was valued at Rs 640 for the purpose of court fees, and that the suit being one for a declaration and consequential relief was not excepted from the operation of S 8 of the Suits Valuation Act and that the prayer for possession was merely ancillary to the prayer for declaration;—*Held*, that the suit fell within the scope of s. 7 cl 5 and that the real value of the property being more than Rs 5,000, an appeal lay to the High Court. **Bai Meher Bai v Magan Chand 29 Bom 98=7 Bom L R 682**

(24) Decree of Munsiffs appealable to the Subordinate Judge

535—Notification of the Judicial Commissioner, dated the 14th April 1891—Act XX of 1890 s. 40 cl (3)—Decrees of Munsifs appealable to the Subordinate Judge.

The Munsif of Partabgarh passed a decree in a suit which embraced three distinct subjects namely land, trees, and damages. The area of the land did not exceed five bighas, the value of the trees did not exceed Rs 100, and the claim for damages might have been entertained by a Court of Small Causes. *Held* that the decree was appealable to the Subordinate Judge under the Notification of the Judicial Commissioner, dated the 14th April 1891 under s. 40 cl (3) Act XX of 1890. **Mata Badal Singh v Inder Singh. Oudh SC 249**

(25) Forum of appeal in a Small Cause Court suit.

536—Small Cause Court suit—Provincial Small Cause Court Act (IX of 1887), Sec. 25—District Court—High Court.

A Subordinate Judge holding Small Cause Courts powers decided a Small Cause Courts suit as one under his ordinary jurisdiction. On appeal, the District Judge also dealt with the suit as such the parties in both the Courts not objecting to the procedure adopted. The plaintiff applied to the High Court contending that the jurisdiction exercised by the District Judge was bad in law.

Held, that the character of the suit was not altered by the mode in which the Subordinate Judge exercised his jurisdiction, and that therefore no appeal lay to the District Court.
Shankarbhai v. Somabhai 3 Bom L R 129.

(26) Inferences from facts found.

537—Inferences from facts found.

Where the case depends upon the proper inferences to be drawn from facts indisputably established by evidence, an Appellate Court may be in as good a position to judge as the original tribunal. But where the case hinges on the question which of two conflicting stories is to be believed, to which witness's credence is to be given, the original tribunal is far better placed than the Appellate Court to correctly gauge the truth.

Indian Manufacturing Co. v. Lalji, 6 Bom L R 1130.

Appellate Court-*Contd.*

8 Appellate Court (Forum)—*Contd.*

(27) Exercise of original jurisdiction by Appellate Court.

538-Original jurisdiction, exercise of, by Appellate Court—Right of appeal to the Court of the Judicial Commissioner.

In an appeal from a decree passed by Court of first instance, the Appellate Court set aside the original decree in the suit and then, styling its further proceedings an original suit, passed a decree as if in an original suit. On application being made to the Court of the Judicial Commissioner for stay of execution of that further decree, *held*,—that the further proceedings, though styled an original suit, must be treated as a continuation of appellate proceedings in the same appeal from an original decree already passed in the same suit. The application for stay of execution of pseudo-original decree passed in such further appellate proceedings by a Court of first appeal is properly made to the Court of second appeal, that is, the Court of the Judicial Commissioner.
Moideen Bawa v. Allandoo, L B R 1893-1900, 231

539—Original jurisdiction, exercise of, by Appellate Court—Right of appeal to the Court of the Judicial Commissioner.

Where, in an appeal from the decree of a Court of first instance, the Deputy Commissioner set aside the decree of an original Court of competent Jurisdiction and then passed a new decree in proceedings styled a regular suit in the Court of the District Judge, *held* that an appellate Court cannot give itself jurisdiction to try the case as an original suit under its original jurisdiction in this manner. The further decree thus made in the suit is a pseudo original decree. It does not follow that, because an appellate Court, in an appeal from an original decree, calls its proceedings a regular suit, that appellate proceedings do become an original suit, or that its further decision in such pseudo-original proceedings becomes less liable to appeal in the Court of the Judicial Commissioner. **Moideen Bawa v Allandoo L B R 1893—1900 229.**

(28) Objection as to irregularity of procedure.

540—Evidence taken by one Judge—Transfer of suit to another Judge who pronounced judgment—Irregular proceedure—Objection taken for first time in second appeal.

Where a case was tried by a Munsif, before whom the entire evidence was taken and nothing remained to be done except giving judgment, and the Munsif instead of giving the judgment himself transferred the suit under the orders of the Judge to the additional Munsif and that officer pronounced judgment and it appeared that this objection was raised for the first time in second appeal, *held* that the proceedings were irregular and the procedure was wholly indefensible, that all the proceedings should be set aside and that the case should be re-tried by the Munsif who had succeeded the Munsif who originally tried the case and took the evidence. **Raghubir Rai v. Thakur Rai A W N 1887, 13**

Appellate Forum-Punj Act XVIII of 1884 s. 39, **63 P R 1891; 2 P R 1900.**

Appellate Forum—Punj Act XVIII of 1884 s 40, **145 P R 1892.**

Appellate Fourm—Jurisdiction—Plaintiff's not defendant's valuation to govern Mortgage—Redemption **91 P R 1889.**

Appellate Forum—Punj Act XVII of 1887 ch X **52 P R 1898.**

Appellate Court defective, Judgment of

See Judgment—Form and contents of judgment

Appellate Court Duty of, to direct examination of Witnessess

See Appellate Court—Evidence & additional evidence on appeal.

Appellate Court, duty of, to form its own opinion on the evidence or record reasons for findings.

See Appellate Court.

Appellate Court, Judgment of

See (1) Judgment.

(2) Appellate Court, errors affecting or not merits of case.

Appellate Court's power to amend plaint.

See (1) Appellate Court.
(2) Plaint amendment of plaint.

Appellate Court production of additional evidence in.

See Appellate Court evidence & additivel evidence on appeal.

Appellate Court, remand to.

See Remand.

Application.

See Limitation Act, (1908) S. 3.

—by person not a party to suit.

See (1) Management of Estate by Court.
(2) Practice—Civil Cases—Application by person not party to suit

—to another Judge after refusal by one.

See Practice—Civil Cases—Application after refusal.

—for execution of decree.

See (1) Execution of Decree—Application for Execution and Powers of Court.
(2) Limitation Act, (1908) Art 182.

—to sue in forma pauperis.

See (1) Mahomedan Law—Dower.
(2) Pauper Suit.

1—Application not specifying section under which it is made.

Where an application was rejected on the ground that it was not made under a certain section of the Code of Civil Procedure, *held*, that, as the section was applicable, the application must be deemed to have been made under it.
Gorakhsavant v Yassavant. 1887 P J 153.

2—Limitation Act S. 158—Application to set aside award—Limitation Act, S, 12 :

The period of limitation for an application to set aside an award is ten days from the time the award is submitted to the Court exclusive of the time requisite for obtaining a copy of the award as prescribed in S. 12 of the Limitation Act.
Ghulam Jilani v Mehammad Husain.
12 M L J 77=29 Cal 167=29 I A 51 P C=4 Bom L R 161=6 C W N 226.

Application—*Concld.*

Notes—Ref: 9 M L J 4-0=32 Mad 510 ; 1 S L R 86 , A W N (1903) 4. Appl ; 35 Cal 648 P C=18 M L J 266=10 Bom L R 581 =12 C W N 585=7 C L J 520.

Application—for presentation to Court written by all parties interested—Presentation by one party—Effect. **9 Ind Cas 195.**

Application—for an order absolute. See cases under—Limitation Act 1877 Art 178.

Appointed daughter.

1—Hindu Law—Will—Custom—Appointed daughter—absolute

A Hindu after giving his widow power to adopt by his will provided as follows :—"If no boy is found and if a daughter has a son that boy becomes a *Dauhitrakarta* according to the Dharmasastras, so that boy alone should become the karta for the entire property belonging to us." *Held*—That the will could be construed as appointing a daughter to raise a son only if there were in existence a living custom to which the words can be referred ; and that the language in the will was not such as to indicate the testator's intention to revive a dead custom or create a new kind of heir for himself unknown to the law of the present day. The onus of proving the existence of the custom is upon the person who relies upon it. **Appa Rao v Gopala Rao. 18 M L J 420**

See also Cases under:—
Hindu Law—Will.

Appointment.

—by will.

See Court Fees Act (sch I, art 11).

—of daughter.

See Hindu Law—Custom—Appointment of Daughter.

—Exercise of

See Transfer of Property Act s. 53.

—Power of.

See (1) Hindu Law—Endowment—Dismissal of Manager of Endowment.
(2) Hindu Law—Will—Construction.
(3) Will—Construction.

See also cases under

(1) Guardian.
(2) Pleader—Appointment & appearance.

Appointment-*Concld*

1—Construction of—Power of appointment—Appointment, of new trustee in place of a dying trustee, under power reversed by the deed—Registration—Indian Trust Act (II of 1882) Ss 1,75—Property dedicated to charitable uses—Construction of document——Originating summons—Certifying Counsel–Taxation of costs-Practice.

An indenture of trust contained the following clause, by which, the settlors reserved to themselves and the survivor of them the right to nominate and appoint trustee or trustees, in the place of retiring or dying trustee or trustees

"It shall be lawful for .. ..to appoint any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying, or going to reside abroad, or desiring to retire, or refusing, or becoming incapable, to act as aforesaid, with liberty upon any such appointment to increase or diminish the original number of trustees, and upon every such appointment the trust premises hereby settled shall be so transferred as to become vested in the new trustee or trustees."

On the death of one of the trustees, the surviving settlor, in exercise of this power appointed a new trustee : this deed of appointment was not registered. Subsequently, the surviving settlor, in exercise of power reversed, appointed three additional trustees by deeds of appointment bearing different dates.

The surviving settlor died . and at her death without leaving progeny, the whole of the trust property was to be utilised for charitable uses and purposes, as provided by the deed of settlement

Held. (1) that the deed of appointment did not require registration.

(2) That the words "upon any such oppointment " in the clause were not words that absolutely governed the surviving settlor's right to increase the number of trustees ; they merely indicated the occassion when she may exercise her right but the right to increase the number of trutees existed. She was therefore, entitled to increase the number of trustees whenever she chose to do so. **Fatmabibi v Shaikh Hassan 9 Bom L R 1071.**

Appointment of another assessor by Judge without notice to claimant.

See Land Acquisition Act.

Appointment of arbitrator by the Court

See Arbitration- Appointment of arbitrators.

Appointment of Arbitrators and Umpires.

See Arbitration under Special Acts.

Appointment of Commissioner.

See Partition.

Appointment of creditors as agents to collect rents and appropriate part towards debts.

See Receiver.

Appointment of Daughter.

See Hindu Law Custom.

Appointment of executors by implication.

See Probate.

Appointment of guardian.

See (1) Guardians & Wards Act.
(2) Guardian.
(3) Act XL of 1858.

Appointment of officers of mosque.

See Mahomedan Law-Endowment

Appointment of receiver.

See Reciever.

Appointment of heir.

See (1) Custom, Adoption.
(2) Custom, Inheritance.

Apportionment.

See Cases under:—

(1) Mortgage (Marshalling)
(2) Mortgage decree.
(3) Contribution suit for.

Apportionment-*Concld.*

(4) Mortgage (Redemption).
(5) Land Acquisition Act.
(6) Sale for arrears of Revenue—Sale proceeds
(7) Landlord and Tenant.

Apportionment of tax:-

See Cases under:-

Madras Acts (District Municipalities Act s. 66)

Appraisement Proceedings.

—Collector acting in.

See Sanction to Prosecution—Where Sanction is necessary or otherwise.

Appropriation of payments.

See (1) Guarantee.

(2) Contract Act Ss. **55—61.**

Appropriation of payments.

1 Payment of rent *1-5*
2 Payment of debt *6-21*
3 Appropriation towards interest 22-23
4 Application of rules regarding appropriation of payments realisations of Land revenue *24.*
5 Appropriation by creditor of payments towards interest. *25*
6 Appropriation of goods unascertained at the time of contract of sale *26*
7 Appropriation of payment towards interest without specification by debtor not saving limitation *27*

(1) Payment of rent.

1—Payment of rent.—A general payment made in one year, without proof that it was in satisfaction of the rents of that year, may be applied in satisfaction of the arrears of the previous years. **Ahmuty v Brodie W R 1864, Act X, 15.**

2.—Revenue sale—Appropriation of payment to specified arrears—Amount if may be credited in the Collectorate towards previous arrears-Sale of property for arrears paid up bad, though previous arrears unpaid—Jurisdiction to sell-Contract Act (IX of 1872), Ss 59,60.

Where money is expressly paid to satisfy a debt and is received and appropriated on that account, it is not in the power of one of the parties

Appropriation of payments-*Contd*

to the transaction, without the assent of the other, to vary the effect of the transaction by altering the appropriation in which both originally concurred.

Where, the September kist of revenue for 1901 and January kist for 1902 being in arrears, the proprietor paid a certain amount into the Treasury specifically appropriating it to the January kist and the payment was received and accepted on that account, but subsequently the Treasury officers appropriated the amount towards satisfaction of the September kist, and then as far as the money went towards payment of a part of the January kist, and the property was thereafter sold for what was thus shown as remaining unpaid of the January kist:

Held—That no arrears in respect of the January kist were due at the date of the sale, and therefore the sale was without jurisdiction. (10 C W N 948=33 Cal 1193, Ref:) **Sheikh Mahomed Jan v Munshi Ganga Bishun Singh 15 C W N 443.**

3.—Payment by tenant for "Rent."—

The word "rent" does not necessarily include interest; so if any sum of money be paid by a tenant to a landlord as rent and the latter receives it as such he cannot be permitted to apply that money towards any interest which might then be due. 25 Cal 571; 575 ref to. **Bhagabati Debya Chowdhurani v Basanta Kumari Debi 11 C W N 110.**

4.—The payments in each year must be presumed to be for the current year, and surplus payments to be for the past,not subsequent years. **Taramonee Dossee v Kally Churn Surmah W R 1864. Act X, 14.**

5—Where a tenant pays money to his landlord on account of rent, without any specification whether the payment was for old or enhanced rent, the landlord is at liberty to credit the payment as he thinks fit. **Shurno Moyee v Kashee Kant Bhuttacharjee 7 W R 511.**

(2) Payment of debt.

6.—Debt barred by limitation.

An unappropriated payment is to be applied to the earliest debt, although the debt is barred by the Act of Limitation, where the facts do not

Appropriation of payments-*Contd.*

raise any question which might affect such priority. **Mooneappah v Venkatarayadoo 6 M H C R 32.**

Mulchand Gulabchand v Girdhar Madhav 8 B H C R 6.

7.—Payments unapplied by either the debtor or the creditor should be appropriated to the earlier items making up the debt due. This rule is not impaired by the decisions in the cases of 5 Bing N C 455 and 6 De G M. and G 474 **Hirada Karibasappah v Gadigi Muddappa. 6 M H C R 197.**

Notes:—Ap, 21 Mad 366 Fol 9 B H C R 429, Ref: 10 Cal 284 F B,

8.—Ss 59, 61—Appropriation of payments—Payment of monthly subscriptions to a fund-Advance of money on mortgage to subscriber—Payment towards mortgage—Appropriation The appellant was the subscriber to the respondent fund, and had as such to pay, under rule 3 of the Articles of Association, Rs. 20 a month to the Fund. He executed a mortgage to the Fund, covenanting to discharge the debt by monthly payments of Rs. 20

Held, that the monthly payments of Rs 20 made by the appellant to the Fund should be credited towards the mortgage loan, and not towards the subscription on his shares **Kannappa Samiyar v Madura Hindu Permanent Fund 1 Ind Cas 909.**

9.—Contract Act ss 60, 74.

In consideration of an advance of Rs. 118, the defendant executed, in favour of the plaintiff, a mortgage-bond, dated 3rd November 1879, by which it was stipulated that the amount should be repaid "in kind by delivery of half the amount of the rubbi crops of every description produced at the first-class rates; and in case the same is not paid in kind, it will be paid principal with interest from the date of execution at one anna per cent, per mensem in cash in the month of Baisakh 1287 F S (April 1880). The defendants admitted execution of the bond, and pleaded payments in grain to the amount of Rs 136, which they failed to prove. It was found that the plaintiff had received payments in grain to the extent of Rs 71, more than half of which, however, he claimed to

Appropriation of payments-*Contd.*

be entitled to appropriate to the payment of other antecedent debts which were due to him by the defendants. It was not stated at the time of payment towards which debt the payments were to be applied, but all the payments were admittedly made in kind. *Held* that the plaintiff was not entitled to appropriate the payments to the antecedent debts, inasmuch as, within the meaning of s 60 of the Contract Act, there were "other circumstances" indicating that the payments were made in liquidation of the amount of the bond. **Sungut Lal v Baijnath Roy 13 Calc 164.**

Notes:—Not Fol 15 All 232 F B. Ap; 12 Mad 161.

10.-Contract Act (IX of 1872), s 60 Creditor's appropriation of payments to one or other of debts. One of two mortgages bore interest at 12 per cent. on the mortgage debt payable with costs, and the other carried simple interest Payments made by the debtor had been appropriated by the creditor to payment of the interest on the bond bearing simple interest, while the compound interest, on the other hand, had been left to accumulate. In a suit brought against the representative of the debtor after his decease, to enforce the mortgage bearing compound interest, the objection was taken to the appropriation by the creditor. *Held* that the rule in s 60 of the Indian Contract Act, 1872, follows the ordinary law in prescribing a rule as to the case in which the creditor may, at his discretion, apply to one or other of the debts due to him, payments made by the debtor A reluctance shown by the debtor to agree to pay compound interest before he executed the mortgage bond at such interest was not an indication within that section, that he intended that application of his payments should be made first to that bond. **Rameswar Koer v Mahomed Mehdi Hossein Khan 26 Calc 39=9 C W N 633=25 I A 179.**

Notes:—Fol; 30 Cal 953; 29 Cal 43; 31 Cal 138; 5 C W N 653; 21 All 361; 23 All 181. Ex 17 M L J 43 P C; 5 C L J 106 P C; 11 C W N 249 P C. Con 34 Cal 150 P C. Ref, 23 Mad 637 6 C W N 769; 23 Mad 170=16 M L J 133;

Appropriation of payments-*Contd.*

W N (1907) 60; 4 A L J 109 P C; 29 All 322; 9 Bom L R 304; 35 Cal 221 P C.

11—Banker and customer—Delivery of half notes— Passing of property in the notes—Appropriation—Pledge —A customer of a bank having intimated his intention to withdraw his deposits and asked the bank to send him the amount, the Bank first sent one-half of certain currency notes of the exact value of the amount due and intimated to the customer that the other halves of the notes would also be sent as soon as acknowledgent of the receipt of the first halves reach them. The customer acknowledged receipt of the same and asked that the other halves may be sent. Before sending the othere halves, the Bank failed. *Held* per *Chief Justice*:—That the property in the notes had not passed from the Bank to the customer The setting aside of the notes and sending the half notes indicated an intention to pass the property but not an intention to pass the property *eo instanti* and that there was no virtual transfer. Per *Miller, J.*:—It was the intention of the debtor in sending the half notes to set apart for the creditor specific notes and to pay by means of them, and this intention having been communicated to the creditor there was a specific appropriation and representation amounting to a pledge, that the Bank would remit the second halves of the particular notes; and consequently the creditor can call upon the Official Assignee for the delivery of the notes or payment in lieu thereof.

Venkataramaniah v The Official Assignee. 19 M L J 283

12—Sale or mortgage of goods not in existence —Charge—Lien—Appropriation–Goods consigned to vendee-Attachment by consignor's decree-holder in the course of transit.

Plaintffs advanced money to defendant No. 1 under the agreement that he would cut and send timber to the plaintiffs, who would sell and appropriate the sale proceeds towards the discharge of a debt owing by defendant No. I. In pursuance of the said agreement, defendant No. 1 despatched some logs to plaintiffs, and while these were in the course of transit, defendant No. 2 attahed them in execution of a decree against defendant No. 1 and they were purchased by defendant No. 3:

Held, that the plaintiffs acquired a right to the timber as soon as it was out, and the timber being specifically appropriated for the satisfaction of

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Appropriation of payments-*Contd.*

plaintiff's debt, they had a valid charge created on it.

This charge is unlike the sort of lien mentioned in the Contract Act, which an unpaid vendor, a bailee, a factor, a banker, an agent, a pawnee or finder of goods, has on the goods in his possession.

The question whether there has been appropriation of goods by their owner for the benefit of a particular creditor is one of fact, and the law does not require any particular mode or form of appropriation.

If there has been a specific appropriation, the consignor, if he is still in possession of the goods will hold them merely as trustee for the consignee.

A contract to sell or mortgage goods, answering a particular description, which are to come into existence in the future, passes property in such goods when they actually come into existence. 21 Bom 287 ; 10 H L Cas 191; 33 L J Ch 193; 9 Jur (N S) 213; 7 L T 172; 11 W R 171; 13 App Cas 523; 58 L J Q B 75; 60 L T 162; 37 W R 513; 19 Ch D 342; 51 L J Ch 14; 45 L T 567; 30 W R 70; 16 Mad 429 at p 434: 31 Cal 667 at p 675; 4 Camp 31; 2 Bing 20; 4 M & W 775 H & H 480; 8 L J Ex 137 referred to. **Maradugula Venkata Ratnam V Kottayya Ramanna 9 Ind Cas 255=9 M L T 276=21 M L J 413.**

13.—S.59—Appropriation of payment—Right to sue—Debt of a third person—Creditor refusing to appropriate as asked—Practice and Procedure.

The plaintiffs sued to recover a sum of money paid by them to defendants on behalf of and in satisfaction of a debt due by S to defendants. The defendants refused to credit the payment towards S's debt, appropriated it to an alleged debt due by the plaintiff and recovered from S the sum owed by him. The defendants contended that the plaintiff had no cause of action against them and if any one was entitled to sue it was S, in order to enforce the recognition of the discharge of the debt due by the plaintiff:—

Held, that the defendants having refused to accept the payment made as in satisfaction of S's debt, and having failed to prove that they were entitled to retain the money on any other ground, were bound to restore it to the plaintiff.

Narayan v Vishnu. 2 Bom L R 706.

Appropriation of payments-*Contd.*

14.—Law before Act IX of 1872.

A creditor entitled to appropriate payments made by a debtor to any account which he might have against him unless the debtor at the time of payment stipulated that the payment should be credited to a particular account in which case the creditor would not be entitled to disregard the request.

Gopal Das v Wuryam Singh. 101 P R 1867.

15—Current accounts—Money paid by debtor to creditor without any stipulation—Creditor entitled to credit it to barred items.—

Held, that money paid to a creditor in a case of current account without any specific appropriation by the debtor might be appropriated as the creditor thought fit and the creditor might apply in payment of items barred by limitation. If the amount paid was only sufficient for part payment of a debt or item, the rest of the debt was not revived without the assent of the debtor.

Gyan Chand v Kurm Bhaggun. 75 P R 1870.

16—Contract Act, 1872, ss. 59, 60, 61—Circumstances indicating apropriation to a particular debt.

Certain persons engaged in the manufacture of indigo, and requiring money for such manufacture, hypothecated to A and B an Indigo factory and its appurtenances together with the Indigo crop of the following season, and the deed provided that the mortgage-money should be paid on demand with certain interest, and that all payments made by the mortgagors should go first towards satisfaction of the interest,and the balance cerdited to principal. The mortgage transaction was throughout conducted by A alone, but both mortgagees contributed half the amount advanced. It was agreed that the proceeds of the crop hypothecated should be sent to A. and transmitted by him as agent for the mortgagors to Calcutta for sale in the market; and it appeared that at the time of the advance one main object of A was to make it certain that the indigo should be transmitted to Calcutta through him,and that the deed was executed for the purpose of preventing the mortgagors from disposing of the crop in any other way. The indigo was accordingly sent to Calcutta through A, and its price was from time to mite sent to and received by him from the broker. Between the dates of the mortgage and the first of such receipts, A made, on his own account, further advances to the mortgagors: and the arrangement was that as against these advances the cash received by him was to be applied. In a suit by A and B to enforce the mortgage, the defendants having pleaded payment: *Held* that A's receipt and payment to himself of the moneys received by him as the price of the indigo must be regarded as payments by the mortgagors to him on account both of the mortgage-debt and of the subsequent advances; and that his power to appropriate such payments to either the former or the latter debt was not affected by the circumstance that he had associated B with him in advancing the mortgage-money, or that he alone had acted as the mortgagor's agent in receiving the price of the indigo. *Held* that the terms of the mortgage-deed and the circumstances in which it was executed, the relations of the parties, the fact that the very thing which was to be given as part security for the debt, the mode in which the indigo was consigned to him for transmission to Calcutta and the fact that at the time when its price was realised it had passed away into the hands of purchasers, and that A could not have supposed that he had any charge or lien upon it in their hands, constituted circumstances within the meaning of s. 60 of the Contract Act, 1872,indicating that the payments were to be applied to the mortgage-debt; and the option of appropriation therefore did not open up to the mortgagees as it might otherwise have done. 5 All 27; 10 All 733 Ref.

Bansidhar v Akhay Ram A W N 1890, 6.

17—Intention; of the parties—Effect of payment towards debt by giving half notes—Question whether any trust was created or appropriation made—Contract Act.

A and Co, in order to pay a debt due to R sent him half-notes on the 16th October 1906. The question was whether the property in the half-notes had passed to R and as to whether any trust was created or specific appropriation made.

Held, (*per* Sir Arnold White, C J.) that the property in the half-notes had not passed. There had been no appropriation of a specific amount to the payment of the particular debt. The only reason for sending the half notes was that it suited the convenience of the Company and R. The,

Appropriation of payments-*Contd.*

setting aside of the notes and sending the half-notes indicated an intention to pass the property but not an intention to pass it *ed instanti* and so there was no virtual transfer.

Per Miller J. (*dissentiente*): It was the intention of the debtor in sending the half notes, to set apart for the creditor specific notes and to pay by means of them and if this intention was communicated to the creditor, then there was a specific appropriation upon which the creditor can rely. The only difficulty is to decide upon the intention as evidenced by the circumstances and the acts of the parties. In the present case, the representations of the Company amount to a "pledge" that they would remit the second halves of the particular notes, and that will give the creditor a right in equity to call for a delivery of the notes or paymens in lieu thereof.

29 L J Q B 172; 2 Camp 37; Foll; 26 L J Ch 710; 5 Ch D 786, Ref. **Koti Venkataramaniah v The Official Assignee. 19 M L J 283= 5 M L T 82=2 Ind Cas 611.**

18—Right to appropriate payments in respect of unlawful transactions.

The question whether a creditor is entitled to appropriate payment made in respect of unlawful transactions, considered, (1905) 1 K B 715 Dist. **M P Ethirajula Naidu v T Lakshminarasimbham Chetty 4 M L T 326.**

19—Appropriation of debt—Payment of half notes—Whether operates as a virtual transfer of property in the notes—Intention of parties-Trust—Contract Act (IX of 1872),

A and Co., Bankers, sent to the Appellant their customer, who had lodged some money with them in fixed deposit, at his request, halves of currency notes. promising to send the other halves on acknowledgment, by appellant, of the prior halves. Before they could send the other halves. A and Co., became insolvent. The appellant sued them for the amount.

Held, (agreeing with White, C. J., and differing from Miller J.) that, by sending the first halves of the currency notes, the senders, did not become bailees or trustees for the creditor, so as to entitle the latter to hold the first halves of the notes as a kind of a security for payment of the other halves, and that the creditor was not entitled to insist on the other halves of the currency notes being sent to him.

Appropriation of payments-*Contd.*

Per Abdur Rahim, J.—*S.* 92, Contract Act, does not apply to the present case as that section occurs in the Chapter relating to sale of goods, and does not apply to money or currency notes, which are made legal tender by statute and are governed by different considerations. (29 L J Q B 172; 3 El and El 22; 6 Bur (N S) 977; 2 L T 373; 8 W R 561; 5 Ch D 786; 46 L J Ch 832; 36 L T 529, Ref 1 Bom L R 339 at p 341; 7 M H C R 233; 25 Bom 702, Ref. **Koti Vencatramiah v The Official Assignee of Madras. 5 Ind Cas 202= 33 Mad 196=8 M L T 316.**

20—Appropriation of payment—Payment into Court of money due under a bond bearing interest—Appropriation of such payments first to satisfaction of interest—Practice.

It appears to be a well-settled practice of the courts to appropriate payments made upon a bond first to the interest due thereon, and thereafter, if any balance remain, to the principal. 8 B L R 11 and 22 W R 525 ref to. **Maharaja of Banares v Har Narain Singh. 1905 A W N 167= 2 A L J 585.**

21—*Held*, before the passing of Act IX of 1872, that a creditor was entitled to appropriate payments made by a debtor to any account which he might have against him, unless the debtor at the time of payment stipulated that the payment should be credited to a particular account, in which case the creditor would not be entitled to disregard the request. P R 101 of 1867, Civil. Money paid to a creditor in a case of current accounts without any specific appropriation by the debtor, might be appropriated as the creditor thought fit; and the creditor might apply the money in payment of items barred by limitation. If the amount paid were only sufficient for part payment of a debt or item so barred, the rest of the debt was not revived without the assent of the debtor, P R 75 of 1870, Civil. If in the case of an account current no election as to the appropriation of a payment were made by either debtor or creditor, the Court would appropriate the payment to the discharge of the first item on the debit side, though that item were barred by limitation. **Noubut v Khubee. P R 27 of 1872.**

Appropriation of payments-*Contd.*

(3) Appropriation towards interest.

22—Creditor and debtor—Payments appropriated towards interest—Absence of evidence of appropriation by creditor at the time—Creditor's right.

Even in the absence of evidence that any appropriation was made by the creditor at the times when the various sums were paid by the debtor, the creditor can be allowed to make out his account on the basis that, when each sum was paid, portion of it was appropriated towards the interest then due. 8 B. L. R. 110 Fol.

Yaranasi Seethamma v Sreshtalur Vijiaraghava Charyulu. 7 M L T 199 = 5 Ind Cas 940

23—Interest. This was a suit on a bond, dated the 28th June, 1878. The suit having been brought more than three years after the date of the bond, would clearly have been barred by time but for an admitted payment of Rs. 50 made on the 21st July, 1878, by the defendant obligor. The plaintiff alleged that the money had been paid to him as interest on the bond debt and he was therefore entitled to compute the period of limitation from that date under s. 20 of Act No. XV of 1877. The defendant on the other hand contended that the sum had been paid on account of the principal of the bond-debt, and s. 20 therefore could not apply. The fact of the payment of this sum was endorsed on the bond, but it was not stated that the payment was made on account of interest. *Held* that under s. 60 of the Indian Contract Act the creditor had a discretion to appropriate this payment either to the principal or the interest of his debt. It was for the debtor to show that he had acted in such a way in respect of this payment as to limit this discretion of his creditor. There being no such evidence the suit was not barred by time. **Nirpat v Shadi. 1 W N 119.**

(4) Application of rules regarding appropriation of payments to realisations of land revenue.

24—Ss. 59, 60-Land revenue, realisation of-Indian Contract Act (IX of 1872), sections 59 and 60. Ss. 59 and 60 of the Indian Contract Act apply to transactions in relation to realisation of land revenue (10 C. W. N. 948. 33 Cal 1193 Diss) **Jogendra Mohan Sen v Uma Nath Guha. 12 C W N 646 = 35 Cal 636 = 8 C L J 41**

(5) Appropriation by creditor of payments towards interest.

25—S. 20—Appropriation by creditor of payment towards interest—Interest not paid as such—Money paid found by Court to have been paid as interest. A mortgage bond was executed in 1884. Under the terms of the bond any money paid was to be applied first in payment of interest and next in payment of principal. The debtor paid several sums from time to time from 1887 to 1899. A suit for sale was instituted in 1902 and decreed. The mortgaged property being insufficient to discharge the mortgage, an application was filed by the decree-holder for a decree under S. 90 of the Transfer of Property Act. *Held*, that having regard to the terms of the bond and finding of the Court the payments were appropriated on account of interest, it might be safely assumed that payments were made on account of interest as such, and that the application for a simple money decree was not barred by limitation. 6 Bom. 103; 3 Bom. 198; 4 All 512 Dist.

Gopi Nath Singh v, Hardeo Singh. 6 A L J 207 = 31 All 285 = 1 Ind Cas 137.

(6) Appropriation of goods unascertained at the time of Contract of sale.

26—Ss. 77, 83, 95 and 178 - Sale of unascertained goods—Appropriation, effect of—Non-payment for goods—Conversion of mate's receipts into bills of lading—Pledge of bills of lading—Conditional appropriation. Where goods, which were agreed to be purchased were not ascertained at the time of the contract, but were subsequently appropriated by the sellers, for the purposes of the contract, and were put alongside the exporting vessel and shipped at the request of the buyers, who subsequently obtained bills of lading exchange for the mate's receipts, the goods must be taken to have been ascertained and, under the conjoint operation of Ss. 77 and 83, Contract, Act, the sale must be taken to have been complete involving the transfer of the ownership of the goods from the seller to the buyer. One of the terms of the contract provided:—" Terms of pay-

Appropriation of payments-*Contd*

ment Cash on delivery of mate's or dock receipts as provided in Cls. 8, 9 and 11. Should the said receipts of warrants be retained by the buyers for examination they shall remain the property of the sellers and be held by the buyers in trust for and at the absolute disposal of the sellers, until payment has been made in cash in terms of this contract, and if payment be made by cheque, until such cheque has been cashed " *Held*, that this clause did not reserve to the sellers the right of disposing of the goods, nor did it render the appropriation conditional on payment of the price. The property in the goods having passed to the buyers they were entitled to sell the goods or pledge them and, therefore, the pledge by the buyers of the bills of lading to a Bank, who acted *bona fide* in the matter, and without any notice of the above mentioned contract between the buyers and the sellers, was a perfectly valid pledge, and did not fall within the proviso to Sec. 178 of the Act.

Per Geidt, J.—The object of the above clause was to enable the sellers to enforce their lien even though the property in the goods had passed to the buyers. **Juggernath Augurwallah v E. A. Smith. 34 Cal 173**

(7) Appropriation of payment towards interest without specification by debtor not saving limitation.

27—S. 20—Payment of interest as such—Appropriation by creditor of payment to-wards interest without specification by debtor does not save limitation-Indian Contract Act (IX of 1872) S. 25 (3)—Promise to pay barred debt—Fresh cause of action.—Under section 20 of the Limitation Act, the payment of interest will save limitation when the payment is made as such, that is to say, the debtor has paid the amount with the intention that it should be paid towards interest and there must be something to indicate that intention The mere appropriation by the creditor of these payments to interest is not such an indication.

A letter containing a promise to pay a time barred debt within one month is an agreement such as is contemplated by S. 25, cl, (3) Contract Act, and gives a fresh cause of action. **Mohammad Abdullah Khan v Bank Instalment Co. Ltd. in Liquidation. 6 A L J 611=31 All 495=2 Ind Cas 379.**

Appropriation of payments-*Concld.*

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Arbitration.

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1. ARBITRATION UNDER SPECIAL ACTS AND REGULATION.

(a) Act VI of 1877.

(1) Adjustment of suit.

1.—Agreement to refer made out of Court during pendency of suit—Act X of 1877, Sections 375, 523—Dismissal of suit as barred by such agreement—Act I of 1877, Section 21—Adjustment of suit—Nature of the adjustment contemplated by the Civil Procedure Code—Equitable bar—Agreement to forego further legal proceedings.—

During the pendency of the present suit, the parties referred the subject matter of the claim to the decision of two arbitrators by an agreement which they executed out of Court. No application was made to make this reference a rule of Court, nor was any proceeding taken by either party to cause the agreement to be filed under Section 523 of the Civil Procedure Code, but the defendant at the next hearing of the suit pleaded the agreement as a bar to its further maintenance. The plaintiff denied the agreement, urging that he had signed it under a misconception of its purport, but the Courts, finding that both parties had deliberately entered into the reference, dismissed the suit, leaving either party to take such action as he might be advised under Section 523 of the Code.

Held, that the grounds upon which the Courts below seemed to have proceeded were not sustainable; that every Civil Court must be taken to have power to proceed to a final adjudication of a suit of a Civil nature which had once been properly instituted before it, unless there was something in the Code of Civil Procedure or in some other Act to oust the jurisdiction of the Court; and that the only bar which a reference to arbitration, which has not been made a rule of Court, can be said to create is that provided for in the last clause of Section 21 of the Spcific Relief Act, which was inapplicable to the present case, as the reference in question was made during the pendency and not before the institution of the suit.

Held further, that a mere reference to arbitration in which there was no distinct agreement that the pending suit should be abandoned, could not be regarded as an adjustment within meaning of Section 375 of the Code, more especially when the very reference itself was denied by one of the parties to it. The adjustment contemplated in that section is one that would enable the Court then and there to dispose of the suit finally, which course would be obviously impracticable where there was a mere reference to arbitration, which left the dispute in practically the same unsettled position as before: nor does the same section contemplate that the Court should be called upon to make an inquiry into

Arbitration-*Contd.*

1 Arbitration under special Acts and Regulation—*Contd.*

whether the plaintiff's claim had or had not been adjusted.

Held further, that the defendant could not successfully plead in the present case that there was an equitable bar to the continuance of the suit on the ground that the parties had agreed to forego further legal proceedings, there being no express agreement to that effect and no such agreement being necessarily implied from the mere appointment of arbitrators, as it would be quite consistent with such an appointment that the parties should still mean the suit to remain on the pending file, with the view of the result of the arbitration being finally embodied in the decree.

Budha v Haku.
P R 130 of 1882.

Notes.—Fol 50 P R 1891.

(2) Minor not properly represented in suit.

2—Where a suit was brought under s. 525 against the defendant described as a minor represented by his mother, his guardian appointed by the District Court under Act XX of 1864 and the plaintiff never applied under section 456 for the appointment of a guardian for the suit and made no such affidavit as that section requires and the Court made no enquiry or order appointing a guardian under section 443, and at the hearing the mother shewed no cause and the Court ordered the award to be filed and passed a decree thereon, *held* that the Court had acted illegally and with material irregularity in departing from the proper procedure and failing to apply its safeguards and that it had no jurisdiction to make any decree against the minor who was not properly represented in the suit. Ranmalsingji v. Jeysing.
1891 P J 206

(3) No decree could be based on compromise presented by umpire.

3—Retirement of some of the arbitrators before expiry of time fixed for filing award—Award presented by umpire.—

An agreement to refer to arbitration was filed in Court and in accordance therewith two arbitrators were appointed on each side and an umpire. The Court made an order fixing a date within which the award was to be filed but, before the expiry of the period fixed, two of the arbitrators retired Subsequent to their retirement their umpire forwarded a document to the Court which was of the nature of a compromise and which he recommended should become the subject of a decree. *Held*—that no decree could be based upon such a document, inasmuch as it was not an award, nor was there any proceeding before the Court in which the compromise presented by the umpire could be filed under s. 375 C. P. C. Niaz Ahmad v Abdul Hamid.
1904 A W N 49=1 A L J 29.

(4) S. 21 of Specific R. Act applyiug to agreement before suit as well as to one made during pendency of suit to.

4—Specific Relief Act S. 21—Agreement to refer matters in dispute to arbitration—Applicability of to pending suits.

In a suit for pre-emption, after service of summons on the defendants the parties agreed to refer the matters in dispute between them to arbitration and an arbitration agreement was drawn up and signed. *Held* the agreement was a bar to the suit. S. 21 of the Specific Relief Act applies to an agreement before suit, as well as to one made during pendency of a suit. It would be most inconvenient if two simultaneous proceedings in respect of disputes were allowed, namely, arbitration proceedings and proceedings before a Court of Justice. Sheo Dat v Sheo Shankar Sing. 27 All 53=
1904 A W N 9 s. c. on appeal.
1904 A W N 160.

(5) Minor member bound by reference made by Karta in a joint Hindu family.

5—The Second Schelule r 20 (1882 S. 525)—in a Hindu Mitakshara Joint family, but when reference to arbitration is secured by misrepresentation and undue influence the minor affected can contest the validity of award in an application for filing the award and cannot be driven to a regular suit. 25 Cal 757; 17 All 21; Fol 27 Bom 287 Ref. Jai Nath Jha v. Kamala Nath Jha.
7 Ind Cas 31.

Arbitration-*Contd.*

1 Arbitration under special Acts and Regulation—*Contd.*

(6) Disposal by Small Cause Court Judge of case referred to arbitrators.

6.—Civil Procedure Code (Act X of 1877), S. 508, 521 and 622–Disposal by Court of case referred to arbitrators.

Where a Small Cause Court Judge, in contravention of the provisions of the Code of Civil Procedure, proceeded to dispose of a suit which had been referred to arbitrators, by taking evidence himself upon the merits and thereafter proceeding to judgment, the Chief Court set aside the decree, under Sec. 622, Act X of 1877, and remitted the case back for disposal under Chapter X of the Code of Civil Procedure.

Dula v Daudzai. **P R 80 of 1879.**

(7) Application of Specific Relief Act, to arbitration made out of Court.

7.—Arbitration—Reference to made out of Court during pendency of suit—Specific Relief Act, 1877—Section 21–Effect of.

Held, that the last clause of Section 21, Specific Relief Act, is inapplicable to a case in which a reference to arbitration is made out of Court during the pendency, and not before the institution of a suit.

P R 130 of 1882, followed. **Fakir v Jaimal.** **50 P R 1891.**

(8) Appointment of arbitrators before new trial granted.

8.—Small Cause Court—Appointment of arbitrators before new trial granted-Act IV of 1866, s. 16.

Plaintiff's suit was dismissed by the Court of Small Causes; and upon his application before a new trial was granted, the Court appointed arbitors. *Held*, that such appointment was beyond the jurisdiction of the Court. **Kheema v Kunhya.** **P R 19 of 1869.**

(9) Effect of s 28, Contract Act on agreement to refer disputed matters to arbitration.

9.—Act IX of 1872, Sec 28—Act VIII of 1859 Sec. 326.

Plaintiff sued in the Small Cause Court for Rs. 431, money received by defendant for plaintiff's use. Before suit was brought, the parties had agreed in writing to refer the matter of disputed accounts between them to arbitration: the agreement was filed under Section 326, Civil Procedure Code, in the District Court and an order of reference was made. The arbitrators filed no award, and about two months after the order of reference was made, the Court superseded the reference recording—"Adjournments have already been granted more than once, and the case seems about as far removed from decision as at the outset. Section 518, Civil Procedure Code, seems to apply that the Court has power to issue an order superseding the arbitration and recalling the suit. I do that now, directing parties to bear their own costs." Nothing further was done in the District Court, but afterwards the plaintiff sued in the Small Cause Court. *Held*, that the agreement to refer did not bar the plaintiff's suit under Section 28 of the Indian Contract Act; and that the order of the District Court must be taken as equivalent to a rejection of the petition to file the agreement: and that the plaintiff's suit in the Small Cause Court would, therefore, lie. **Raj Bhag Singh v Assa Singh.** **P R 37 of 1876.**

(10) Effect of O. 32, r. 7 C P C on decree in terms of award.

10.—O. 32, r. 7 (1882 S. 462)—Compromise—Minor—Leave of Court—Award—Decree upon award.

Section 462 of the Civil Procedure Code contemplates the existence of a guardian and a pending litigation. Hence, the section has no application where the mother of a minor agrees, on behalf of the minor, to an award, and a decree is afterwards permitted to be passed in terms of the award. **Vithaldas v Dattaram.** **3 Bom L R 887=26 Bom 298.**

Notes:—Ref: 27 Bom 287.

(11) Reference to arbitration invalid for want of leave of Court under C P C O. 32, r. 7.

11.—O 32, r 7. O. 23 r. 3: Sch. II (1882—Ss. 462, 475, 525)—Arbitration pending suit for partition, in which there are minor parties.

Where parties to a partition suit referred the matter of the suit to arbitration pending the suit

Arbitration-*Contd.*

1 Arbitration under special Acts and Regulation—*Contd.*

and an award is passed· *Held*, that the agreement refer ro arbitration was not lawfully entered into, as there were minors in the suit, and leave of the Court had not been got under S. 462 of C. P. C, before the submission or after the award. The adjustment was hence not binding on the minors, nor, having regard to the nature of the suit, on the majors. *Semble*: Assuming the award is the completion of an agreement lawfully entered into by the parties, and that such agreement, *plus* the award, affected the right of the parties pending the suit, it could only do so as an agreement adjusting the suit; and as such could be recorded and acted upon under S. 375, C. P. C. *Quære*:—Whether an award filed under S. 525, C. P. C., and got under similar circumstances, would be invalid.

Lakshmana Chettiar v Chinnathambi Chetti 24 Mad 326.

Notes:—Ref: 3 Bom L R 431; 565; 26 Bom 76; 109; 726; 10 Bom L R 366; 33 Bom 69. Not Fol: 8 C L J 294.

(12) Land Acquisition Act—Act VI of 1857.

12.—Appointment of third arbitrator—Non-attendance of umpire—Waiver.

Where one of two arbitrators, appointed under s. 10 of Act VI of 1857, by letter and also verbally authorized his co-arbitrator to appoint a certain person as third arbitrator, and the co-arbitrator wrote to the proposed third arbitrator informing him that he had been so appointed,—*Semble*—That there was a good appointment "by writing" of the third arbitrator within the meaning of s. 12 of Act VI of 1857. Where a third arbitrator appointed under s. 12 of Act VI of 1857 considering that his services were required merely as an umpire, though he had due notice of the first meeting, neglected to attend that or any subsequent meeting of the arbitrators and took no part in the making of the award,—It was held that such non-attendance of the third arbitrator did not render the award a nullity, but was only a ground for setting it aside on the ground of irregularity. Where an officer, appointed under Act VI of 1857 to conduct arbitration proceedings on behalf of Government, attended the first two meetings of the arbitrators and did not object to two of the arbitrators proceeding with the reference in the absence of the third arbitrator, and did not attend the subsequent meeting of the arbitrators,—It was held that the Government had thereby waived their right to insist on the non-attendance of the third arbitrator as a ground for setting aside the award.

Ardesar Hormasji Wadia v. The Secretary of State for India in Council. 9 B H C R 177.

Notes:—Fol; 1 Bom L R 261; 10 Bom 381. Ref: 12 B H C R 250; 21 Bom 424 F B.

13.—Land acquisition—Judgments of arbitrators separately given.

The separately recorded opinions, on different dates, of arbitrators (appointed, under Act VI of 1857, to assess the value of land taken for a public purpose) who have never met or consulted together do not constitute an award under the Act. An award to be good, must contain the joint judgment of the arbitrators up to the latest period previous to the execution of the award.

Fatma Bibee v Collector of Surat. 8 B H C R A C 79.

Notes:—Ref: 9 B H C R 177.

14.—S. 32—Waiver of irregularity—Well in mill compound—Manufactory.

By a Government notification of the 3rd of June 1863, published in the Gazette, it was declared, under the provisions of Act VI of 1857, that a certain strip of land passing by the mill of the defendants was required for a public purpose,—the Bombay, Baroda and Central India Railway,—a plan of which land was to be seen in the Collector's office. On the 4th of November following, the secretary of the defendants' company received a notice signed by the Collector, requiring the owner of the milll to call at the Collector's office to signify his acceptance or otherwise of the compensation for the land required. The secretary went to the Collector's office, and there saw a plan, from which it appeared that an adjoining well from which the engine of the mill was supplied with water was intended to be taken, but no compensation for the well or land required was then agreed upon. On the 28th November a notice was signed by the Collector was served on the defendants, stating that he had appointed an arbitrator on behalf of Government, and requiring the defendants to appoint

Arbitration-*Contd.*

1 Arbitration under special Acts and Regulation—*Contd.*

an arbitrator also; the defendants in reply stated that they had already appointed an arbitrator. *Held*, that the defendants had, by appointing their arbitrator to determine the compensation for the land required, waived any irregularity in the previous proceedings, and precluded themselves from claiming to have the whole manufactory taken under s. 32, Act VI of 1857, though no proceedings were taken in the arbitration for merely twelve months subsequently, and the defendants had shortly before such proceedings made such a claim. **Kharshedji Nasarvanji v Secretary of State for India. 5 B H C R O R 97.**

Notes;—Ref: 14 Cal 423.

(b) Act X of 1859.

(1) Suit under.

15—*Quære*—Whether Act X of 1859 empowered a Judge to refer a case to arbitration.

Gazee v Hameed Buksh. 16 W R 160.

Notes.—Diss: 27 Cal 61.

16.—Arbitration in suits under Act X of 1859—Procedure.

Irrespective of the Civil Procedure Code, persons are at liberty to refer any matter in dispute to arbitration, and any award made under such circumstances may be enforced.

There is no reason why the principle should not be applied to a suit under Act X of 1859.

Khemna Gowala v Budoloo Khan. 6 Cal 251=7 C L R 92.

(c) ACT XX OF 1863.

(1) S. 16.

17.—Suit for dismissing numbers of Devastanam Committee—Power of Court to refer the matter to Arbitrators-Legality of award.

A suit was brought to dismiss members of Devastanam Committee & to get damages, it was referred to Arbitrators under s. 16 of Act XX of 1863 who dismissed the members and awarded a portion of damages claimed with interest. *Held* that the Court was right in referring the matter to arbitrators who had also power to dismiss the members and grant damages provided the amount including the interest does not exceed the amount claimed in the plaint. **Perumal Naik v Saminatha Pillai. 19 Mad 498**

Arbitration-*Contd.*

1 Arbitration under special Acts and Regulation—*Contd.*

Notes:—Fol: 12 M L J 431. Ref: 11 M L J 337.

17A—S. 14, 16—Compulsory—Arbitration—Scheme.

Under s. 16 of the Religious Endowments Act, the District Judge has no power to refer the whole suit for decision to an arbitrator, though the Judge may refer any matter in difference in the suit for decision by an arbitrator. The District Judge cannot frame a scheme in a suit under S.14 of the Act. **Veraraghava Perumalayya v Sitaramayya. 12 M L J 40= 26 Mad 361.**

18.—Award—Decision by majority without such provisions in the award,

Plaintiff brought this suit to obtain a decree dismissing defendants, committee and manager of a certain pagoda, from their offices on the ground of malversation. The Court made an order expressed to be by consent of the parties concerned, and in exercise of the Court's discretionary power under s. 16 of Act XX of 1863, referring the matters in difference to three arbitrators for final determination, the said arbitrators "to make their award in writting and submit the same" within a certain period. Each arbitrator delivered a separate award in writing, two arbitrators finding for the plaintiff. The Civil Judge made a decree in accordance with the award of the majority of the arbitrators. The first defendant appealed on the grounds (1) that he had not consented to the arbitration and (2) that there being no provision in the order of reference to the effect that the finding of a majority of the arbitrators should prevail, there was no valid award. *Held* that in this case the order of the Judge was valid without the assent of the persons to be bound; that he might, when he made the order, have inserted as a provision that the decision of the majority should be that of the body, and that there was no reason why his ratification of that mode of decision, wholly within his discretion, should not be equivalent to a previous command. **Immedy Kanuga Ramaya Gaundan v Ramaswami Ambalam. 7 M H C 173.**

Arbitration-*Contd*

1 Arbitration under special Acts and Regulation—*Contd.*

19.—Upon the fact found in the case and embodied in the decree by the arbitrators Act XX of 1863 was not applicable, and the compulsory reference to arbitrator and the decree made thereon were illegal and void. **Protapchandra Misser v Brojonath Misser. 19 Cal 275.**

(d) BOM. REGULATION VII OF (1827)

(1) Award validity of.

20.—Where an award was held to be bad on the ground that the deed of submission to arbitration did not contain all the conditions required by the law (Bombay Regulation VII of 1827), as it made no provision as to the "time within which the award was to be given,"—*Held* that the parol consent of the parties to the deed of submission before the arbitrator to waive such omission will not cure the defect. **Nusserwanjee Pestonjee v Mynoodeen Khan. 6 Moore's I A 134.**

Notes.—*Fol:* 10 W R 206. *Dist:* 24 Mad 364; 23 Bom 629; 1 Bom L R 261; 27 Cal 61; 4 A L J 691; 30 All 32; 33 Cal 352 F B; (1907) W N 273 *Ref:* 3 W R 147; 11 C W N 1011 F B; 6 C L J 320 F B; 19 W R 8; 28 Bom 601; 30 Bom 275=7 Bom L R 697; 33 Cal 487=3 C L J 293; 33 Cal 68 F B=9 C W N 1046=2 C L J 241, 35 Cal 61 F B.

(e) DEKKAN AGRICULTURIST RELIEF ACT XVII OF 1879.

(1) S. 47.

21.—The Dekkhan Agriculturists' Relief Act does not interfere with the filing of an award made in a private arbitration under section 525 of the Civil Procedure Code. **Gangadhar Sakharam v Mahadu Santaji. P J (1883) 332=8 Bom 20.**

Notes.—*Fol:* 21 Bom 63.

22.—Arbitration-Dekkhan Agriculturists' Relief Act XVII of 1879, Secs, 3, 12, 47 and 74—Arbitration—Award—Civil Procedure Code Act XIV of 1882, Secs. 521, 522—A private award to which agriculturist-debtors are parties—Filing of the award in Court.

A Civil Court can file a private award to which agriculturist debtors are parties without adjusting the accounts under the Dekhan Agriculturists' Relief Act XVII of 1879 Gangadhar v Mahadu followed. **Mohan v Tukaram. 21 Bom 63=1895 P J 435=1895 P J 63.**

Arbitration-*Contd.*

1 Arbitration under special Acts and Regulation—*Contd.*

(f) N W. P. Rent Act (XVIII of 1873)

23-25.—Under the general law parties to suits may, if they are so minded, before issue joined, refer the matters in dispute between them to arbitration, and after issue joined, with the leave of the Court.

Act XVIII of 1873, does not prohibit the parties to the suits mentioned therein from referring the matters in dispute between them in such suits to arbitration. Where therefore the parties to a suit under that Act agreed to refer the matters in dispute between them to arbitration, after issues had been framed and evidence recorded, and applied to the Court to sanction such reference, held (Stuart, C. J., dissenting) that the Court was competent to grant such sanction, and on receiving the award to act on it. **Goshain Girdhariji v Durga Devi. 2 All 119.**

(g) N. W. P. Land Revenue Act XIX of 1873 Ss. 221 & 222-231.

26.—Civil Procedure Code, s. 521—Award delivered after expiration of time allowed by Court.

The principle of the ruling of the Privy Council in 13 All 300: L R. 18 I A 51, is applicable also to arbitrations under s. 221 of Act No. XIX of 1873. **Gauri Shankar v Babban Lal. 14 All 347.**

27.—The provisions of s. 222 to 231 of Act No XIX of 1873, contemplate that the award therein dealt with should be an award made by more arbitrators than one. When therefore a Settlement Officer had delivered a decision under s. 230 upon what purported to be an award by one arbitrator only, it was *held* that such so-called award and the decision thereon of the Settlement Officer would not prevent the matters dealt with therein being re-opened in a Civil suit. W N 1886, p. 180 distinguished. **Parsidh Rai v Rajinain Rai. 18 All 172=16 W N 14.**

Arbitration-*Contd.*

1 Arbitration under special Acts and Regulation—*Contd.*

(h) Power of Court to refer question to arbitrators.

28—Indian Succession Act (IX of 1865), Sections 234, 261—Application by one of two executors for revocation of grant of probate—Court referring question to arbitrators.

Semble.—Though under Section 261 of the Indian Succession Act, 1865, the proceedings in contentious cases are to take, as nearly as may be, *the form of a regular suit* according to the provisions of the Civil Procedure Code, the Court before whom an application under Section 234 of the Act is instituted has no jurisdiction to delegate the decision of the question raised to arbitrators, even with the consent of the parties.

Campbell v Simpson. 72 P R 1894.

(i) Oudh estates Act—

Award made by financial Commissioner in dispute regarding maintenance.

29-30.—Made by Financial Commissioner in dispute regarding maintenance—Rules of the British Indian Association—Act 1 of 1869, s. 33—

Against SS, a Taiukdar, A and S put in claims to be entitled to shares in the estate. Their claims were dismissed by the Financial Commissioner, Mr. Davies, on the 27th August 1867 but he advised them to accept any maintenance awarded to them by the Committee of Talukdars. Subsequently on the 9th January 1869 the Financial Commissioner made the following award in respect of their claims:—"The sharers in compliance with Mr. Davies' order have applied to the Talukdars' Committee. The case has now come to me for disposal, not judicially but as supervisor of the Talukdars' proceedings. A, who is childless, will receive for his life a two-annas share in the estate. S and his heirs will receive in perpetuity a three-annas share in the same estate. On the death of A his share will be divided equally, one-anna will revert to SS and his heirs and successors, and one-anna will go to S and his successors." A died and one-anna accordingly went to S making his share up to four-annas and one-anna reverted to SS. S was put in possession of land having a gross rental equivalent to the profits of a four-annas share. The plaintiff, the son of SS, sued the defendants, the descendants of S alleging that the award of the 9th January 1869 was in the nature of an award for maintenance and must be read subject to the rules of the British Indian Association framed in 1867 and that S having died, he was entitled under those rules to 25 per cent. of the gross rental from the first generation of his heirs as rent payable by the defendants to himself. The defence set up was that the Financial Commissioner was acting purely as an arbitrator and not as in any way connected with the British Indian Association and that the rules of the British Indian Association could not be read into that award the effect of which was to confer a share in absolute proprietary right on S and his heirs. *Held*, that the Financial Commissioner when making his award of 9th January 1869 was acting as a private gentleman and in not any official capacity and that his award should not be treated as an award made by the British Indian Association or read subject to the rules of that Associat on. **Ganga Bakhsh v. Dalip Singh. 7 0 C 218.**

(j) Regulation VII of 1822 setting aside award of arbitration.

31.—*Held* that an award of arbitration under section 33, Regulation VII of 1822, cannot be set aside by the Courts of Judicature. **Furzand Ali v Ahmed Hossein. 1 Agra Rep, A C 267**

(k) Punjab Land Revenue Act (1887) S. 158, suit to set aside award of arbitrators appointed by Revenue Officer in partition proceedings.

32—Suit to set aside award of arbitrators appointed by Revenue Officer in partition proceedings—Allegation of fraud, but no dispute as to title.

Plaintiffs sued to set eside an award of arbitrators appointed by a Revenue Officer, under Chapter X of the Punjab Land Revenue Act, 1887 in a dispute between the parties about partition of land. No question as to title was raised, but plaintiffs sued on the ground of fraud inasmuch as they had not been given the land which had been promised to them.

Held, that the suit would not lie, plaintiffs' only course being to press their objections before the Revenue Officer, and thereafter appeal to the superior Revenue authority. **Arjan Singh v Sochet Singh, 52 P R 1898.**

Arbitration-*Contd.*

(2) REFERENCE OR SUBMISSION TO ARBITRATION.

(1) Power of Court to refer.

33.—Reference by Court acting under s. 566—Civil Procedure Code.

A Court of first instance to which issues have been remitted under s. 566, Code of Civil Procedure, by the appellate Court has only jurisdiction to try the issues remitted and is *functus officio* in other respects and cannot make a reference of the case of arbitration which is only within the jurisdiction of the appellate Court. 22 W R 207 referred to. **Nand Ram v Fakir Chand. 7 All 523=5 W N 139.**

Notes.—*Ap*: 12 Mad 113.

34.—C. P. C. O. 26. r 1 (1882—S.383) Arbitration—Reference of a case to an arbitrator—Powers of the Court to issue commission for examination of witnesses.

When a case is referred to arbitration, under S. 506 of the Civil Procedure Code, it is competent to the Court to issue, under S. 383 of the Code, a commission for the examination of witnesses. **Rabiabai v Rahimabai. 7 Bom L R 560.**

35.—Arbitration award—Reference by Tahsildar—*Ultra vires*—Hindu law—Mother's share—Right to inherit.

In a mutation case, the parties made an application to the Tahsildar, who was a Magistrate of second class, stating that they would be bound by the award of one P. The Tahsildar made a reference to arbitration. *Held* that the Tahsildar had no power to make the reference, and the award, not having been made on private reference, was *ultra vires*.

The share which a Hindu mother gets on partition between her sons is her *Stridhan*. **Mathura Prasad v Ganga Ram. 7 A L J 69= 5 Ind Cas 519.**

36.—Award—Agreement to refer to arbitration—Application to file such agreement—Power of Court where there is a denial to the execution of such agreement—Competency of Court to enquire into objection denying validity of a reference to arbitration—Appeal—Appeal on grounds other than the decree being in excess of, or not

Arbitration-*Contd.*

2 Reference or submission to Arbitration —*Contd.*

in accordance with the award—Civil Procedure Code, 1882, Sections 520, 521, 522, 523, and 525.

Held, by the Full Bench.

(i) That a Court is competent upon an application under Section 525, Civil Procedure Code, to file an award to enquire into and decide objections other than those specified in Sections 520 and 521 of the Code.

(ii) That Section 526 does not limit the enquiry allowed under Section 523. and that a Court is competent upon an application under that section to file the reference to arbitration in spite of defendant's denial of the agreement to refer;

(iii) That an appeal lies from an acceptance or rejection of an application under Section 525, Civil Procedure Code, when the award is illegal *ab initio*; and

(iv) That an order rejecting an application, under Section 523, Civil Procedure Code, is appealable.

(21 P R 1898, F B overruled. 74 P R 1894 F B; 1 All 156, 21 Cal 213, and 20 Bom 596 disapproved. 25 Cal 767. 134 P R 1888. 49 P R 1893, 17 All 21, 20 Mad 89, 25 Cal 141, 13 All 300, 8 All 548, '18 Mad 423, 22 Mad 299, 24 Cal 469, 27 Bom 357, 11 Cal 6: 4 P R 1882 cited.)

Jhangi Ram v Mussammat Budho Bai. 84 P R 1901.

37—Civil Procedure Code (Act XIV of 1882), Sections 508, 509, 512—Order of reference—Omission to pass such order —Fatal defect.

Held, that the omission of a Court which refers a case to arbitration to pass an order of reference such as is contemplated by Sections 508, 509 of the Civil Procedure Code, is fatal to the subsequent proceedings and in the absence of any such order there can be no legal award (P R 3 of 1883 cited. **Harchand Rai v. Chuttan Lal P R 35 of 1884**

38—Competency of Lower Appellate Court—Civ. Pro. Code, 1859, s. 113.

It was held (in accordance with the opinion of the Full Bench) that the lower appellate Court was competent to refer the matters in difference

Arbitration-*Contd.*

2 Reference or submission to Arbitration —*Contd.*

in the suit to arbitration, under the provisions of Act VIII of 1859, chapter VI. **Chiranji Lal v. Jamna Das, 7 N W P 243.**

39-40—The Second Schedule r. 3 (1882 Ss. 508, 520)—Second reference—Power of Court—Revision of award.

A reference was made to arbitration. The arbitrator examined the witnesses made an award after the death of one of the parties, and without bringing upon the record the name of his legal representatives. The Munsif "set aside the award and sent back the case to the arbitrators for decision" the legal representative of deceased party agreeing to the submission. *Held*, that the Munsif had no power to refer the case to a second arbitration as after setting aside the first award the power of the Munsif to refer was exhausted. Held further, that the Munsif could not remit the award under S. 520 as no objection to its legality was apparent on the face of it. (2 All 181; 27 Mad 112, Ref: 21 All 314).

Pachkauri Ram v. Nand Rai, 5 A L J 658 =A W N (1908). 228=30 All 505.

41—Religious Endowments Act—Ss. 14, 16—Removal of trustee—Reference to arbitrator under S. 16:—The District Judge has jurisdiction to refer to an arbitrator the question of the removal of a trustee arising in a suit, instituted under S 14 of the Religious Endowments Act. 19 Mad 498, foll. **Nambi Aiyangar v. Yajnarayana Somayajial, 12 M L J 431.**

Confirming 11 M L J 337.

42-43—Appeal—Decree on award—Award, illegality of—Decree, finality of:—

Where the reference to arbitration is illegal and there is an award, there is an appeal against the decree notwithstanding that it is in conformity with what purports to be an award.—

Subbarami Reddi v. Rajamannar Aiyangar, 12 M L J 396=26 Mad 47 also 9 C W N 873 also 33 Cal 498 under S. 525.

(2) Power of parties, to refer.

44—Civil Procedure Code, 1859, ss 312, 325—Mode of reference to arbitration.—

Ss. 312 and 325 of the Code of Civil Procedure (VIII of 1859) were enabling, and were not intended to be restrictive or exclusive. Parties who are *sui juris* are competent, before decree, to make

Arbitration-*Contd.*

2 Reference or submission to Arbitration —*Contd.*

any agreement as to the settlement of the suit. **Jogessur Banerjee v. Kulyanee Churn Deo, 24 W R 41.**

45—Reference to arbitration.—

To be bound by an award, the parties must voluntarily refer to arbitration: coercion of any sort on the part of the Court to induce consent vitiates the reference.—P R 28 of 1868.—The Court may recommend but cannot order, submission.—P R 52 of 1869.—The reference may be made on the verbal application of the parties in person.—**Natha Singh v. Jodha, P R 24 of 1873.**

46—The Second Schedule r. 1 (1881—S. 506)—Arbitration—Award-Appeal from decree based on an award—'All the parties to the suit'.

Held, that the words 'all the parties to a suit' in S. 506 of the Code of C. P. refer to the succeeding words of the same section 'any matter in difference between them in the suit' and would not necessarily include parties who never put in appearance in the Court, and between whom and any of the parties to the submission there was not in fact any matter in difference in the suit. 1887 A W N 215, ref. to. **Pitammal v. Sadik Ali, 1902 A W N 19=24 All 229.**

Notes:—Dist: 4 A L J 347; W N (1907), 147; 29 All 423. Ref 17 M L J 394, Fol: 7 A L J 807.

46A—Court to recommend, not to order.—

A Court has only power to recommend a reference to arbitration but cannot compel, the parties to adopt such a course. **Kazee Kasimoodeen v. Hajoodeen, 52 P R 1869.**

47—"All the parties"

Held, that a submission to arbitration by some of the parties only does not bind the others and the reference is invalid. **Deo Nandan v. Bhirgu Rai, 7 W N 215.**

(2A) Modes of reference to arbitration.

47A—S. 522—Arbitration—Reference—Award—Powers of arbitrators—Award—Decree.

The Code of Civil Procedure deals with arbitrations under three heads, (1) where the parties to a litigation desire to refer to arbitration any

Arbitration-*Contd.*

2 Reference or submission to Arbitration —*Contd.*

matter in difference between them in the suit. In this case all proceedings from first to last are under the supervision of the Court; (2) where parties having recourse to litigation agree to refer their differences to arbitration and it is desired that the agreement of reference should have the sanction of the Court. In that case all further proceedings are under the supervision of the Court; (3) where the agreement of reference is made and the arbitration itself takes place without the intervention of the Court and the assistance of the Court is only sought in order to give effect to the award. There is a difference between these three classes. In cases falling under head 1, the agreement to refer and the application to the Court founded upon it must have the concurrence of all parties concerned and the actual reference is the order of the Court. So, in this class, no question can arise as to the regularity of the proceedings up to that point. In cases falling under heads 2 and 3 proceedings described as a suit and registered as such must be taken in order to bring the matter—the agreement to refer or the award as the case may be—under the cognizance of the Court. There is or may be a litigious proceeding—cause may be shown against the application—and it would seem that the order made thereon is a decree within the meaning of that expression as defined in the Civil Procedure Code. **Ghulam Jilani v Muhammad 4 Bom L R 161.**

(2B) Power of Court to attach special conditions.

47*B* — Condition as to payment of costs — Legality of.—

The Court has no power to hold back a reference to arbitration or attach to it a condition as to payment of costs. The power to deal with costs is limited to an order after the filing of the award. **Kaushia v. Pira, 11 P R 1886, Rev.**

(2C) Power of District Judge to refer whole suit for decision to an arbitrator.

47*C*—Ss. 14, 16—Compulsory arbitration—Scheme:—Under s. 16 of the Religious Endowments Act, the District Judge has no power to refer the whole suit for decision to an arbitrator, though the Judge may refer any matter in difference in the suit for decision by an arbitrator. The District Judge cannot frame a scheme in a

Arbitration-*Contd.*

2 Reference or submission to Arbitration —*Contd.*

suit under S. 14 of the Act.

Veraraghava Perumalayya v. Sitaramayya 12 M L J 40=26 Mad 361.

(3) Matters for arbitration.

48—Whatever matters parties to a suit may agree to refer to arbitration, they can refer such matters or any of such matters as are in difference between them in the suit.

Trunath Chowdhry v. Manick Chunder Doss. 14 W R 469.

49—Second Schedule r. 20 (1882—S. 525)—"Matter to which the award relates".

The words "matter to which the award relates" mean not the precise matter awarded to one party or the other by the arbitrator but the matter referred to in the beginning of the section *i e.*, the subject-matter of the arbitration.

Narsingh Das v. Ajodhya Prasad Sukul, 31 Cal 203.

Notes:—Ref: 29 Mad 44.

50—Sch. II r. 17 (1882 S. 523) scope of S. 523, C P C refers to cases in which persons, whether they be litigants or not, themselves agree independently of the Court, to refer the matters in difference between them to arbitration, and ask the Court to have the agreement filed.

Sheo Dat v Sheo Shankar Singh. 27 All 53=1904 W N 9. on Appeal 1904 W N 160.

51—The Second Schedule r. 1 (1882 s. 506) —Question whether the Court has jurisdiction—Arbitration—Reference to. A question whether the Court has jurisdiction to try the matter in dispute can be referred to arbitration through Court and the decision of the arbitrators is final.

Ghalam Jilani v Mahammad Ahmed 12 M L J 77=4 Bom L R 161=6 C W N 226=29 Cal 167=29 I A 51 P C.

Notes—Fol: 27 Mad 255=14 M L J 356; 33 Cal 11; 29 Mad 303; 9 Bom L R 259; 1 S L R 149. Ref: 30 Cal 218; 7 C W N 180; 9 O C 205; 11 C W N 240; 4 L B R 130; A W N (1907), 177; 1 S L R 86; 12 O C 40; 26 All 205; 2 C L J 80.

Arbitration-*Contd.*

2 Reference or submission to Arbitration —*Contd.*

52—Guardian and Wards Act (VIII of 1890) —Rival claimants for guardianship-Arbitration—Power to refer dispute to arbitration—Code of Civil Procedure, (Act XIV of 1882) section 647. *Per curiam*—Rival claimants to be appointed as guardian of a minor, are not in the position of ordinary litigants and cannot refer the matter in dispute to arbitration The guiding principle, in appointing guardian, is the consideration what is best for the welfare of a minor. **Mahadeo Prasad v Bindeshri Prasad. 5 A L J 101=1908 A W N 51= 30 All 137=3 M L T 203.**

52A—Reference of question of fact during pendency of appeal.—

During the pendency of an appeal, any question of fact in issue between the parties may be referred to arbitrators for decision by them. 7 All 243 Not Fol; 21 W R 210 Fol.
Kapilashwar v Joharmal 1 C P L R 118.

52B—Consent to refer to arbitration—Additional property—Mutual mistake.—

When a dispute after succession was referred to arbitration, and it was found after the award that the property was larger than was supposed at the time of the reference, *held* that, the plaintiff, though a party thereto, could claim her share in the additional property. **Ma Pwa v Ma Bwin. L B R 1872—1892, 196.**

(4) Agreement to refer future differences to arbitration.

53—Naming of arbitrators—Civil Procedure Code (1882), s. 523—

A general agreement to refer future differences to arbitration comes within s. 523 of the Civil Procedure Code (Act XIV of 1882), and may be filed under that section. The section is not confined to cases in which a dispute actually existing at date of agreement is agreed to be referred to arbitration. But the agreement must name the arbitrator or arbitrators, and an agreement which provides for the future appointment or election of arbitrators does not fall within the section. The effect of the last clause of s. 523 is to give the parties to such an agreement power to nominate the arbitrator, even when they have agreed that he shall be appointed by the Court. In such cases the Court must appoint their nominee. **Fazulbhoy Mehrali Chinoy v Bombay and Persia Steam Navigation Company. 20 Bom 232.**

54—Where parties have agreed to refer their differences to arbitration, the Court is bound o application of one of the parties to file the agreement and proceed under Section 326, Civil Procedure Code, unless sufficient cause be shewn against the agreement by the other party; and the fact that such party has altered his mind arbitrarily, and without good reason, is not a sufficient cause within the Section. *Per* Lindsay, J. A suit for damages for such arbitrary breach of agreement will lie. **Peer Bukhsh v Jumal P R 80 of 1870.**

55—Civil Procedure Code (Act XIV of 1882), Sections 522, 523, 591—Agreement to refer to arbitration—Application to file such agreement—Power of Court where there is a dispute as to the factum of such agreement—Competency of Court to deal with such question—Appeal—Award—Finality of judgment in accordance with award—Appeal from decree in accordance with award on ground that there was no real agreement to refer-Error affecting decision of case.—

Held, that it is not a correct interpretation of Section 523 of the Civil Procedure Code, that section is intended to apply only to those cases where the agreement to refer to arbitration is admitted, and that where there is a substantial dispute between the parties as to the *factum* of the agreement, the Court is not compentent to go further and deal with the objection finally. It is not only within the competency of the Court before which the application is pending to determine the *factum* of the agreement to refer or the submission to arbitration, but it is bound to do so.

Held, further, that though a decree based on an "award" is declared to be final by the legislature under the terms of section 522, Civil Procedure Code, the provisions of that section presuppose the existence of a valid or legal award upon which a decree has been given, and where it can be shown that there is no legal award, that is to say, no award regularly and properly arrived at by arbitrators duly appointed, the finality prescribe by Section 522 does not apply, and the

Arbitration-*Contd.*

2 Reference or submission to Arbitration —*Contd.*

decree is appealable like any other ordinary decree. 48 P R 1882, cited.

Held also, *semble*, that though the order directing an award to be filed is not appealable, still when a decree has been passed on the award, an appeal will lie on the ground that there was no legal award because there was no real agreement to refer the dispute to arbitrators, and on such appeal the correctness of the finding of the original Court as embodied in the interlocutory order may be challenged as an error affecting the decision of the case, within the meaning of the last part of Section 591, Civil Procedure Code.

Atma Ram v Jamita. 134 P R 1888.

Notes—Cited 84 P R 1901=112 P L R 1901; Overr: 21 P R 1898 F B.

(5) Reference by executor to arbitration.

56—Application for probate—Opposition by caveator—Effect of award—Jurisdiction of Testamentary Court to decide question of award—Power of executor to refer question of execution of will to arbitration.—

Any dispute (for instance. as to the due execution of a will) in a suit on the testamentary side of the High Court can be referred to arbitration, and the Court will recognize such reference and the award made in it. An executor having propounded a will applied for probate, a caveat was filed denying the execution of the alleged will, and the matter was duly registered as a suit. The executor and the caveatrix subsequently referred "the dispute" to arbitration, and an award was made that the alleged will had not been executed. The executor nevertheless subsequently continued the suit. At the hearing the caveatrix pleaded the award, and contended that it was binding on the plaintiff (executor). The plaintiff (executor) contended that the Court as a Court of Probate had no jurisdiction to try any question as to the award, but was limited only to the question of the execution of the will. *Held per* Candy, J that the Court had jurisdiction to determine the question as to the award. *Held*, also that the award was binding on the executor. **Ghellabhai Atmaram v Nandubai. 20 Bom 238.**

In the same case on appeal—*Semble* (Farran, C J and Strachey, J)—

Arbitration-*Contd.*

2 Reference or submission to Arbitration —*Contd.*

An executor, against whose application for probate a caveat has been entered, cannot submit to arbitration the question whether the will propounded by him was duly executed by the deceased. **Ghellabhai Atmaram v Nandubai 21 Bom 335.**

57.—Hindu Law—Joint family—A manager of a joint Hindu family has the power to bind the family by a reference of its dispute with any out-sider regarding any family property to arbitration, provided such reference be for the benefit of the family. Any minors in the family would be bound by the reference and consequently by the award made upon it. **Balaji v Nana 5 Bom L R 95=27 Bom 287.**

(6) Application for reference.

58.—Parties to application-Act VIII of 1855 s, 313.—An application for arbitration, as provided by s 313 of Act VIII of 1859, must be made by all the parties who are materially interested, otherwise it is liable to be declared invalid by the Court and to be set aside. **Baikanthanath Chatterjee v Naziruddin 1 B L R S N 11: 10 W R 171.**

59.—C. P. C. Sch II S 506—Reference to arbitration-Court's power to make the reference.

The Court has no power of its own motion to order a reference to arbitration and it can only do so under Chapter XXXVII of the Code of Civil Procedure.

The power to make the order of reference is given by s 508, Civil Procedure Code, and section 506 of the Code contains the provisions as to how the order is to be applied for.

It appears, from s 506 of the Code of Civil Procedure, (1) all the parties to the suit must desire a reference, (2) they must all apply to the Court for an order of reference, (3) they must apply either in person or by their respective pleaders specially authorized in writing and (4) the application must be in writing and state the particular matter sought to be referred.

The absence of a written application to seek reference does not make the order of reference invalid. **Haji Widina v Luxmibai 1 Bom L R 617**

Arbitration-*Contd.*

2 Reference or submission to Arbitration —*Contd.*

60 -The Second Schedule r 1 (1882 Ss 506 and 510)—Arbitration. *Held*, that when parties apply orally to the Judge to refer the suit to arbitration and the Judge reduces their application to writing, and then makes a reference to arbitration, it is not open to him having regard to the provisions of S. 510 of the Civ Pro Code to supersede that reference, the arbitrator not having declined to act.

Held further that the second paragraph of S, 506 is directory only. 6 M I A 134 Dist; 27 Cal 61 and 23 Bom 699 Ref. **Abdul Hamid v Riyaz ud-din 4 A L J 691= A W N (1907) 273=30 All 32.**

61.—The Second Schedule r 1 (1882 S 506)—Application if to be made by all parties to suit. Semble—Such leave or consent of the Court to the application by all the parties to refer the matter to arbitration is not necessary under s 462 of the Code of Civil Procedure.

Annada Krishna Dey v Jogendra Nath Dey 8 C L J 294.

62.—The Second Schedule r 1 (1882-506, 523) Applicability of, to pending suits—Written agreement—Not signed by all parties-Effect of S 523 C P C does not apply to an agreement to refer to arbitration any matter which is the subject of a pending suit—4 Bom 1 diss. from; 29 Cal. 167 followed. All parties to the suit must sign the agreement. **Tincowry Dey v Fakir Chand Dey 30 Cal 218=7 C W N 180.**

63.—Civil Procedure Code (Act X of 1877), Section 506—Application in writing, want of—Jurisdiction.

Held that under Section 506, Act X of 1877, an application in writing by the parties is essential before a case can be referred to arbitrators and that, where this is wanting, the reference by the Court and proceedings of the arbitrators are without jurisdiction, and a decree based on the award not final.

Held, further, that the consent of the parties to waive the condition required by the Act. that the application shall be in writing, can give no jurisdiction to the Court to delegate its own functions to arbitrators, and found a decree upon their award and it is only upon a consent recorded in writing that the Court can make an order of reference so as to render the award ensuing thereupon capable of being turned into a final decree. **Mir Amanullah v Chota Mirza P R 67 of 1879.**

Notes—Ref; 109 P R 1883.

64.—C. P. C. O 41 r 25 (1882 S 566).—Arbitration—Application by parties to Court of first instance after reference by appellate Court.

When a District Judge has remitted issues, under section 566 of the Code of Civil Procedure to the Court of an Assistant Collector, the latter, not being seized of the case, has no authority to entertain an application to refer to arbitration the matters in difference between the parties. **Raisal Singh v Bhola Ram A W N (1906) 221.**

65.—Mode of application.

The application for a reference to arbitration must be made in Court by an instrument in writing by the parties in person, or their pleaders specially authorized in that behalf. **Bhrigoo Roy v Bhagruth Upadhya W R 1864 Act X, 41.**

Gazee v Hamid Buksh 16 W R 160.

(7) Power of partner to bind the firm by reference to arbitration in absence of special authority.

66.—Specific Relief Act s 21.

One partner, though entitled to bring a suit on behalf of the firm of which he is a member to recover a debt due, to the firm, has no power in the absence of special authority, to bind the firm by submission to arbitration of the claim so brought. 3 Bing 101 and 2 Mad 228 referred to. **Ram Bharose v Kallu Mal 22 All 135.**

67.—Agent's power to refer to—Custom of trade judicially recognised—Existence of-Indian Contract Act S 188—Effect.

Where a custom exists among European importers of Karachi to the effect that no European firms in Karachi will import goods from Europe except on an indent containing an agreement to submit disputes to arbitration and has been judicially recognised.

Arbitration-*Contd.*

2 Reference or submission to Arbitration —*Contd.*

Held, that, the case of an agent dealing with European firms importing goods, the effect of S. 188 of the Indian Contract Act is to confer upon him the authority to refer the disputes to arbitration, that being a lawful thing necessary for the purpose of doing business.

An agent dealing with such firms cannot do business at all unless he agrees to a submission of matters in dispute to arbitration.

Thomas Betram Shimwell v Baniram Govindram 3 S L.R 5=1 Ind Cas 937.

68.—Civil Procedure Code (Act XIV of 1882) Sections 440, 506—Power of next friend to refer on behalf of minors.

In a suit described as brought by all the members of a family jointly the elder brother, acting as next friend on behalf of his minor brothers agreed to refer the matter to arbitration. The application for reference was signed by the elder brother alone, the other brothers being present throughout the proceedings. The award was given against the plaintiffs, and their accusation of misconduct against the arbitrators having been found false by both the lower Courts, the objection was taken for the first time in second appeal to the Chief Court that B one of the brothers described as a minor was not a minor and that the reference to arbitration was void as against him.

Held that even if B were in fact not a minor he was estopped by his own conduct from putting forward this plea at the late stage he did.

Held further that there is no provision of the Code of Civil Procedure which prevents a next friend suing under Sectoin 440 of the Code from referring the minor's interests to arbitration. (P R 64 of 1870 F B) (P R 1 of 1882) (P P 48 of 1882) referred to. **Haidar v Mauju P R 92 of 1885.**

69—Power of recognised agent of party to refer—Act X of 1877, Sections 36, 37, 506.

Held, following the Full Bench decision in (P R 64 of 1870,) that the recognized agent of a party to a suit is competent to act on his behalf in submitting a matter in dispute to arbitration, there being nothing in Section 506 of the Civil Procedure Code, which precludes a person who under Section 37 is in the position of a recongised agent from doing that which, under Section 506, the party whom he represents is able to do in person. **Hari Singh v Mussammat Lachmi P R 1 of 1882.**

70—Submission to—Submission made only by some members of the partnership-Submission not binding on those members who do not submit.

One of several partners in a partnership cannot bind the others by a submission to arbitration even of matters arising out of the business of the firm. It is no part of the ordinary business of a trading firm to enter into a submission to arbitration. **Datoobhoy v Vallu. 1 Bom L R 828**

71—The Second Schedule r. 1 (1882-S. 506)——Arbitration, reference to—Partnership—Suit for winding up partnership—Consent of all parties necessary.

In a suit for winding up a partnership a reference to arbitration cannot be made by Court except on the application or with the consent of all the parties (though some of them were *ex-parte* and unrepresented). **Subbarami Reddi v Rajamannar Aiyangar. 12 M L J 396= 29 Mad 47.**

72—C.P.C.O. 33 r. 7, Sch II (1882 Ss. 462, 506, 522)—Award-Decree—Appeal-Submission to arbitration on behalf of minors—Law of Court not obtained.

A reference to arbitration was made through Court in a suit some of the defendants to which were minors. The guardian of the minors as such, signed an application under section 506. The arbitrators made an award, in terms of which a decree was passed. Held that the decree not being in excess of or not in accordance with the award, no appeal lay. An application made under section 506 stands on a very different footing from the agreement or compromise contemplated by section 462. Therefore the guardian of the minor parties to a suit is not bound to obtain the leave of the Court to make such an application, and in absence of fraud or gross negligence on the part of the guardian, the minors are bound by his consent. (27 Cal 229=3 Bom L R 887=26 Bom 298) **Hardeo Sahai v Gauri Shankar. 2 A L J 493=1905 A W N 171=28 All 35 =3 Bom L R 887=26 Bom 298.**

Arbitration-*Contd.*

2 Reference or submission to Arbitration —*Contd.*

'7A) Power of agent to bind his principal to arbitration.

72A—Suit cognizable by Small Causes Court brought in High Court—Non-joinder—Contract of sale made subject to rules of Rice Marchants Association—Rule ousting jurisdiction of Court of Law—Rule providing for fixing vaida rate of goods for purpose of ascertaining differences in case of non-fulfilment of contract—Principal and Agent—Agent's power to bind his principal to arbitration—Indian Contract Act (IX of 1872), S. 93—Sale—Tender—Specific relief Act. The Bombay United Rice Mrchants Association framed rules and prescribed a certain form of contract which was very generally used in Bombay.

By these rules a Sub-Committee was nominated to decide all disputes. It was also provided that the exclusive authority to decide all such disputes should be the said Sub-Committee and the Association and that no party should be at liberty to go to Court with respect to any matter connected with such contracts except to enforce the decision of the Sub-Committee and the Association. It was further provided that the Sub-Committee should keep a record of the daily rates and on the last day of the *raida* should fix the *raida* rate (i e the market rate of the day), on the basis of which differences should be calculated which became payable in cases in which contracts were not carried out. The plaintiffs who were rice merchants in Rangoon were not members of the Association but they employed agents in Bombay who were members to purchase rice for them and on the 24th November, 1906, these agents bought from the defendants 1,340 bags of rice at Rs 9 per bag deliverable at the *raida* of Magshir Sud, 1963 (i e from the 18th November, 1906, to 30th November 1906). The contract contained the following clause. "This contract is made subject to the rules of the Bombay United Rice Merchants Association. Each party is bound to act in accordance with the same. The plaintiffs and a few others were purchasers and they were apprehensive that in setting the *raida* rate the interests of the buyers would be disregarded in favour of those of the sellers. They accordingly wrote to the President of the Association, calling upon him to see that no interested person was allowed to act on the Sub-Committee for fixing the *raida* rate. In accordance with the practice a

Arbitration-*Contd.*

2 Reference or submission to Arbitration —*Contd.*

special Sub-Comittee was appointed to fix the rate consisting only of three persons one of whom was not a member of the standing Sub-Committee and another of whom had large contracts of sale due at this *raida*. This Su-Committee fixed rate at Rs. 8-11-0 per bag. The plaintiffs alleged that it should have been fixed at Rs. 9-2-0 or Rs. 9-4-0 per bag which was the real Market rate of the day ; that the rate fixed was dishonestly fixed in the interest of sellers ; that the Sub-Committee was not constituted according to the rules, two members of it being ineligible, one because he did not belong to the standing Sub-Committee and the other because he was interested in fixing a low rate and they contended that for these reasons, *inter alia*, they were not bound by the rate fixed. The sum claimed as damages was less than Rs, 1,000.

Held, (1) That the High Court has jurisdiction and that the suit should proceed, subject to the provisions as to costs, contained in S. 22 of the Presidency Small Cause Courts Act (XV of 1882).

(2) That the alleged partnership was proved, but nevertheless the suit could not be dismissed for non-joinder.

(3) That the plaintiffs were entitled to sue at law, notwithstanding the provisions contained in the rules of the association requiring all disputes to be submitted for decision to the association and restricting the right of members to sue each other.

(4) That, at the meeting of the Association held on the 30th November, 1906, the plaintiffs (through their agents) had consented to the appointment of a Sub-Committee of three persons to fix the *vaida* rate and that they were therefore bound by the rate then fixed.

Any stipulation, that the award of an arbitrator shall be accepted as final, restricts the rights of contracting parties to invoke the aid of the ordinary Courts and to that extent is void

The effect of S. 28 of the Indian Contract Act (IX of 1872) S. 21 of the Specific Relief Act (I of 1877), read with the related sections of the Indian Arbitration Act (IX of 1899) and of the Civil Procedure Code dealing with arbitration, is, that a person may not contract himself out of

Arbitration-*Contd.*

2 Reference or submission to Arbitration —*Contd.*

his right to have recourse to Courts of law, but that in the event of any party having made a lawful agreement to refer a matter of difference to arbitration as a condition precedent to going to law about it, the Courts will recognise the agreement and give effect to it by staying proceedings in the Courts. **Mulji Tej Singh v Ransi Devraj.** **11 Bom L R 273=34 Bom 13=3 Ind Cas 837.**

(7B) Manager, power to refer to arbitration.

72B—The senior members of a joint Hindu family can bind the junior members by arbitration proceedings carried on by them in good faith 16 All 231, referred to. **Chinna Poochiammal v Ganga Naiken.** **1898, 9 M L J 34.**

(8) Absent plaintiff, special authority.

73—An application for arbitration on behalf of an absent plaintiff is not allowable without special authority. **Goor Chunder Puteetundo v Joogul Chunder** alias **Shama Churn Ghose.** **1 W R 80.**

(9) Unauthorised reference.

74—Where a mukhtar not specially empowered to refer the case to arbitration, signed the submission, *held*, that under Section 313, Civil Procedure Code, the award did not bind his principals. P R 11 of 1869, Civil. Persons admitted to act under Notification 1225, of 26th September 1866, are recognized agents, and have power to bind their principals by submission to arbitration; a special authority in writing is not necessary **Choohur Singh v Jeet Singh.** **P R 64 of 1870.**

Notes:—Fol: 1 P R 1882; Ref: 92 P R 1885: 92 P *R* 1903.

75—*Right* to object validity of submission in Chief Court when no such objection was taken in Lower Appellate Court.

Where a mukhtar, not specially empowered to refer the case to arbitration, signed the submission or *ikrarnamah*, it was *held*, that under Section 313 of Act VIII of 1859, the award did not bind his principals. In the Lower Appellate Court, the principals relied upon the merits of the case, and took no objection to the validity of the arbitration; *held*, that not having adhered to the award they were not barred from taking such objection in the Chief Court. **Wazeera v Mookum** **P R 11 of 1869.**

76—Civil Procedure Code, 1882, Sections 36 and 506—Recognized agent—Reference to arbitration.

Held, by the Full Bench.

(1) that it is competent to a party to a suit to file an application under Section 506 Civil Procedure Code, for an order of reference to arbitration by the agency of an authorized agent;

(2) that no special form of authorization in that behalf as in the case of a pleader, who must be specially authorized, is necessary in the case of a recognized agent to enable him to make an application to refer to arbitration.

Ram Das v Abbas Khan. **51 P R 1893 F B.**

77—*Held* that a Mukhtiar in a Revenue Court must be empowered by an instrument in writing to refer the matter in dispute to arbitration in the same way as a Pleader in a regular suit—Chapter VI of the Code of Civil Procedure being made applicable to suits under Act X by section 14 of Act XIV of 1863. **Ram Pershad v Nazeer Husain.** **1 Agra Rep. R A 63.**

78—The Second Schedule r 1 (1882 S. 506)—Reference by pleader not expressly authorised—Knowledge of party of the reference—Acquiescence, effect of.

A pleader should not apply for an order for referring a case to arbitration, unless he is expressly authorised to do so. A *vakalatnama* in general terms is wholly insufficient.

But, where the party, on whose behalf the application is signed, knows about it and acquiesces in it, he cannot raise the objection of want of authority in the pleader afterwards. **Ram Jiwan Ram v Kali Charan Singh.** **4 A L J 342=A W N (1907) 139.** **=29 All 499.**

Arbitration-*Contd.*

2 Reference or submission to Arbitration —*Contd.*

79—s. 506—Application by pleader not specially authorised.

Where a pleader who made the application for reference to arbitration was not specially authorised to make such application as is required by sec. 506, C. P C. and there was nothing to shew that the reference to arbitration was acquiesced in by the subsequent conduct of the party; *Held*—That the reference to arbitration was not valid. 24 Cal 469 (1897), distinguished. **Sheo Das Misser v Birj Nandan Pershad.**
7 C W N 343.

(10) Application made during hearing.

80—Civil Procedure Code, 1859, s 313.

When an application for reference to arbitration is made in open Court at or during the final hearing of a suit in the presence of all parties, and they consent thereto, a written authority, such as that referred to in s. 313 of Act VIII of 1859, seems not to be required. **Akber Beg v Bunda Ali,** **2 N W 419.**

Jeyasankira Devi v Nagannada Devi.
1 Ind Jur O S 136: 1 M H C R 106.

81—Arbitrator—Referee—Consent order—Referee unable to act—Court's jurisdiction to proceed with hearing.

There is a great difference between the appointment of an arbitrator and of a valuer or referee: the first is appointed to decide differences which have arisen, the second to prevent differences arising.

Where, a consent order is taken out, by the parties to a suit, referring the dispute to a referee and it becomes impossible for the referee to act, it is competent to the Court to set the consent order aside and to proceed with the further hearing of the suit. **Shantaram v Jamsetji.**
4 Bom L R 212.

(11) Submission in writing

82—Civil Procedure Code, 1859, s 326.

S·326 of the Civil Procedure Code made all submission to arbitration by an instrument in writing practically a rule of Court. **Pestonjee Nuserwanjee v. Manockjee & Co.**
1 Ind Jur N S 69.

83—The Second Schedule r 17 (1882 S. 523)-

C C 101

Arbitration-*Contd.*

2 Reference or submission to Arbitration —*Contd.*

Agreement for reference to arbitrators to be appointed by parties to settle future dispute must be in writing to be acted upon under S. 523.
Nand Lal v Alexander Akinson.
95 P L R 1905.

84—Civil Procedure Code Ss. 506, 505—Reference to arbitration—Court's power to make the reference.

The Court has no power of its own motion to order a reference to arbitration and it can only do so under Chapter XXXVII of the Code of Civil Procedure. The power to make the order of reference is given by Section 508, Civil Procedure Code, and section 506 of the Code contains the provisions as to how the order is to be applied for.

It appears, from Section 506 of the Code of Civil Procedure, that (1) all the parties to the suit must desire a reference, (2) they must all apply to the Court for an order of reference, (3) they must apply either in person or by their respective pleaders specially authorized in writing, and (4) the application must be in writing and state the particular matter sought to be referred. The absence of a wirtten application to seek reference does not make the order of reference invalid. **Luxmibai v Widina Cassum.**
1 Bom L R 617 = 23 Bom 629.

Notes:—Ref: 4 A L J 691 Fol (1907) W N 273; 30 All 32.

85—Code of Civil Procedure (Act XII of 1882) Ss. 506, 578.—Application for an order of reference to arbitration made, not in writing—Whether this is an irregularity.

The second paragraph of Section 506 of the Code of Civil Procedure which says that every application for an order of reference shall be in writing is directory only, as to the form in which the application, should be made. So where with the parties consented to a reference to arbitration & the order of reference was made by the Court, in the presence of their counsel or advocates, but not upon any written application for reference, the order was good within the jurisdiction of the Court & was not void. It is merely an irregularity not affecting the merits or the jurisdiction of the Court, & the case falls within S. 578 of the

Arbitration-*Contd.*

2 Reference or submission to Arbitration —*Contd.*

Civil Procedure Code. Shama Sundram. Iyer v Abdul Latif. 27 Cal 61= 4 C W N 92.

86—S. 322—Arbitration—Reference-Award-Power of arbitrators—Award—Decree.-The Code of Civil Procedure deals with arbitration under three heads, (1) where the parties to a litigation desire to refer to arbitration any matter in difference between them in the suit. In this case all proceedings from first to last are under the supervision of the Court; (2) where parties having recourse to litigation agree to refer their differences to arbitration and it is desired that the agreement of reference should have the sanction of the Court. In that case all further proceedings are under the supervision of the Court, (3) where the agreement of reference is made and the arbitration itself takes place without the intervention of the Court and the assistance of the Court is only sought in order to give effect to the award. There is a difference between these three cases. In cases falling under head 1,the agreement to refer and the application to the Court founded upon it must have the concurrence of all parties concerned and the actual reference is the order of the Court. So, in this class no question can arise as to the regularity of the proceedings up to that point. In cases falling under heads 2 and 3 proceedings described as a suit and registered as such must be taken in order to bring the matter—the agreement to refer or the award as the case may be—under the cognizance of the Court There is or may be a litigious proceeding-cause may be shown against the application—and it would seem that the order made thereon is a decree within the meaning of that expression as defined in the Civil Procedure Code. **Ghulam Jilani v Muhammad, 4 Bom L R 161=6 C W N 226=12 M L J 77=29 Cal 167= 29 I A 51 P C**

Notes—Ref: 8 C W N 390, 30 Cal 918; 7 C W N 180; 12 O C 40; 27 Bom 287; 29 Bom 285=6 Bom L R 1132; 2 C L J 61, 11 O C 116; 10 C W N 601=2 C L J 153; 33 Cal 498; 7 C L J 486; 31 Mad 479=18 M L J 485=4 M L T 328; 9 O C 205; 19 M L J 480; 32 Mad 510; 4 L B R 130; 1 S L R 86. *Con*: 33 Cal 757 F B =10 C W N 609=3 C L J 450; 11 C W 240. Dist: 28 All 21=2 A L J 450=

Arbitration-*Contd.*

2 Reference or submission to Arbitration —*Contd.*

(1905) W N 165; 2 C L J 80; 26 All 205. Fol: 14 M L J 356=27 Mad 205; 2 C L J 142; 29 Mad 503; 33 Cal 11; 899. 8 C W N 916; 29 All 457 F B=W N (1907) 177=4 A L J 405; 9 Bom L R 259; W N (1907) 117; 1 S L R 149. Appl: 35 Cal 648 P C=18 M L J 266=10 Bom L R 581= 12 C W N 585=7 C L J 520.

(12) Ineffectual reference.

87—Refusal of arbitrator to act—Act VIII of 1859, ss 319 and 326.—

Where parties had executed a deed agreeing to refer all matters in dispute to the arbitration of three persons, and one of the arbitrators refused to continue to act, and the other two consequently refused to proceed with the reference, the Court refused to order the agreement to be filed in Court. **Brooke v Surdial 12 B L R Ap 13**

88—S. 510—Supersession—Applicability of s. 510—Jurisdiction of Court to appoint new arbitrators without consent of parties—subsequent acquiescence effect of-S. 510 of the Code of Civil Procedure 1882 applies to cases in which an arbitrator has not merely been nominated but has also consented to act in the arbitration and subsequently dies or refuses to act or becomes incapable of acting. This section pre—supposes the existence of a valid reference In order to perfect the appointment of an arbitrator acceptance of the office is necessary. *Held* (*Banerji J. dubitante,*) that when a suit was referred to two arbitrators, and an umpire was nominated and agreed upon by the parties, but the latter refused to act, the Court had no jurisdiction to appoint an umpire in this place, if the parties did not consent to such appointment, and, that the reference to arbitration was invalid—*Held* further that subsequent acquiescence of the parties in the proceedings of the arbitrators would not validate the reference if it was made by the Court without jurisdiction.— **Fayazuddin v Minuddin. 1907 A W N 159=6 A L J 851.**

89—Want of express consent.—

The Judge intimated that he should refer the suit to arbitration, and allowed a certain time to the parties to object to that course. No objection was made within such time, and thereupon the Judge referred the cause to arbitrators named by him. After the day fixed, the defendants objected.

Arbitration-*Contd.*

2 Reference or submission to Arbitration —*Contd.*

Held that the reference was not warranted, there having been no express consent by the parties **Degumbur Chatterjee v Ram Prea Debea Marsh 517: 2 Hay 583**

Notes—Ap: 5 C W N 268. Fol: 28 Cal 305.

90—The Second Schedule r. I (1882 S 506) Validity of the award when one of the parties not joining submission Arbitration. In a suit to enforce a mortgage, a joint written statement was filed on behalf of the mortgagor, his sons, and grandsons. The suit was referred to arbitration, but the submission was not signed by one of the defendants. Their pleader, however, signed it on behalf of all the defendants. An award was made. Objections preferred to it by the defendants who had not signed it, were overruled, and a decree was passed in accordance with the award against all the defendants.

Held, that there was no reference to arbitration on behalf of the defendant who had not signed the submission, and there being no award in law it could not bind any of the defendants. 24 All 229. Dist. **Kahdu Singh v Daryao Singh 4 A L J 347=A W N (1907) 147 =29 All 423.**

91—Civil Procedure Code, 1882, Section 523 —Agreement to reject arbitration—Application to file such agreement—Plea that consent to agreement was improperly obtained—Power of Court to investigate such plea—

The petitioner made an application under Section 523, Civil Procedure Code, 1882, that an agreement between him and the defendant to refer a dispute to the arbitration of two persons named in the agreement be filed in Court.

The defendant pleaded that his consent to the agreement had been obtained by fraud and misrepresentation.

The lower Court held that it was not open to it to go into these questions in the proceeding before it, and refused the application.

Held, that the Court could not say whether or not sufficient cause for not ordering the agreement to be filed had been shown, within the true meaning of Section 523 of the code, unless and until it has investigated and adjudicated upon the defendant's objections.

Arbitration-*Contd.*

2 Reference or submission to Arbitration —*Contd.*

The mere allegation by the defendant that he did not freely and with full knowledge of all material facts consent to the agreement, cannot be deemed to be sufficient cause for not filing the agreement until the Court is in a position to affirm that the allegations have been established. 13 P. R. 1888, referred to and followed.—

Ram Rattan v Basaka Mal 49 P R 1893

Notes:—Overr. 21 P R 1895 F B; Ref 84 P R 1901=112 P L R 1901.

(13) Refusal to Consent to arbitration.

92 - Refusal to consent to arbitration—Presumption.

Nothing which passes between the parties to a suit in any attempt at arbitration compromise should be allowed to effect the slightest prejudice to the merits of their case as it eventually comes to be tried before the Court No presumption can be raised against a party to a suit from his refusal to withdraw from the determination and submit to arbitration. **Mohabeer Singh v Dhujjoo Singh 20 W R 172**

93-The Second Schedule r.I (1882 Ss 506, 522) Hindu law-Hindu mother, interest of, on partition —Abatement of suit—Arbitrator—Valuator—Civ. Pro Code (Act XIV of 1882) Ss. 506 522—Decree upon award of valuator—Right to sue, revival of. Upon a partition D was allotted a one-third share of certain premises as a Hindu mother. A suit brought by her to restrain appellant, who had purchased the two-thirds share of the sons from encroaching upon her was compromised and by consent an order purporting to be made under S 506 Civil P. C. was made referring it to certain persons to settle the price of D's share and interest in the disputed property and directing that, upon payment by the Appellant to D's attorney of the price so settled, D do convey all her share and interest in the property to the appellant. After the award as to the price but before decree thereon D died leaving two sons the present respondents, who obtained an ex parte order reviving the suit in their names. They subsequently applied for a decree upon the award under S 522, Civil Procedure Code.

Held, that the order of reference upon the compromise which gave D certain fresh rights in respect of which the right to sue survives to her representatives, the present Respondents.

Arbitration-*Contd.*

2 Reference or submission to Arbitration —*Contd.*

The persons to whom it was referred to settle the price of D's share were rather valuators and the order of reference cannot accordingly be regarded as one under S 506 Civil Pro Code. No decree can be awarded under S 522 C P Code.

Chooney Money v Ram Kinkur Dutt. 5 C W N 242=28 Cal 155.

Notes.—Fol 30 Cal 831.

94—Jurisdiction of Court over arbitrators—Civil Procedure Code (Act XIV of 1882) ss. 508, 516.

When a Court has referred a suit to arbitration, it has jurisdiction over the arbitrators to give up documents filed before them as exhibits during the course of the arbitration, and to return the original records of the suit which may have been handed to them. Such jurisdiction can be exercised by an application made in the suit on notice to the arbitrators. **Nursing Chunder Dawn v. Nuffur Chunder Dutt 17 Calc 832**

94 A—S 21—Arbitration—Agreement to refer to arbitration future disputes—Maintainability of suit—Burden of proof.

The parties to the suit entered into an agreement, which contained a condition that if any dispute arises between the parties regarding the agreement, it shall be settled by a certain person and his decision shall be binding on the parties. The plaintiffs sued the defendants for recovery of money basing their claim on the agreement. It was contended that since the plaintiffs had refused to refer the dispute between them to the arbitration of the person named, their suit was barred by S. 21 of the Specific Relief Act.

Held, that the burden of establishing the plea was on the defendants and that they had failed to discharge it. **Udhe Singh v Sardar Bishen Singh 35 P L R 1911=25 P R 1911= 55 P W R 1911=9 Ind Cas 736.**

(14) Power to carry out the arbitration by individuals selected by the association.

95—Ss 4 and 20—Clause in a contract empowering reference to arbitration, effect and validity of—Dispute referred to an association—Power to carry out the arbitration by individuals selected by the association—Contract Act IX of 1872, S 28 Exception I.

Arbitration-*Contd.*

2 Reference or submission to Arbitration —*Contd.*

Application to file an award in accordance with the rules made under S 20 of the Act. The defendants contended that the awards ought not to be filed by reason of the illegality of the arbitration clause in the contract between the parties; *held*, that such an arbitration clause comes within the definition of a submission to arbitration under S. 4 cl (4) of the Act and that, therefore, the clause was a perfectly lawful one. Further, the arbitration clause in the contract is covered by exception I to S 28 of the Indian Contract Act.

Held, further that though, where a dispute is referred to the award of a body of person, who can sit as a tribunal, the arbitrators might not be entitled to delegate their power to individuals, yet where a dispute is referred to an association consisting of a large and fluctuating body of persons, who cannot sit as tribunal, it must be taken that the parties intend that that body shall carry out the arbitration in the only way in which it is possible to do so, *viz* by individuals selected for that purpose. **Ganges Manufacturing Company v Indra Chand 33 Cal 1169.**

(15) Agreement to refer not in writing

95 A—Act X of 1877, Section 523 application under—Agreement in writing.

On an application under Section 523 Act X of 1877 where it appeared that plaintiff and one of the defendants, who did not profess to be acting on behalf of any person other than himself, had executed out of Court an agreement to refer to arbitration certain matters affecting themselves, and to other defendants, not parties to the agreement. *Held*, that the agreement could not be enforced under Section 523 of the Code, as the person who made the application and the persons against whom it was sought to enforce the agreement could not be held to have "agreed in writing" within the meaning of the above Section. **Jai Singh v. Kishen Singh P R 17 of 1880.**

(16) Agreement purporting to be made by all the parties held to be in writing.

95 B—Act X of 1877. Section 506—Agreement to refer signed by one of two plaintiffs and the defendant, but purporting to be made by all the parties.

Arbitration-*Contd.*

12 Reference or submission to Arbitration —*Contd.*

An application purporting to be made on behalf of both the plaintiffs and the defendant in a suit, for an order of reference to arbitration, held, to be an application in writing within the meaning of Section 506 of the Code of Civil Procedure, although not subscribed by one of the plaintiffs and to be binding upon such plaintiff if presented unchallenged by him or in his presence.

Nek Mahomed v. Ahmad Ali P R 53 of 1880.

(17) Agreement to refer to arbitration whether adjustment of suit.

96.—S. 375—Agreement to refer to arbitration whether adjustment of suit—Agreement not in writing.

Upon the petition of a party to an agreement to refer to arbitration matter in dispute in the suit, it is not competent for the Court to decree under sec. 375 " that the said agreement to refer to arbitration be recorded and that in terms of the said agreement the suit be referred to the arbitrator with all such powers and authorities as are vested in arbitrators under the provisions of the Code of Civil Procedure and the said arbitration be finished within 6 months from the date of completion and filing of the decree." This order is of the nature of an order under Ch. XXXVII of the C. P. C., but where such agreement to refer to arbitration is not in writing neither sec. 506 nor sec 523 of the Code of Civil Procedure applies. Further, sec. 523 does not apply to an agreement to refer where there is a pending suit. 6 C W N 226: 29 Cal 167: Sp. c. L. R. 29 I. A. 51 (1901), referred to. 4 Bom 1 (1879), dissented from. *Per* Maclean, C. J.—Merely an agreement to refer to arbitration is not an adjustment of the suit within the meaning of sec, 375 of the Code. 26 Bom 76 (1901), distinguished. *Per* Hill and Stevens, JJ, *Quære*—Whether an agreement to refer to arbitration would under no circumstances be an adjustment of a suit such as is contemplated by sec. 375, C. P. Code. **Fakir Chand Dey v. Tincowri Dey. 7 C W N 180.**

(18) Agreement to refer not an adjustment of suit.

96 A & 96 B.—Ss. 506 (1), 523, 375-Partition suit—Submission to arbitration by plaintiff and

Arbitration-*Contd.*

2 Reference or submission to Arbitration —*Contd.*

1 defendant—Another defendant's signature obtained later—Effect—Agreement to refer not an adjustment of suit.

A sued his brothers B and C for partition, and D and E, the minor sons of B and M, mother of plaintiff, were also defendants. On the 6th April 1908, during the pendency of the suit, A and B executed a muchilika whereby they agreed out of Court to refer their dispute to five arbitrators. C signed the muchilika later. On the next day A withdrew from the submission. A petition was subsequently put in on behalf of B, C, D and E, under Ss. 375, and 523 of the Code of 1882, praying that the matter may be referred to arbitrators as originally agreed. A opposed this petition on the grounds that (I) C did not sign the reference along with A and B; (II) the other defendants were not parties to the reference; and (III) S. 523. C. P. C., did not apply to pending suits.

The lower Court found that the agreement to refer was true and that permission was subsequently obtained on behalf of the minor defendants D and E to settle the dispute by arbitration, and it therefore ordered the matter to be referred to arbitrators on the ground that the reference was a bar to the further hearing of the suit.

Held that this order was appealable, and that, as plaintiff was not a party to the order, it was not one passed under S. 506 (1) of the Code.

Held also that an agreement to refer cannot be treated as an adjustment under O. 23, r. 3 of the Code of 1908. (29 Cal 167; 29 Mad 303; 30 Cal 218, Fol.; 21 M L J 363; 26 Bom 76; 24 Cal 908; 24 Mad 326; 33 Bom 69 Ref.)

T. Venkatachellam Reddi v T Rungiah Reddi. 10 M L T 248.

(19) New decree capable of execution though old decree barred.

96 C.—Execution of decree—Matter referred to Arbitration—New instalment decree—New decree capable of execution though old decree barred—Civ. Pro. Code (Act XIV of 1882). Ss, 525, 526.

The decree-holder obtained a decree against

Arbitration-*Contd.*

2 Reference or submission to Arbitration —*Contd.*

the judgment-debtor in the Calcutta Small Cause Court in 1895. This decree was transferred for execution to the Sub-Judge of Nadia. The decree-holder endeavoured in vain to execute it —his last application for execution being presented in 1906. This was objected to by the judgment-debtor. The parties ultimately agreed to refer the matter to arbitration. The arbitrator gave his award on March 18th, 1907, as follows : " The judgment-debtor withdraws his objections, and the decree-holder agrees to take the decretal amount by instalments as follows. The remainder will have to be paid in two years more in half shares. In the event of non—payment, the decree-holder will be at liberty to execute .. and to realise the money by attachment and sale of the judgment debtor's property " On receiving this award, the Court ordered " that the award is approved and accepted by the Court, and in terms thereof the original decree is modified and a decree is to be substituted as set forth in the award and agreed upon by both parties This execution case is dismissed in terms of said award. " On August 25th, 1908, a formal decree was drawn up in terms of the award

The judgment-debtor paid the first instalment and on March 31st, 1909, the decree-holder applied for execution of the decree of 1908 with respect to the second instalment. The judgment-debtor contended that the execution of the old decree was time-barred and that the decree was not capable of execution.

Held by *D, Chatterjee and Teunon, JJ.* (*Cave, J, dissenting*) that the award and the order of March 18th, 1907, should be regarded and treated as an award and order under Ss. 525 526, Civ. Pro. Code (1882) and the decree of August 25th, 1908, should be executed as a decree made in accordance with the award made under the said sections, and the propriety of such a decree could not be called in question by the judgment debtor in execution. **Nagendra Chandra Banerjee v. Harendra Nath Mukherjee. 11 Ind Cas 457.**

(20) Official assignee not a necessary party to arbitration proceedings.

96D —Vesting order under—Insolvency Act III of 1909, passed thereafter—Further proceedings governed by Act of 1848—S. 127 (2), Act III of 1909—Arbitration—Submission—Not revoked by vesting order or insolvency—Failure to pay claim—Whether a difference between the parties—Official Assignee not a necessary party to arbitration proceedings-Award—Effect upon official assignee—Suit against insolvent—Duty of Court.

A vesting order made under the Indian Insolvent Debtors Act, 1848, cannot be treated as one made under the Presidency Towns Insolvency Act, III of 1909, in view of the clear provisions of S 127 (2) of the latter Act.

Where the vesting order was made under the Act of 1848, all proceedings continue, and all provisions of the old Act apply thereto, as if the new Act had not been passed.

Though the Court can entertain a suit against a debtor against whom a vesting order has been passed under the Act of 1848, it is nevertheless the duty of the presiding Judge to see that the decree is so drawn as not to prejudice the rights of the other creditors under the Insolvent Debtors Act.

Insolvency or the issue of a vesting order does not operate as revocation of a submission to arbitration.

Where, at the time of the reference, a vesting order is in force, the proceedings of arbitrators cannot have any direct effect on the property of the insolvent, and the result of an award is to merely convert an unliquidated claim into a liquidated one which the Official Assignee or Trustee can scrutinise like any other claim. Such an award is an order merely *in personam*.

The Official Assignee is not a necessary or a proper party to such proceedings.

Mere failure to pay a claim constitutes a matter in difference between the parties to a submission. (22 Cal 259, Ref. 4 S L R 14, Ref. 22 Cal 259; 26 Mad 406 (421), Ref. and Fol. 5 S L R 7) **James Finlay & Co. v Jeshanmal R. Kirpalani. 5 S L R 4.**

(21) Matters outside the suit referred to arbitration.

96 E.—S. 115—High Court—Revisionary ju-

Arbitration-*Contd.*

2 Reference or submission to Arbitration —*Contd.*

risdiction—Zanzibar Civil Courts——Zanzibar orders in Council, 1897, cl. 29—Arbitration, absence of—Matters referred outside the suit—Parties to reference no parties to suit—Application for decree in terms of award—Death of plaintiff—Heirs not on record——Irregularity—Illegality.

The High Court of Bombay has powers of revision over all the Civil Courts of Zanzibar.

A suit was referred to the sole arbitrament of the Judge into whose Court it was brought, but there was no written reference. The matters in difference submitted to the arbitration were not all included in the suit; and some of the parties to it were persons who were not in the suit at all. The award was made in 1904. The plaintiff died in 1905. No application was made in time to have a decree in terms of the award; nor was an application ever made to bring plaintiff's heirs on the record. The plaintiff's son applied on the 6th April 1909 to have a decree passed in terms of the award, which the Court did the next day:—

Held, (1) that, in acting as he did, the Judge had far exceeded his jurisdiction.

(2) that the defendant should, under S. 115 of the Civil Procedure Code of 1908, be protected against the consequences of a procedure, so entirely unauthorised, from first to last, by any law. (1901) L R 29 I A 51; 4 Bom L R 161, Ref.

Merali Visram v Sheriff Devji. 13 Bom L R 1017.

(22) Agreement of parties to refer question to Court for decision.

97.—Decision, if appealable—Court acting as arbitrator—*extra cursum curiæ*.

In the course of a suit for recovery of possession of some land, the parties who owned different shares of a Pergunnah came to an agreement to the effect that they should ask the Court to decide the question of title on the basis of the *thakbust* map only and the plaintiff said he would abide by that decision. The Court decided accordingly and held that "the *thak* map itself showed that the Plaintiff's predecessor and his co-sharers were disputing about the land and the survey map showed that it was newly formed *chur* land, and that in such circumstances that *thak* map could not be held sufficient evidence of plaintiff's title." *Held*—That in deciding the question on the basis of the *thakbust* map, in accordance with the agreement of the parties the Court acted as arbitrator, and hence no appeal lay from that decision.

Kumar Saradindu Roy v Bhagabati Debya Chowdhurani. 10 C W N 835.

(23) Appeal from order refusing to file agreement to refer to arbitration.

97A.—Civ. Pro. Code, 1882, s. 523—Order refusing to file agreement to refer to arbitration —Appeal.

Held, that an appeal lies against an order refusing to file an agreement to refer to arbitration. (5 All 333, 26 All 205, 29 Cal 167, 9 O.C. 205, Ref.)

Khalka Baksh Singh v. Suambar Singh. 11 O C 116.

(24) Admission by defendant in reference to arbitration, whether an evidence against him.

97B—S. 120——Action for goods bargained and sold—Vendee's refusal to take delivery of goods appropriated by vendor—Reference to arbitration—Admission.

Where the plaintiff agreed to sell and the defendant to buy goods of a certain description and the property passed to the defendant by his assenting to the appropriation made by the plaintiff. *held*, the plaintiff was not precluded by S. 120, Contract Act, from suing in the form of an action for goods bargained and sold, for the price of the goods, on the defendant refusing to take delivery.

If, in a reference to arbitration signed both by the plaintiffs and the defendants, the defendant askes for a decision whether the goods appropriated by the plaintiff-vendor are of inferior quality and wants an allowance in respect of them, it is evidence of his assent to appropriation.

Quere:—Whether an agreement to refer to arbitration need not be stamped under Sch. I, Art 5 (b) of the Stamp Act. 15 Cal 1, dist. 15 Mad 150, Ref.

Finlay Muir and Co. v Radhakishen Gopikissen. 36 Cal 736= 3 Ind Cas 185.

Arbitration *Contd.*

2 Reference or submission to Arbitration —*Contd.*

(25) Power of Court to remand on arbitration proving infructuous.

97C—O. 41 r. 23 (1882 S. 562)—Reference to arbitration—Award—Decree—Appeal——Second submission, effect of—infructuous arbitration—Order of remand good.

In a suit to recover money, the parties referred the matter to arbitration. An award was made and a decree passed in the terms thereof, the Court of first instance having overruled all objections to the validity of the award. Upon appeal to the District Judge on the ground that there was no valid award in law, the parties agreed to refer the matter to a fresh arbitration. The second submission having proved infructuous, and the suit having been remanded for trial on the merits, *held*, that the effect of the agreement to refer the matter to fresh arbitration was that the decree and the award upon which the decree has been founded were both set aside and could not be regarded as subsisting ; the course open to the Judge was either to try the case on the merits or to refer the matter to arbitration. The Court adopted the latter course, and the arbitration having proved infructuous, the only other course open to the Court was to remand the case for trial on the merits. **Rahim Baksh v Ram Nath. 2 A L J 477=1905 A W N 54.**

(26) Question of limitation when to be raised.

97D—Question of limitation when to be raised.

All questions of limitation must be presumed to have been disposed of prior to the first reference to arbitration. **Jagmandhar Das v Piari Lal. A W N 1881, 17.**

(27) Remanding case for trial on arbitration proving infructuous.

97E—Award—Decree—Appeal— Second submission, effect of—Infructuous arbitration Order of remand good.

In a suit to recover money, the parties referred the matter to arbitration. An award was made and a decree passed in the terms thereof, the Court of first instance having overruled all objections to the validity of the award. Upon appeal to the District Judge on the ground that there was no valid award in law, the parties agreed to refer the matter to a fresh arbitration. The second submission having proved infructuous, and the suit having been remanded for trial on the merits, *held*, that the effect of the agreement to refer the matter to fresh arbitration was that the decree and the award upon which the decree had been founded, were both set aside and could not be regarded as subsisting ; the course open to the Judge was either to try the case on the merits or to refer the matter to arbitration. The Court adopted the latter course, and the arbitration having proved infructuous, the only other course open to the Court was to remand the case for trial on the merits. **Rahim Baksh v Ram Nath. 2 A L J 477=A W N 1905, 164.**

(28) Submission by coercion.

97F—Voluntary submission to arbitration—Submission by coercion, effect of.

For a binding award, the parties must voluntarily refer to arbitration ; coercion of any sort by the Court will vitiate the reference. **Ali Buksh v Kadir Buksh. 28 P R 1868**

(3) APPOINTMENTS OF ARBITRATORS AND UMPIRES.

(1) Power of Judge to appoint.

98—Consent of nominees—Fresh appointment after refusal to act.

Before a Judge refers a case for arbitration, he should ascertain whether the persons nominated are willing to accept the office, and till he has done so any nomination of an arbitrator by him, without the application or consent of the parties, is illegal. But when a case has once been referred to arbitration, after the preliminary steps have been properly taken, the Judge has the sole power of appointing fresh arbitrators in the room of such as refuse to act. **Troyluckhonath Roy v Collector of Beerbhoom. Lockenath Roy v Collector of Beerbhoom. Huronath Roy v Kasheenath Roy. W R 1864, 338**

99—Arbitration Wajib-ul-arz–Price——power given by wajib-ul-arz to appoint arbitrator to settle price-Wajib-ul-arz unenforcible.

Arbitration-*Contd.*

3 Appointment of arbitrators and umpires—*Contd.*

Where the terms of the *wajib-ul-arz* were that when there was a dispute with respect to the price of a property the matter should be referred to arbitration and, if the parties, did not refer it, the Collector should have power to appoint an arbitrator ; *held*, that the clause was incapable of enforcement and the *wajib ul-arz* did not enable a Court to fix a substitute for the contract entered into between the vendor and the vendee a different contract with regard to the consideration for the sale. **Mehi Lal v Chet Ram 3 A L J 479**

(2) Nomination by Judge.

100—Civil Procedure Code, 1859, s 314-Validity of appointment of arbitrator.

Where both parties could not agree in nominating an arbitrator and the Judge nominated one under s. *314*, Act VIII of 1859, and one of the parties, six weeks after the nomination, objected to the Judge's nominee, but could not show on appeal that he did not request the Judge to nominate some one, the appointment was held good and binding upon both parties.

Suroop Ram Deb v Gobind Ram Deb. 7 W R 13.

101—Ss. 510 & 524—Reference to arbitration——Refusal of person appointed arbitrator to act—Appointment of arbitrator by Judge under section 510-Effect of section 524 on such appointment.

The words 'so far as they are consistent with any agreement so filed' in section 524 do not mean that the agreement must contain in every case an express provision as to what ought to be done if any arbitrator is unwilling to act, in order that a Judge may act in conformity to it, and that section 510 has otherwise no application The reasonable construction is that the action of the Judge under section 510 should not be inconsistent with the agreement, if it contains any special provision on the subject. **Bala Pattabhirama Chetti v Seetharama Chetti. 17 Mad 498.**

(3) Arbitrators not consented to.

102—Invalid award.

The Code gives no power to a Court to enforce arbitrators on an unwilling suitor. The award

C. C 102

Arbitration-*Contd.*

3 Appointment of arbitrators and umpires—*Contd.*

of arbitrators so appointed will not be enforced.

Sheonath *alias* Burray Kaka v Ramnath *alias* Chotay Kaka. 1 Ind Jur., N. S, 161 : 5 W R P C 21=10 Moore's I A 413.

103—Power of Court to appoint new arbitrators—Civil Procedure Code, 1882, Section 510.

The Court has no power under Section 510 of the Code of Civil Procedure to appoint a new arbitrator in the place of another when the latter had refused to accept his apppointment.

(6 Mad 414), (18 Cal 324) and (17 Mad 498), referred to. **Radha Kishen v Daulat Ram. 110 P R 1900.**

104—The Second Schedule r. 2 (1882 Ss. 507, 510)—Illegal award—Arbitrators, appointment of, without consent—Refusal to act—Appointment of new arbitrator by Court—Acquiescence.

S. 510 C. P. C. (1882), applies to cases, in which an arbitrator has not merely been nominated, but has also consented to act in the arbitration, and subsequently dies or refuses to act or becomes incapable of acting. The section presupposes the existence of a valid reference. (18 Cal 324 Diss.)

In order to perfect the appointment of an arbitrator, acceptance of the office is necessary.

Held, therefore (*Banerji J dubitante*), that where a suit was referred to two arbitrators, and an umpire was nominated and agreed upon by the parties, but the latter refused to act, the Court had no jurisdiction to appoint an umpire in his place, if the parties did not consent to such appointment and that the reference to arbitration was invalid.

Held, further, that subsequent acquiescence of the parties in the proceedings of the arbitrators would not validate the reference if it was made by the Court without jurisdiction.

Fayazuddin v Aminuddin. 6 A L J 351= 1 Ind Cas 354=1908 W N 159.

(4) Appointment of sole arbitrator in place of four.

105—Civil Procedure Code, 1859, ss. 315, 318, 319—Recall of reference—Consent—Appointment of substitute for arbitrator.—

Arbitration - *Contd.*

3 Appointment of arbitrators and umpires—*Contd.*

In a suit for a partnership account, the matters in dispute were, by an order dated the 19th April 1877, referred by consent to four persons and an umpire, the award to be made within five months. Some steps were taken in the reference but the arbitrators failed to make their award within the time limited, and meanwhile the umpire died. After negotiations for appointment of a fresh arbitrator and enlargement of the time had failed, the plaintiff moved that "the order of the 9th April 1877" might be recalled, and that the matters in dispute might be referred to the arbitration of such person or persons as the Court might be pleased to admit, or be tried and determined by the Court. The defendant opposed the application. An order was, however, made on the 29th May 1878 that the order of the 19th April 1877 should be recalled, and that all matters in difference between the parties should be referred to C D, who should make his award in writing within three months, or within such further time as the said C D might think necessary. Certain provisions as to the payment of costs were also made. *Held* that the order of the 19th May was not an order recalling the reference under s. 318 and then referring it afresh under s 315 of Act VIII of 1859, but an order under s 319 appointing a new arbitrator in the place of the old ones, for which the consent of all parties was not necessary. Under s. 319 of Act VIII of 1859, the Court has power to appoint an arbitrator or arbitrators either in the place of an arbitrator or in the place of arbitrators. **Rampersad v Juggernauth. 6 C L R 1.**

(5) Umpire, appointment of.

106.—Act VIII of 1859 s 316—Difference of opinion.—

Where a case has been referred to arbitration but no provision has been made in the reference for any difference of opinion among them as directed by s 316 Act VIII of 1859,—*Held* that the Court, on the case coming before it, and objection being taken to the award, should have ordered that the arbitrators should appoint an umpire, or should have declared that the decision of the majority should prevail; or should have appointed an umpire: or should have made such arrangement as the parties would have consented to; or if they could not agree, such arrangement as it thought fit. Where this was not done, and the case came up in special appeal to the High Court, the case was sent down, that it might be submitted to arbitrators with a distinct order under s 316.

Haradhan Datt v Radhanath Shaha 2 B L R S N 14=10 W R 398 =11 W R 9.

107.—Bengal Chamber of Commerce, arbitration by—Rules—Umpire, appointment of—Failure to appoint, effect of.

The rules of the Arbitration Tribunal of the Bengal Chamber of Commerce were construed to contemplate the appointment of the umpire before the arbitrators entered upon the reference and not on their disagreement.

If the terms of a reference provided that the umpire is to be appointed before the arbitrators enter upon the reference, the same cannot go on until such umpire is appointed, and the award of the arbitrator cannot be made a decree of the Court, 4 Dow 756 (1836) and 1 Exch 572 (1847). Fol. **Chooni Lal v Madhoram. 13 C W N 297=36 Cal 388= 1 Ind Cas 391.**

108.—Implied agreement to abide by award of umpire or of the majority.—

The appointment of an umpire, coupled with the provisions of Chap. VI of Act VIII of 1859, implies that the parties agree to be bound by the award of the umpire or of the majority of the arbitrators. **Bussawa Singh v Boodhoo P R 9 of 1869.**

109.—Arbitration—ss. 509, 510—511—Appointment of umpire subsequent to difference among arbitrators.

Where in an order of reference to arbitration no provision was made for a difference of opinion among the arbitrators and, on such a difference arising, the Court appointed an umpire; *held*, that the appointment was illegal as it was not made under the provisions of either s. 509, 510, or 511. **Ravat Naran v Ravat Lalji 1890 P J 238.**

(6) Appointment of arbitrator by Court.

110.—Semble.—

Where no arbitrator has been named in an

Arbitration-*Contd.*

3 Appointment of arbitrators and umpires—*Contd.*

agreement and the aid of the Court in the appointment of an arbitrator is invoked. the parties ought to have an opportunity of being heard upon the selection to be made. 12 Moore's I A 112, referred to. **Coley v Dacosta 17 Cal 200.**

Notes—Fol: 19 Cal 278.

(7) Power of Court to appoint new arbitrators.

111.—Power of Court to appoint new arbitrators-Civil Procedure Code (1882) s 510.The Court is empowered under s 510 to appoint a new arbitrator in the place of another only in cases where the latter had signified his assent to take upon himself the duty of an arbitrator. 6 Mad 414, approved of **Bepin Bihari chowdhry v Annoda Prosad Mullick 18 Calc 324.**

Notes.—Ref 6 A L J 351; 17 Mad 498. Diss· (1908) W N 159.

112.—The second Schedule r 16 (1882 s 522) Arbitration-Award-Appeal-Application to Court to appoint a new arbitrator. Where a party to a suit has agreed to an arbitration and has selected an arbitrator, he cannot ask the Court to appoint another arbitrator, it is only under S 510 of the Code that the Court can appoint a new arbitrator. 10 Bom 381 Fol. **Shiam Sunder Lal v Bhairon Singh A W N (1906) 51= 3 A L J 185.**

(8) Appointment of umpire by arbitrators.

113.—Umpires—Mode of appointment prescribed by contract—Delegation by arbitrators of their right to appoint umpire.

A contract provided that disputes between the parties were to be referred to the arbitration of two merchants, and that, should the arbitrators be unable to agree, they should appoint an umpire The plaintiffs and defendant referred their dispute to two arbitrators. These arbitrators disagreed in their report, and referred the case to the Bombay Chamber of Commerce for the appointment of an umpire. The Chamber of Commerce appointed an umpire, who made his award. *Held* that, the appointment of the umpire was invalid. The arbitrators could not delegate the power of appointment conferred on them by the contract. **Smith v Ludha Ghella Damodar 17 Bom 129.**

Arbitration-*Contd.*

3 Appointment of arbitrators and umpires—*Contd.*

(9) Incapacity to act

114.—Act VIII of 1859, s 319—Absence from the country.

When a person goes away from the country and remains away, and there is no evidence to show an intention to return, that person becomes incapable of acting as umpire within the meaning of s 319 of Act VIII of 1859.

Gadadhar Moitry v Ganga Prasad Moitry 4 B L R O C, 89.

(10) Effect of Judge not voluntarily chosen as arbitrator.

114A.—Guardianship—Minor, having no property—Personal protection not needed—Appointment objection of—Orders nominally in conformity with statutory provisions—Effect of-Judge, arbitrator, not voluntarily chosen.

Where no guardian was needed for the protection of the person of the minor, who had also no property of which a possible guardian could take charge, and the machinery of law was set in motion by a person who induced his servant, the maternal grandfather of the infant, to make an application for appointment of himself as her guardian in order that she might be ultimately married to his son, the orders passed in proceedings so instituted and conducted, even if they were nominally in conformity with statutory provisions, were not invested with the efficacy of legal orders made on *bona fide* judicial proceedings.

If the parties have treated a Judge as their arbitrator and have submitted to his decision, even though he had no jurisdiction to deal with the matter in controversy, his decision is binding on them, as if it were the award of an arbitrator. This rule has no application where the arbitrator was not voluntarily chosen by one of the parties, who acted under judicial pressure of the highest degree to which he was not in a position to offer effectual and successful resistance. **Subhadra Koer v Dhajadhari Gossain 15 C L J 142.**

(11) Effect of arbitrators not made in the agreement.

114B.—S 141, O 11 r 3 Sch II cl 17—C P C. (Act XIV of 1882), S 523—Agreement to refer dispute to arbitration—Arbitrators not named in

Arbitration-*Contd.*

3 Appointment of arbitrators and umpires—*Contd.*

the agreement, effect of—Ambiguity—Power of Court to appoint arbitrator—Three agreements to refer to arbitration relating to one transaction—One application for order of reference sufficient———Different causes of action, joinder of—Contract, terms of, parties cannot resile from—Punjab Courts Act (XVIII of 1884) S. 70 (1) (a)—Material irregularity—Express provisions of contract and imperative provisions of law ignored by lower Court—Revision.

Three agreements in precisely similar terms and relating to what, to all intents and purposes, was one transaction, were executed between plaintiff and defendant within a short period of each other. One of the terms of these agreements was that "in case of any dispute whatsoever arising under this contract the same is to be referred to two European merchants residing in Karachi, each party having the right to nominate one arbitrator." When a dispute arose, the plaintiff applied under cl 17 Sch II of the Code of 1908, that the said agreements be filed in Court and an order of reference made to arbitrators to be appointed in accordance with the provisions of the agreements.

The plaintiff in his application duly nominated as his arbitrator a European merchant residing at Karachi, but the defendant, though called upon to do so, failed to nominate his arbitrator. The lower Court held the terms of the agreements to be "ambiguous" and ruling that they should have "contained the names of arbitrators, nominated an Amristsar gentleman to act as arbitrator on behalf of the defendant. It also ruled that each agreement gave rise to a different cause of action and that three causes of action could not be conveniently tried together.

Held, (1) that, apart from the question of convenience, the plaintiff was justified under O. 11, r. 3, read with S. 141 of the Code, in asking the Court to take action in one application upon all three agreements:

(2) that, unlike the provisions of S. 523 of the old Code, cl. 17 of the new Code does not require that arbitrators should necessarily be "named" in the agreement;

(3) that the fact that no persons were specially named in the agreements as the persons to be

Arbitration-*Contd*

3 Appointment of arbitrators and umpires—*Contd.*

appointed did not render the agreements "ambiguous" *Id certum est quod certum reddi potest.* (That is certain which can be reduced to a certainty).

(4) that the lower Court had no power in contravention of the express agreements between the parties and the imperative terms of cl. 17 Sch. II of the Code, to appoint as an arbitrator a person who was not a European merchant residing in Karachi, and that, in so doing, the Court committed an irregularity which materially prejudiced the plaintiff;

(5) that, as it is quite possible for the parties to nominate certain European merchants residing in Karachi as their respective arbitrators, the lower Court must deal with the case in accordance with law, and arbitrators must be appointed in accordance with the provisions of the agreements;

and (6) that, as the defendant had wisely or unwisely agreed to appoint as his arbitrator a European merchant residing in Karachi, it was not open to him to plead that he did not know any European merchant there.

Obiter:—Parties must adhere to contracts made by them with full understanding of all the terms, and must not be allowed to resile from their agreements, simply because they subsequently find it to their interest to do so.

Charles Louis Dreyfus & Co. v Guarditta Mal. 85 P L R 1911=9 Ind. Cas. 655.

(12) Arbitrators appointed without consent of party.

114 C—Appeal—Waiver.

In appealing to set aside an award of arbitrators which the appellant contends is not binding upon him, he is not bound to appeal against every interlocutory order which was a step in the procedure that led up to the award. Both the Code of Civil Procedure and the Punjab Code require the consent of the parties to a reference to, and the appointment of, arbitrators. A party by appearing before arbitrators appointed without his consent, and in spite of his repeated remonstrances, does not forfeit his right to question the validity of their award. **Sheo Nath alias Burray Kaka v Ram Nath alias Chotay Kaka.**

5 W R 21=10 I A 413.

Arbitration-*Contd.*

3 Appointment of arbitrators and umpires—*Contd.*

(13) Power of Court to reduce the numbers of arbitrators fixed by the Court

115—Agreement in writing to refer differences to arbitration—Award, objection to filing of—Limitation Act, sch. ii, art. 158—Decree in accordance with award—Appeal to District Judge—Jurisdiction—Civil Procedure Code, s. 510—Arbitrators, number of.

The parties entered into an agreement in writing that certain differences between them should be referred to the arbitration of five persons named in the agreement. The agreement was filed in Court under s. 523 of the Code of Civil procedure. Before the Court's order was passed, three of the arbitrators resigned, and three other persons were substituted for them by the Court on the application of the parties. On the day fixed for the filing of the award, an arbitrator named by the defendant did not appear. The Court struck out the name of one of the arbitrators nominated by the plaintiff. The remaining arbitrators made an award, in accordance with which the Court passed a decree, disallowing the defendant's objections on the ground that they were not filed within ten days from the date of the filing of the award. The defendant appealed to the District Judge. *Held*, that the defendant was not precluded from appealing to the Distrct Judge from the first Court's decree because he had not applied to set aside the award within the ten days allowed by Art. 158, sch. ii, of the Indian Limitation Act. The agreement referred to in s 523 of the Code of Civil Procedure is an agreement in writing that any differences between the parties shall be referred to the arbitration of the persons named in the agreement or to be appointed by the Court having jurisdiction in the matter to which the agreement relates. In this case there being no clause that the difference should be referred to the arbitration of any persons to be appointed by the Court, the Court, under s. 524 of the Civil Procedure Code, had no juridiction whatever to appoint fresh arbitrators, nor under s.510 of the Code could it reduce the number of the arbitrators fixed by the agreement. *Held*, further, that where a decree has been made upon a judgment given upon an award and which is not in excess of and is in accordance with the award, an appeal from such decree will lie on the ground that the so-called award upon which the judgment and decree are based, is, from one cause or another, no award in law; *held*, therefore, that an appeal lay to the District Judge from the decree made under judgment which was not in excess of the award. **Mussammat Sheopal Kuar v Bhaiya Tara Bakhsh Singh 2 O C 355.**

Arbitration-*Contd.*

3 Appointment of arbitrators and umpires—*Concld.*

(4) DUTIES AND POWERS OF ARBITRATORS.

(1) Ascertainment of parties at issue.

116—Decision on issue.—

"All matters in difference in the suit, including all dealings and transactions between the parties," having been referred to the arbitration and award of certain persons, the arbitrators should ascertain upon what points the parties are at issue and upon each of these points come to a finding. **Luchmee Narain v Pyle 2 N W 150.**

117—Procedure at—Arbitrators deriving information from a third person—Presence of the referring parties—Award — Arbitrator—Delegation of duties—Ministerial acts.

It would be prudent and discrete for arbitrators, when they desire to put themselves on the best footing of information as to matters of law to ask all the parties to be present when they communicate with any gentleman whom they may see upon that subject. But if they cannot be shown to have acted with improper partiality or for any other purpose than that of being correctly informed about the law, and avoiding mistakes of law, and if they cannot be shown to have been misled as to the law, their award should not on that ground be set aside.

An arbitrator may delegate to third persons the performance of acts of a ministerial character. **Buta v Municipal Committee of Lahor 29 Cal 854=4 Bom L R 673=P R 87 of 1902=7 C W N 82.**

118—(1908 Sch. 11 and S. 21)—Examination of arbitrator as to whether a portion of his proceedings was an award—Admissibility in evidence—Civ. Pro. C de, 1882. S. 526—S. 21 of Code of 1908)—Appeal against order filing award.

It may be that an arbitrator cannot be examined to show what he intended by his award, but where the question is not what the arbitrator

Arbitration-*Contd.*

4 Duties and powers of arbitrators—*Contd.*

intends by his award but is whether a certain paragraph in his proceedings was intended to be an award at all, there is nothing to prevent his examination. An appeal lies from an order directing an award to be filed under S. 526, C.P.C. Act XIV of 1882. (27 Mad 255; 29 Mad 303 Fol.)

Tulsi Das Narsi v. Madam Subanna Chetty. 6 M L T 137=2 Ind Cas 92= 19 M L J 394.

118A—Arbitration to effect partition—Arbitrator must effect complete partition—Partial partition volid, if such was intention of parties. As it is not ordinarily the intent of the parties that some matters only should be determined and that they should be at liberty to go to law for the rest, it follows that, where a reference is made to arbitration, the arbitrator is equally bound to make a final decision upon all the matters referred to him in order that his award as to any should be effectual. But, if, in the reference to arbitration, there be a clause empowering the arbitrator to make one or more awards at his discretion, the Courts, unless there be something repugnant to such a view, will hold that the arbitrator may make a valid and final award on one matter only. The strict rule of English law cannot be applied to India, where the submission to arbitration is not written by one who is conversant with the law. Consequently, the Court will rather look to the probable intention of the parties and to what the case requires Thus, an award of the arbitrators will be upheld as regards the property,divided, even though the whole has not been divided, if from the nature of the property and other circumstances of the case, a partial partition was the probable intention of the parties. Further, if a question is not brought before an arbitrator for decision, the fact that he does not decide the question does not detract from the finality of his award. **Mukund Ram Sukal v Saligram Sukal 2 C P L R 202.**

119—Duty of arbitrator.

Where a case is referred to arbitrators they are not bound to give an award on each point: they have to give their award on the whole case. They are Judges of law as well as Judges of facts, and an error in law does not vitiate an award. **Ghulam Jilani v Muhammad 4 Bom L R 161. =12 M L J 77=6 C W N 226=29 Cal 167= 29 I A 51 P C.**

Arbitration-*Contd.*

4 Duties and powers of arbitrators—*Contd.*

Powers of arbitrators under general reference.

119A—General reference to arbitration—Powers of arbitrator.

Under a general reference of all matters in difference, the arbitrator is not confined within the rules of law and equity, but has greater latitude than the Courts of law in order to do complete justice between the parties; and he may take into consideration all moral questions in forming his judgment, and decide according to equity and good conscience, e g., he may relieve against right which lies hard upon one party, but which, having been acquired legally and without fraud, cannot be resisted in a Court of Justice. Such being the powers of arbitrators, the effect of their award also is powerful. An award is a final and conclusive judgment as between the parties respecting all the matters referred by the submission. It binds the rights of the parties for all time without appeal,except where it is provided expressly that it shall have a temporary effect only. (Russel on Arbitration's 4th edition, pp. 110 and 476, Ref.) **Parmeshri v Lachumi A W N 1884, 148.**

(2) Delegation of authority.

120—Absent arbitrators.—Arbitrators have no power to delegate their authority to others. Thus, if some of the arbitrators are absent, those present cannot appoint others in their stead. **Surubjeet Narain Singh v Gouree Pershad Narain Singh 7 W R 269.**

Notes—Fol: 20 W R 420.

121—By Deputy—Unanimous decision.

In cases of arbitration Judicial officers should exert themselves as far as possible to obtain an unanimous decision of the arbitrators inasmuch as when the arbitration is worse than useless. A Deputy cannot serve as an arbitrator on behalf of another. A *gumashta* may himself be an arbitrator but cannot act in the name of his principal. **Baij Nath v Jugul Kishore Old S C 11.**

122—Ch. II Arbitration-Decree in accordance with the award—No appeal lies—Arbitrator delegating authority. Where decree is in accordance with the award, no appeal lies.

Where persons to an arbitration agreed to accept certain estimate and valuation made by a certain person, and the arbitrator proceeded to

Arbitration-*Contd.*

4 Duties and powers of arbitrators—*Contd.*

examine that person as a witness and accepted his estimate and valuation:—*Held*, that the arbitrator was thereby not guilty of delegating his authority to that person. **Hafiz Haji Muhammad Fakhar-ud-din v Murlidhar, 5 Ind Cas 621.**

(3) Procedure of arbitrators.

123—Technical rules.

Arbitrators are not bound by the technical rules of Court. **Reedoy Krishto Mozoomdar v Puddo Luchon Mozoomdar. 1 W R12.**

Notes—Dist: 9 All 253. Ref: 7 W R 401.

123 A—Procedure at—Arbitrators deriving information from a third person—Presence of the referring parties—Award—Arbitrators—Delegation of duties—Ministerial acts.

It would be prudent and discrete for arbitrators, when they desire to put themselves on the best footing of information as to matters of law to ask all the parties to be present when they communicate with any gentleman whom they may see upon that subject. But if they cannot be shown to have acted with improper partiality or for any other purpose than that of being correctly informed about the law, and avoiding mistakes of law, and if they cannot be shown to have been misled as to the law, their award should not on that ground be set aside.

An arbitrator may delegate to a third person the performance of acts of a ministerial character.

Buta v. Municipal Committee of Lahore 4 Bom L R 673.

124—Evidence.

Arbitrators ought only to take such evidence as is required by the terms of the agreement referring the question in dispute to arbitration.

Krishnakanta Paramanik v Bidya Sundaree Dasi. 2 B L R Ap. 25

Notes—See 11 W R 24.

(4) Matters referred by Court

125—Separate awards.

Arbitrators should give separte awards in a case referred to them by the Judge, and on other matters referred to them by the parties, instead of mixing them all up and giving a general award. **Roghoo Nundun Lall Sahoo v Bunwaree Lall Sahoo 3 W R Mis 27.**

Notes.—Diss: 12 W R 255. Fol 5 W R Mis 12 6 W R Mis 115.

(5) Decision on matters not referred.

126—The decision of arbitrators in a matter not in difference between the parties, nor referred to them, is null and void for want of jurisdiction. **Moshahel Singh v. Konomutty Bewa 15 W R 172**

127—Civil Procedure Code (Act X of 1877). Sections 508 510-Arbitrators not confining themselves to issues referred—Defective order of reference—Proper order where defects in award arise from Court not drawing up proper order of reference.

After issues had been fixed, but before any evidence had been adduced on either side, the parties agreed to refer the whole case to the decision of certain arbitrators and an umpire, and stipulated in the written agreement filed in Court that the decision of the majority should bind the parties. The Court thereupon, by an order of reference made over the issues which had been previously drawn, but which did not cover the whole matter in dispute to the arbitrators named in the agreement of reference. The majority of the arbitrators finally gave in an award, which the first Court set aside, and proceeded to try the case on the merits, but the lower Appellate Court on appeal, holding that the first Court was not justified in rejecting the award, passed judgment in accordance therewith. It appeared from the award that the arbitrators had not confined themselves to the issues actually referred, as they were not empowered by the order of reference to decide what particular relief the plaintiff was entitled to.

Held, that the judgment of the lower Appellate Court passed in accordance with the award could not be upheld: that arbitrators who have been appointed in the course of a suit under a submission which has been made a rule of Court, can exercise no greater power than is vested in them by the referring order, as their powers are circumscribed within the four corners of that instrument, and can neither be enlarged nor narro-

Arbitration-*Contd.*

4 Duties and powers of arbitrators—*Contd.*

wed by the view the arbitrators may themselves take of their duties.

But *held* further, that as it appeared that the defects which vitiated the award arose in consequence of the referring order not being drawn up in accordance with the agreement of the parties, the proper course to pursue was to set aside all the proceedings subsequent to the filing of the agreement to refer the case to arbitrators, and as the umpire had since died, to remand the case for the Court to proceed under Section 510 of the Civil Procedure Code, with the view of either appointing a new umpire or of superseding the reference, and in the event of a new umpire being appointed, with directions to the Court to draw up a proper order of reference under Section 508, including an issue as to the relief, if any, to which the plaintiff was entitled, and thereafter to proceed according to law, or, if no suitable umpire could be appointed, for the Court to proceed with the suit. **Ram Ditta v. Mussammat Bhagan P. R. 3 of 1883**

Notes.—Cited 91 P R (1888); 35 P R 1884.

(6) Power to order payment of fees to be condition precedent to hearing of reference.

128—Arbitrators-Application by for sanction of Court as to costs—Reference—Civil Procedure Code Act X of 1877 Chap XXXVII.

The Court has no power under the provisions of the Code of Civil Procedure to sanction an order passed by the arbitrators to whom a matter has been referred making the payment of their fees a condition precedent to their hearing the reference. **Steel v Roberts. 6 Calc 809=8 C L R 439**

129—Power of Arbitrator to direct payment by instalments—Award, meaning of—Civil Procedure Code (*Act* XIV of *1882*) Ss 518 and 522.

Held, that the word award" in the last sentence of S 522 of the Code, means the award as given by the arbitrators and not as amended by the Court under S 518 of the Code.

Held further that, where all matters in dispute between the parties to a suit for money due on a bond were referred to arbitration, the arbitrator had power to determine not only the amount to be paid, but also the mode of payment, and could therefore direct payment by instalments. (*8* All 449 Fol. Punjab Record (1906) P 47 Ref.) **Ram Sarup v Bindra Prasad 12 O C 23=1 Ind Cas 328.**

Arbitration-*Contd.*

4 Duties and powers of arbitrators—*Contd.*

130.—Sections 516, 525—Limitation, claim barred by.

Arbitrators to whom the matters in diference between the parties to a suit have been referred, are competent to dismiss the claim, if on taking the evidence they find it barred by limitation without deciding any of the other issues. **Babaji v Kano. 1883 P J 339**

(8) Interest after date of Submission.

131.—Courts of reference—Act VIII of 1859, Sections 312–322.

Where all matters in difference between the parties in the suit were referred to arbitration under an order of Court,—*Held* that, the arbitrators had power to award interest after the date of the submission, and to deal with the costs of the reference and award. **Mohan Lall v Nathu Ram I B L R, O C 144.**

(9) Costs.

132.—Omission to fix scale of costs.

An award directed that the defendant should pay the costs of the suit, and of the reference, and of the award without fixing the scale. On application to the Court to do so, the case was sent back to the arbitrator for that purpose. *Held* that when the order of reference gives the arbitrator full discretion over costs, he alone can fix the scale. **Barrut Chunder Doss v Damjee Pittumber Burke, O C 7 Cor. 150.**

133—Civil Procedure Code, 1859 Sec 317 et seq.

Where by an order of reference made pending a suit, all matters in reference between the parties are referred to an arbitrator by the Court under Act VIII of 1859, Section *317 et seq*, the arbitrator has power to deal with the costs of the suit. **Muddoosoodun Chowdhry v Koylas Chunder Shaw.**

Koylas Chunder Shaw v Muddoosoodun Chowdhry, 2 Ind Jur N S 12.

Arbitration-*Contd.*

4 Duties and powers of Arbitrators—*Contd*

134.—Power of arbitrators to deal with costs —Order of reference.

Held, that, though when a reference to arbitration in a suit is a general one of the whole case, the power of dealing with costs rests with the arbitrators, this is not so where one or more specific issues have been referred and the question of costs is not included in the issues so referred. (19 P R 1880), and (3 P R 1883), cited.

Har Golal v Sodhi Kartar Sing. 91 P R 1888.

135.—An arbitration award gave to one of the parties costs, but the submission had not left this question to the arbitrators ; *Held* that the award was open to an objection of the kind specified in Section 520 of the Code of Civil Procedure, and the Civil Court is bound to refuse to file in under Section 526.

Where however the party who benefits by the excess gave it up, the award was ordered to be filed and a decree passed exclusive of the excess

Dagdusa Filakchand v Bhukan Govind Shet. P J (1884) 232=9 Bom 89.

Notes—Ap 11 Mad 220 F. B.

(10) Employees of one party constituted Judges or Arbitrators by both parties.

135A.—S. 114—Contract, breach of—Goods supplied for a specified purpose—Implied warranty of fitness—Contract to supply " sleepers " for use by railway company—Stipulation by vendor that " passing " of sleepers by himself to be final, effect of—Employees of one party constituted judges or arbitrators by both parties, functions of.

The appellants, timber merchants, undertook to supply to C " sleepers " intended to be supplied for use by the Madras Railway Co. Having been fully informed of the purpose for which C.required these sleepers, the appellants impliedly warranted that they would be reasonably fit for that purpose. Most of the sleepers actually supplid proving unfit for the purpose were rejected by the Railway Company, whereupon respondent who had acquired C's rights under the contract sued for damages for breach of the contract. The appellants in defence relied on a stipulation in the contract to the effect that the " passing " of the sleepers by themsemselves would be final both as regards measurement and quality.

Held—That this did not mean that the Appellants were entitled to deliver under the contract any kind of sleepers they chose. They had merely the right to determine, by and through the skilled and experienced persons whom they should necessarily employ for the purpose, acting honestly and impartially according to the best of their judgment, whether the goods supplied were in confirmity with the requiremets of the contract.

Held, therefore, that there was no " passing " of the sleepers within the meaning of the contract when one of the two persons employed for the purpose did not possess the requisite skill and experience, and neither of them had applied his mind to the essential point, *viz* the conformity of the goods supplied with the contract, both having been in fact left in ignorance of the contract, and therefore without the materials necessary to enable them to act as judges or arbitrators in deciding upon a matter in which the interests of the parties were in conflict.

The Bombay Burmah Trading Corporation Limited v Aga Mahomed Khaleel Shirazee. 15 C W N 981. (P. C.)

(11) No suit maintainable against arbitrators for want of skill or negligence.

136.—Arbitrators, suit against.

Arbitrators are not liable to be sued for want of skill or negligence in making their award, but if they act fraudulently and corruptly or maliciously, they are answerable in damages to the parties aggrieved. **Devshankar v Lalabhai. 1880 P J 257.**

(12) Addition subsequent to making award.

137.—Addition subsequent to making award —Arbitrator *functus officio*.

An arbitrator *functus officio* when he has made the award; and a subsequent addition to or alteration of the award is not valid as binding upon the parties. Where an award declaring that two persons were equally entitled to the properties of a deceased person was presented for registration and the registrar having required specification of the properties dealt with by the

Arbitration-*Contd.*

4 Duties and powers of Arbitrators—*Contd.*

award, the arbitrator furnished a schedule in which he mentioned some items as having been gifted to one of them during the lifetime of the owner and as not being subject to the equal rights declared by the award. Held, that the annexation of the schedule was *ultra vires* of the arbitrator and that the schedule was not binding on the parties to the arbitration. **Jaffri Begam v Syed Ali Bazi. 28 I A 111=11 M L J 149 P C=3 Bom L R 311=5 C W N 585=23 All 383 P C**

(13) Arbitrator not empowered to alter the course of legal devolution.

138.—Powers of Inheritence—Devolution—family custom—Mahomedan Law.

An arbitrator has no power to alter the course of legal devolution in a mode at variance with the ordinary principles of Mahomedan Law in the absence of any special family custom. An arbitrator cannot validly declare divisible property indivisible for ever. **Jafir Begam v Syed Ali. 11 M L J 149=3 Bom L R 311=5 C W N 585=23 All 383=28 I A 111 P C**

Notes:—Ref: 26 Bom 577=23 Cal 498=33 Cal 881=4 C L J 162.

(14) Power of Court to vary arbitrators' order as to costs.

138A.—Order varying arbitrators order as to costs.

Where the arbitrators in their award directed that each party should bear its own costs, *held*, that the Court had no power to vary this order by making an additional order that the defendant and plaintiff should, as regards the Government, each pay half the amount of Court Fees. **Mir Mahomed v Mussammat Khair-ul-nissa P R 19 of 1880**

(15) Power of arbitrator to take property out of the custody of a lawfully appointed guardian.

139.—S. 46—Removal of guardian—Consent of guardian—Arbitrator's power-District Judge's jurisdiction *extra cursum curiæ*—Appeal.

An arbitrator has no power to take property out of the custody of a guardian appointed by Court and placing it in charge of another, or to declare a legally appointed guardian a nominal one. Nor has a District Judge, as such, jurisdiction to remove a guardian under the Guardians and Wards Act. The consent of the guardian cannot enable the Judge or the arbitrator to exercise such powers A Court cannot, while acting *extra cursum curiæ*, do that which the parties cannot legally authorise an arbitrator to do. If it does, such acts or orders would not be regarded as those of an arbitrator merely because the parties had consented. Such order would therefore be appealable. 1 H L Sc. 47, 1 H L Sc. 70, L R 7 Ch 45 (1896) A C 139 ref to. **Inder Narain Singh v E E Adlan. 8 C W N 37.**

(16) Power of arbitrator ending with the completion of the award.

139A.—Where a legal representative of a deceased party is not bound by, or entitled to enforce, the contract to refer to arbitration, depends upon the nature of the right which forms the subject-matter of the reference; that is, upon the question, whether the right is purely personal or survives to the legal representative.

If, upon the death of a party to arbitration proceedings, his representative in interest becomes a party thereto and proceeds with the investigation, the award is binding upon him.

When the arbitrator has made, or made and published, his award as a completed instrument, his power is wholly at an end. If after executing the award the arbitrator exercises a fresh judgment on the case and alters the award in any particular, the alteration is merely nugatory and his act is like a spoliation by a mere stranger.

Until the arbitrators have finally published their award as their final determination, they may make alterations therein.

What constitutes a completion of the award may depend upon the terms of the submission, and upon the facts and circumstances of the individual case. **Ramji Ram v Salig Ram. 14 C L J 188.**

(17) Power of arbitrator to settle a fair and equitable rent.

140.—S. 30—Suit for enhancement—Reference to arbitration.

Arbitration-*Contd.*

4 Duties and powers of Arbitrators.—*Concld.*

In a suit for enhancement of rent under sec. 30 of the Bengal Tenancy Act the case was referred to arbitration on the application of the parties and the arbitrator settled a fair and equitable rent: *Held*—That the arbitrator had jurisdiction to do so inasmuch as the parties declared that they would be bound by what the arbitrator would decide. **Ganga Charan Roy v Sasti Mandul, 6 C W N 614.**

(18) Arbitrator's power to alter course of legal devolution.

140A.—Arbitrator's power to alter course of legal devolution.

An arbitrator has no power to alter the course of legal devolution in a mode at variance with the ordinary principles of the law by which the parties are governed, in the absence of a special custom prevailing in the family. He has no power to make property which is divisible by law indivisible for ever. **Jafri v Ali Raza. 3 Bom L R 311.**

5. SUBMISSION OF AWARD.

(1) Extension of period for submission of award.

141.—Practice.

Applications for the extension of the period for the submission of an award and orders thereon should be made in writing and recorded.

Monji Premji Sett v Maliyakel Koyassan Koya Haji. 3 Mad 59.

142.—Umpire—Civil—Procedure Code, 1882. s. 509.

As in the case of an arbitrator, so in the case of an umpire, a Court has power to extend the period within which the award is to be submitted. The Court can extend the time allowed to an umpire under s. 509 of the Code.

Kupu Rau v Venkataramayyar. 4 Mad 311.

143.—Order granting extension for time for presenting an award.

When the application for extending the time for the presentation of an award is made within time, the order on that application is not bad in law if it is made after the expiry of the period which it grants. **Suppu v Govindcharyar. 11 Mad 85.**

Arbitration-*Contd.*

5 Submission of award—*Contd.*

Notes:—Ex: 15 Mad 384. Ref: 25 Cal 757 F B; 18 Mad 423 F B; 17 Bom 357; 20 Bom 596, 9 Bom L R 757 P C.

144.—An award completed and signed and made over to a peon of the Court on the date fixed for filing it, is within time, although owing to its having been made over after office hours it does not reach the hands of the Court until the next day. **Sita Ram v Bhawanidin Ram. (1903) 23 W N 205.**

145.—Failure to fix time—Effect on award.

The provision contained in s. 508, Code of Civil Procedure requiring the Court to fix a reasonable time for the delivery of the award is not imperative but directory, and non-compliance with it does not make the order of reference abortive and any subsequent arbitration proceedings ineffectual and bad. **Har Narain Singh v Bhagwant Kuar. 10 All 137= 8 C W N 28.**

Notes—Fol: 18 Mad 22.

146.—Making and filing award—Award made, but not filed within time specified by order of Court—Civil Procedure Code (Act XIV of 1882), ss. 508, 514, 521.

The present suit for dissolution of partnership and all matters in dispute between the parties thereto were by Judge's order, dated 18th July 1887, referred to the arbitration of A and B. The time for making and filing the award was by subsequent orders extended to the 18th May 1888 The award was made on that day, but was not filed until the 18th June 1888. The second defendant obtained a rule calling on the other parties to show cause (*inter alia*) why the award should not be set aside by reason of its not having been filed in time. *Held* that the omission to file the award on or before the 18th May 1888 did not render it invalid. The word "made" in ss. 514 and 521 of the Civil Procedure Code (Act XIV of 1882) does not include the filing of the award. **Umersey Premji v. Shamji Kanji. 13 Bom 119.**

Notes—22 Mad 22. Ref: 26 All 105. Fol: 8 C W N 916; 27 All 459=2 A L J 201= (1905) W N 47.

Arbitration-*Contd.*

5 Submission of award—*Contd.*

(2) Award leaving point of issue undecided

147.—Omission from reference of a point in dispute—Decision by Court after submission,

Where matters in dispute are referred to arbitration, and it is found that one question at issue is omitted from the reference, and that the award returned by the arbitrators contains no decision thereon, the party interested should bring the omission to the notice of the Court. If he fails to do so, the Court is not wrong in not passing any order or coming to any decision on that point. **Raj Narain Roy v Juggessur Mookerjee. 14 W R 247.**

(3) Delivery of award to party.

148.—Completion of arbitration—Act VIII of 1859 ss 315, 318, and 320—Record of proceedings.

By an order of January 17th, 1867, a suit was referred to two arbitrators under s 312, Act VIII of 1859, who were to make their award in writing, and submit the same to the Court within three months. No order for enlarging that time was made. The first meeting of the arbitrators was held on May 22nd, 1867. and four subsequent meetings were held, at which all the parties attended, and evidence was taken; at the last of which meetings, namely, on 27th July, an objection for the first time was taken on behalf of the defendant that the time limited by the order of reference had expired, but the arbitrators proceeded with the reference. The award was made on 12th August 1867, and remained with one of the arbitrators until his death in August 1868. Subsequently it was produced by the other arbitrator, on the application of the parties to the suit, and delivered to the successful party, by whom it was brought into Court on the 10th May 1870, and judgment was moved for in accordance therewith. *Held* that the arbitrators had authority to make the award. The award was properly submitted to the Court. S.320, Act VIII of 1859, does not make it necessary for the arbitrators to submit the award to the Court personally. Submission to the Court under s 320 is not necessary to the completion of an award under Ss. 315 and 318. Although an arbitrator may deliver his award to one of the parties, he ought not to hand over with it the proceedings, depositions and exhibits. **Jagat Sunderi Dasi v. Sanatan Bysak. 5 B L R 357.**

Arbitration-*Contd.*

5 Submission of award—*Contd.*

Notes.—Ref. 13 Bom 119.

(4) Arbitrator's lien on award.

149.—Arbitrator—Application by arbitrator for payment of his fees before producing award-Arbitrator's lien on award—Civil Procedure Code, 1882, Section 622—Right of arbitrator to sue for his fee n absence of express agreement to pay such fee—Contract Act, 1872, Sections 95, 171.

The District Judge having passed an order requiring the petitioner to produce in Court an award which he, acting as arbitrator for certain parties, had drawn up, and signed but had not yet delivered to them, the petitioner applied to the Chief Court for revision of the said order, and alleged that one of the said parties had applied to the lower Court to file the award under Section 525, Civil Procedure Code; that in taking up the arbitration he did not intend to act gratuitously; that he had not yet received his fee, which the referring parties refused to pay; that he had a lien on the award for such fee; and that if he produced the award in Court he would be left without a remedy for its recovery. The petitioner took these objections in the lower Court, which, however, overruled them, and gave him ten days' time to get an order from the Chief Court in his favour. For respondents it was contended that the application did not lie; that the Chief Court should not interfere as the applicant had other and more suitable remedies, and that the petitioner had no lien on the award.

Held, that the petitioner was competent to make, and the Chief Court had jurisdiction to entertain, the application in question.

Held, further, that in the absence of any express promise by the parties to a reference to remunerate an arbitrator, the latter has no right of action in respect of such remuneration, his sole remedy being to refuse to deliver his award until his charges are paid.

Held, also that, on general principles and in the absence of any direct provision to the contrary, an arbitrator has a lien on his award for the payment of his reasonable charges.

The sections of the Indian Contract Act relating to liens are not exhaustive, and do not negative the existence of liens not therein specified.

Arbitration-*Contd.*

5 Submission of award – *Concld.*

per Roe, C. J —An arbitrator may properly be regarded as an ordinary seller and entitled to a lien under Section 95 of the Contract Act.

Kirkpatrick. 22 P R 1897.

(5) Effect of award not submitted on due date.

150—Arbitration, reference to—Award not submitted on due date—Setting aside of order of reference—Procedure to be followed by Court.

Where a reference to arbitration falls through owing to non-submission of the award on the date fixed for submission, the course the Court should follow is to fix a date for the hearing of the suit, so as to enable the parties to appear and adduce evidence in support of their respective cases. Where this procedure was not followed, the High Court set aside the order of dismissal of the suit for default of appearance. **Gopal Lal Mandal v Suresh Chandra Mukerji 12 C L J 624.**

6 REMISSION TO ARBITRATORS.

(1) Defective and illegal award.

151—An award, defective and illegal on the face of it, should be at once remitted to the arbitrators. **Luchmee Narain v Pyle 2 N W 150.**

152—In a suit for balance of account, the arbitrators allowed as a set-off an item founded on a *budnee* or wagering transaction. The Court, disallowing this item as illegal, decreed the rest in terms of the arbitrators' award. *Held*, that the *budnee* set-off had been rightly disallowed for illegality, but that the proper procedure was to remit the award for the re-consideration of the arbitrators on account of the illegal matter apparent on the fact of it. If they refused to amend their award accordingly, it would have been misconduct in terms of Section 324 Civil Procedure Code. **Ram Kurn v Zahira. P R 101 of 1868.**

Notes—Ref: 89 P R (1883).

153—In a suit for breach of betrothal against two defendants, the plaintiff and one of the defendants consented to arbitration. The arbitrators awarded damages against both defendants. The Court trying the suit passed judgment upon the award, striking out the name of the non-consenting defendant.—*Held*, that the procedure of the Lower Court was erroneous; that the proper course was to remit the award under Section 323, Civil Procedure Code for illegality on the face of it. **Narain v Kanhe P R 3 of 1872**

Arbitration-*Contd.*

6 Remission to Arbitrators—*Contd.*

154—Civil Procedure Code, 1882, Sections 518, 520. 522—Decree professing to follow an award of arbitrator but not in accordance therewith—Appeal—Award embracing matters not referred to arbitration — Procedure.

Plaintiff sued for a declaration that one Mussammat N. B. was his lawful wife, and the question was referred, with the consent of the parties, to arbitration. The arbitrators decided that the marriage which had taken place between plaintiff and Mussammat N. B. was illegal; that the girl had been previously betrothed to one K, R. (another defendant), but that plaintiff's marriage should be held good as plaintiff had given his own sister in exchange for Mussammat N. B., but that it should be a condition that R.C. (one of the defendants), who had effected plaintiff's marriage, should get K. R. betrothed to a girl under eight years of age within two years, and, if he failed to do so, should pay K. R. Rs. 500 as damages. The lower Court, thereupon, passed a decree simply to the effect that Mussammat N. B. was the legal wife of plaintiff.

Held, that the decree of the lower Court, although it professed to follow the award, was not "in accordance" therewith, and was appealable.

Held, further, that inasmuch as the Court, in order to pass a decree embodying all the provisions of the award, would have had to determine matters not referred to arbitration and would have been giving a decree against, R. C., one defendant, in favour of K. R., another defendent, who never asked for such a decree, the lower Court should, according to Section 520 of the Code, have remitted the award to the arbitrators for re-consideration.

Mussammat Gondi Bai v Thakar Dass 60 P R 1896.

(2) Award containing mistakes, omissions, or defects.

155—Civil Procedure Code, 1869, ss. 322, 323, 324.

S. 323, Act VIII of 1859, authorizes a Court which refers a case to arbitrators to remand it to

Arbitration-*Contd.*

6 Remission to Arbitrators—*Contd.*

them for re-consideration when their award contains mistakes, omissions, or defects which cannot be amended by the Court under s. 322. Such award, on the refusal of the arbitrators to re-consider it, becomes null and void, without proof of corruption or misconduct under s. 324. **Mohun Kishen v Bhoobun Shyam** **7 W R 406.**

(3) Application to remit award to arbitrators.

156—Time for remission—Civil Procedure Code, 1859, s. 320.

An application that an award be remitted to the arbitrators, in order that the proceedings, depositions, and exhibits in the suit which had not been submitted with it to the Court under Act VIII of 1859, s 320, should be so submitted, ought to be made within ten days after the award has been originally submitted; otherwise if the award be good on the face of it, the Court will give judgment upon it. **Baney Madhub Roy v Hurry Mohun Roy** **2 Ind Jur N S 16.**

(4) Judgment passed on award within time allowad for remission.

157—Civil Procedure Code, 1859, ss. 324, 325—Remission after judgment.

A judgment given according to an award under s. 325 of Act VIII of 1859, without waiting for the ten days prescribed by s. 324 of that Act, is illegal, and will be set aside. After passing judgment according to an award, such award cannot be re-submitted to the arbitrator for re-consideration and correction. **Pohkar Pershad v Punchum Rae** **2 N W 235.**

(5) Remission to arbitrators after decision on special appeal

158.—A case having been referred to arbitration without provision being made for a difference of opinion, and the arbitrators having given in differing awards the Court of first instance tried the case anew, and dismissed the suit. This decision was confirmed on appeal. In special appeal the plaintiff asked that the case might be sent back to the arbitrators with a provision for difference of opinion, and that they might submit their award a second time. *Held* that it was too late at this stage to allow such a course. **Thakoor Dass Chuckerbutty v Ram Jeebun Chuckerbutty** **14 W R 150.**

Arbitration-*Contd.*

6 Remission to Arbitrators—*Contd.*

Notes.—*Dist* 8 C L J 475.

159.—Arbitration—Decree in accordance with an award—Revision—Civil Procedure Code 1882, Section 622.

Held, that the omission of a Court to remit an award which determines matters not referred to arbitration is not subject to revision, and, although a revision lies against a decree based upon an arbitration award on the ground of material irregularity, yet that material irregularity must have reference to the proceedings of the lower Court and not to those of the arbitrator. 89 P R 1902 F B; 64 P R 1870; 25 P R 1902 P C cited. **Sita Ram v Dhanni Ram.** **92 P R 1903.**

(6) Refusal of arbitrator to re-consider award.

160.—The plaintiff in this suit sued the defendants to recover certain moneys presented to him on his marriage which he alleged the defendants had received and appropriated to their own use. The defendants denied that they had received such moneys, but admitted that such moneys had been credited by the plaintiff's father to the firm in which they, the plaintiff and the plaintiff's father, were jointly interested, against a larger amount of moneys belonging to the firm which had been expended on the plaintiff's marriage. The parties agreed to refer the matter in dispute between them to arbitration, and to abide by the decision of the arbitrator. The arbitrator decided that the plaintiff could not recover the money he sued for, and which had been credited to the firm of which he was a partner, as a larger sum had been expended on his marriage out of the funds of the firm. The plaintiff obtained the opinions of certain pandits to the effect that, under Hindu law, gifts on marriage are regarded as separate acquisitions, and prayed that the Munsif would remit the award with these opinions, to the arbitrator. The Munsif remitted the award with the opinions, requesting the arbitrator to consider them, and to return his opinion in writing within a certain period. The arbitrator having refused to act further, the Munsif proceeded to determine the suit, and gave the plaintiff a decree on the ground that, in a joint Hindu family, presents received on marriage do not fall into the common fund. *Held* (Pearson J. dissenting) that, there being no illegality apparent on the face of the award, the Munsif was not justified in remitting the

Arbitration-*Contd.*

6 Remission to Arbitrators—*Contd.*

award, or in setting the award aside and proceeding to determine the suit himself, but that he should have passed judgment in accordance with the award. **Nanak Chand v Ram Narain. 2 All 181.**

Notes.—*Ref:* 22 Mad 202; 3 All 636; 30 All 505=5 A L J 658=(1908) W N 228.

(7) Refusal by arbitrator to act.

161.—Arbitrator refusing to act—Award on one point only—Remission to arbitrator—Limitation—Adverse possession.

An arbitrator made his return deciding one of the issues raised in the case namely, that the defendants had been in possession for more than 12 years. Both the parties claimed under the same landlord. On remission by the Munsif thereupon himself decided it in favour of the plaintiffs. The subordinate Judge, on appeal, held that the award was sufficient for the determination of the case, and reversed the decision of the Munsiff, and gave the defendants a decree in terms of the award. *Held* that, as the plaintiffs and the defendants claimed under one and the same landlord, and the question between them being which of the two had the better title to the land in dispute, the case could not have been concluded by the finding of the arbitrator upon the question of possession, and that the Munsif had acted rightly, on the arbitrator declining to complete the award in deciding the case himself. **Jonardon Mundul Dakna v Sambhu Nath Mundul. 16 Cal 806**

(8) Appeal impugning propriety of order of remission.

162.—Civil Procedure Code, 1877, s 520.

An award was remitted under s. 520 of Act X of 1877. The arbitrators refused to re-consider it, and the Court thereupon proceeded with the suit, and gave the plaintiffs a decree. The defendants appealed from such decree on the ground, amongst others, that the award had been improperly remitted under s. 520. *Held* that the question whether the award had been properly remitted under s. 520 or not could be entertained in such appeal. **Abdul Rahman v Yar Mahammad 3 All 636.**

But see **George v Vastian Soury 22 Mad 204.**

Arbitration-*Contd.*

6 Remission to Arbitrators—*Contd.*

Notes.—Ref: 31 Mad 345=18 M L J 228.

(9) Omission of arbitrator to carry out terms of reference

163.—Filing agreement to refer to arbitration in Court—Decree—Civ. Pro. Code 1877, ss. 2, 250, 522 & 524.

The sharers of a joint undivided estate agreed in writing that such estate should be partitioned and the accounts thereof settled by arbitration, and named one of such sharers as arbitrator, and agreed that he should settle all the accounts, show the surplus at each sharer's credit, and prepare lots, after partition of the lands and houses comprehended in such estate, and have them drawn within one year from the completion of the partition. Subsequently one of such sharers applied, under s. 523, to have such agreement filed in Court. The other sharers not objecting to this course, such agreement was filed accordingly, and the case was referred to such arbitrator. The arbitrator made an award whereby he partitioned such estate into lots, assigning some only of such lots by name, and wherein, he stated that he had not been able to settle the accounts owing to the default of the parties, and that, considering that the partition should take effect without any delay, he did not ask for further time. He further stated that "all the parties state that they will adjust the accounts after renewing the agreement," and he requested that the unassigned lots might be drawn in Court. The Court made an order confirming the award, and it being objected that the settlement of the accounts should not be postponed, but that they should be settled as agreed, directed that the arbitrator should settle the accounts, and gave him a year's time for that purpose, and, some of the parties not being willing to draw the unassigned lots, directed the distribution of such lots "in reference to the age and number" of the sharers. Held that such order was a "decree" within the meaning of ss. 2 and 522, that the arbitrator should himself have drawn such lots, or he should have made the parties draw them, but, inasmuch as it would not have strained the agreement to have had such lots drawn in Court, and no objection had been taken to the arbitrator not having himself drawn them, it was not incumbent on the Court to have remitted the award in order that the arbitrator might have drawn them; that the Court, however

Arbitration-*Contd.*

6 Remission to Arbitrators—*Contd.*

should not have distributed such lots in the manner it had done, but should have drawn a lot for each person, and in acting as it had done it had acted contrary to the award, and for that reason its decree could not be maintained: and that, in confirming the award before the accounts had been settled and award made in respect thereof, the Court had acted erroneously, inasmuch as the award had left undermined a very important matter, viz.. the settlement of the accounts, and the Court should, under s. 526, have remmitted the award for the re-consideration of the arbitrator, and, as it had the power to remit it upon such terms as it thought fit, the Court could have allowed one year, if necessary, for the settlement of the accounts; and on this account, and also because the Court had made an order postponing the settlement of the accounts, and thereby made an order contrary to and in excess of the award, its decree must be reversed. **Sadik Ali Khan v Imdad Ali Khan. 3 All 286.**

164—Civil Procedure Code (1882), s. 521—Legality of order remitting award for reconsideration—Appeal.—

An award, submitted by arbitrators, to whom all matters in dispute had been referred, stated that "defendant has not produced any witness in support of his contention raised in issues Nos. 1, 2 5, and 6, hence we have only to deal with issues Nos. 3, 4, and 7", and, dealing with those issues, the arbitrators gave their finding. The award was remitted on the ground that the arbitrators had not determined the issues Nos. 1.2, 5, and 6. *Held*, (1) the legality of an order remitting an award for the reconsideration of the arbitrators may be challenged on appeal against the decree ultimately passed; and (2) that the award ought not to have been remitted: there was no illegality on the face of it, and there was a decision on the whole matter in issue between the parties. 14 W R 327; 11 Cal 172; 2 All 181 and 3 All 643, referred to. **George v Vastian Soury, 22 Mad 202.**

Notes:—Ref: (1908) W N 242; 31 Mad 345 = 18 M L J 228; 5 A L J 644; 18 M L J 485 = 31 Mad 479.

(10) Omission to give notice.

164.—Award—Omission to give notice—Ss. 516 to 522, Civ Pro Code, 1882.

Arbitration-*Contd.*

6 Remission to Arbitrators—*Concld.*

Omission to give notice as required by s. 516, Civ. Pro, Code, 1882, is a material irregularity. 14 All 343, 20 All 474, 3 Mad 59, 11 *Mad* 144, 15 Mad 354, U *B* R 1892-1896, Vol. II. 9 Ref. The spirit of ss. 516 to 522, Civ. Pro. Code, appears to require that, if an award has to be remitted, the notice to be issued under s. 516 should be issued, when the award, in its final shape, is filed in Court. **Ma Shwe Me v Maung Tok Tho. U B R 1897-1901 Vol. II 24.**

7 REVOCATION OF, OR WITHDRAWAL FROM ARBITRATION.

(1) Revocation of agreement to refer.

165—It is almost a universal rule that a submission to arbitration is revocable before award made. **Surubjeet Narain Singh v Gouree Pershad Narain Singh, 7 W R 269.**

Notes:—Fol: 20 W R 420.

(2) Mode of revocation.

166—A revocation by deed can set aside a deed by which a person binds himself to abide by the decision of arbitrators. Revocation by parol may set aside a parol agreement. Notice is not necessary. **Alla Ayappa v. Nundula Peraiya** alias **Perambotlu, 3 M H C R 82.**

But **See, Nagasawmy Naik v. Rungaswamy Naik. 8 M H C R 46.**

Notes:—Ap: 1 N W P 252.

167—Telegram staying proceedings.—

In the course of arbitration proceedings in Calcutta one of the arbitrators received two telegrams purporting to be sent by the parties in Darjeeling to the arbitrators, the terms of which were: "Stay further proceedings; arrange matters here". *Held*, that the telegrams sent to the arbitrators did not amount to an absolute revocation of their authority. **Kellie v. Fraser, 2 Cal 445.**

Notes:—Appr: 22 Cal 451; 29 Cal 315, Fol: 24 Mad 31; 33 Cal 1065 = 4 C L J 238; 36 Cal 59. Ref. 19 Cal 358; 24 Cal 190; 1 C W N 156; 4 Bom 482; 22 Bom 701; 31 Cal 274.

168—Lapse of time, Presumption of revocation from—Suit to enforce agreement to refer.—

Where some months had elapsed without either party taking action to carry out an agree-

Arbitration-*Contd.*

7 Revocation of, or withdrawal from arbitration-*Contd.*

ment to refer a dispute to arbitration, the plaintiff was held not to be debarred from considering the agreement revoked and prosecuting his suit.

Jeorakhun Loll v. Muttra Pershad, 1 N W Ed 1873, 252.

(3) Ground for revocation.

169—Sufficient cause.—

An agreement to refer an existing dispute to arbitration is as binding and capable of enforcement as any other lawful contract: and a submission of such a dispute to arbitration once made is not, without just and sufficient cause, revocable. 3 Mad 82, overruled. 3 Mad 183 and 7 Mad 257, followed. **Nagasawmy Naik v. Ruogavamy Naik, 8 M H C R 46.**

Notes:—Ref: 10 Bom 381; 27 Mad 112, Fol: 13 M L J 311.

170—Agreement to refer to—Civil Procedure Code—Revocation of arbitration.

When parties agree to arbitration unless the provisions of the Code are expressly excepted by the parties to the agreement, it must be taken as having been agreed by them that it was subject to the Civil Procedure Code. When persons have agreed to submit the matter in dispute to the arbitration of one or more persons, no party to such an arrangement can revoke it unless for good cause, and no mere arbitrary revocation will be permitted. **Dalu Ram v. Jai Ram, S C 17.**

171—Arbitration — Arbitrator subsequently indebted to one party or subsequently known to be so—Revocation of reference—Decision—Misconduct:—Where an arbitrator was, or had subsequently become, indebted to one of the parties to the reference, the other party is entitled, on becoming aware of such indebtedness, to revoke and put an end to the reference. An award made in spite of such revocation is invalid and unenforceable. **Mahomed Wahid-ud-din v. Hakiman, 29 Cal 278.**

Notes:—Ref: 58 P W R 1907=1 P R 1908 F B.

172—The parties referred the matter in dispute to arbitration, and the umpire was called in. Defendant petitioned the Court to supersede the reference, on the ground that plaintiff's side had been tampering with the umpire, and it was likely that the latter would not act impartially. The Court superseded the reference and itself disposed of the case. *Held*, that the supersedure was not authorised by Chapter VI, Civil Procedure Code, and the case must be sent back to be disposed of according to the reference.—

Kashmiri Das v. Mussammat Paras, P R 28 of 1874.

173-174—The Second Schedule r. 21 (1882 S. 526)—Arbitration—Award—Judicial misconduct—Indebtedness of arbitrator to a party—Arbitrator, as muktear of one of the parties.

Where parties have, out of Court, referred a matter in dispute to arbitration by an arbitrator, and it subsequently transpired that the arbitrator has been acting as a muktear of one of the parties without any remuneration, the other party is entitled to withdraw from the reference. If the arbitrator, after receipt of the revocation, makes an award, such award cannot be enforced by suit. If an arbitrator is indebted to one of the parties at the time of reference and in either case does not disclose that fact to the other party, such party would be entitled to revoke the reference upon discovery of the fact, and in any event any award made by such arbitrator would be invalid on the ground of judicial misconduct. 17 Cal 200; 3 C W N 361; 25 Cal 141 ref. to.

Musstt Bibi Hakiman v. Mahomed Wahiduddin, 6 C W N 235.

175—Long and unreasonable delay in the conduct of the proceedings—Civil Procedure Code (Act XIV of 1882), S. 523 —

A submission to arbitration can only be revoked on good grounds. The claimant, in a reference to arbitration, is the person on whom, *ceteris paribus*, it is incumbent to promote the conduct of the proceedings; and when, therefore, there is a long and unreasonable delay unexplained by any act of the other party, either conducing to it or consenting to it or waiving it, the latter is, *prima facie*, entitled to decline to go on with the reference, and to revoke the agreement for submission. Where an agreement to refer has been duly revoked, the Court is incompetent to order it to be filed under s. 523 of the Code of Civil Procedure. **Coley v Dacosta, 17 Cal 200.**

Notes—Fol: 19 Cal 278.

176—Omission to fix time within which award should be made—Notice.—

Arbitration-*Contd.*

7 Revocation of, or withdrawal from arbitration-*Contd.*

According to the proper construction of the Code of Civil Procedure (that is to say, construing it with reference to the constitution of the Civil Courts of India and the abiding direction to them to proceed in all cases according to equity and good conscience), when persons have agreed to submit the matter in difference between them to the arbitration of one or more specified persons, no party to the agreement can revoke the submission to arbitration, unless for good cause, and a mere arbitrary revocation of the authority is not permitted. Where no time was originally fixed within which the award was to be made, it is open to either party to hasten the proceedings by giving notice to the arbitrators that the award must be made, and an umpire appointed, within a reasonable time; but where the time elapsing after the notice has been actively employed by the arbitrators,and the delay has been owing to necessity which they could not control, the parties cannot recede from their submission by reason of the notice.

Pestonjee Nusserwanjee v Manockjee & Co 10 W R P C 51-12 Moore's I A 112. Ablakhee Kooer v. Oodun Singh, 15 W R 331

177—S. 508 C P C-Reference—Revocation—An award cannot be set aside by the Court on the mere surmise that the arbitration has been partial. After the parties to a suit have agreed to refer to arbitration, and the order of reference has been made by the Court under s. 508 of the Code of Civil Procedure, neither of them can arbitrarily and on no sufficient ground withdraw from the agreement 12 M I A 130 followed.

Nainsukh Rai v Umadai 7 All 273; 5 W N 12

Notes—Fol: 10 All 8. Dist· 9 All 253

178—Withdrawal from the arbitration —

The parties to a suit agreed through their attorneys to refer the suit to arbitration; and Judge's order was by consent of both attorneys signed in order to carry out that agreement. The defendant was present at the two meetings of the arbitrators but after that he changed his attorney, and sent notices to the plaintiff and to the arbitrators withdrawing his assent to the arbitration and took out summons alleging that as he did not sign a special authority to his attorney to sign the consent order that order was not binding upon him:—

Held, that the objection was not valid and the order of reference would stand good.

Semble:—When a party has seen an order of reference to arbitration and authorized his attorney to consent to it, even though he does not sign it, that writing may be regarded as a special authorization in writing to his attorney to consent the terms referred to therein. **Bhanmal v Mathuradas. 1 Bom L R 261.**

(4) Revocation of submission.

179—A reference to arbitration once made cannot be revoked except for good cause and not at the mere will of one of the parties to it.

Sultan Muhammad Khan v Sheo Prasad. 20 All 145.

180—Revoking or superseding submission or reference —

A regular submission to arbitration cannot be revoked by one of the parties. **Pars Ram v Asa Ram P R 9 of 1870.**

181—Arbitration revocation of—Good cause—Collusion of arbitrator —

A submission to arbitration can be revoked for good cause and not arbitrarily (12 M I A 112 foll). Where the arbitrator is in fraudulent collusion with the defendant, the submission can be revoked. **Bansi Dhar v Sital Prasad. 3 A L J 613=1906 A W N 253=29 All 13**

181A-C P C O 22 r. 3 (1) The Second Schedule (1882 ss 365,523)-Arbitration, contract to refer to—Rule of Court—Death of one party, effect of —Revocation of contract only for just and sufficient cause—Leave of Court—Abatement of arbitration:—Under the English common law the authority of an arbitrator may, at any time before the award is made, be revoked at the pleasure of any party to the submission, whether such submission be by agreement in writing, bond deed or Judge's order or order at *nisi prius* Such authority is, therefore, revoked in England by the death of any one of the parties to the submission 15 R R 580: 7 Taunt 57; referred to. This rule of English common law has not been followed in India, so that contracts to submit to

Arbitration *Contd.*

7 Revocation of, or withdrawal from arbitration-*Contd.*

the decision of an arbitrator are not revocable at the mere will or pleasure of the parties. 8 M H C R 46 followed A submission which has not been made a rule of Court is not revocable without just and sufficient cause, and a submission which has been made a rule of Court can be revoked only with the leave of Court for good cause shown. 12 M I A 112, referred to. Where an uncle and his nephew who were members of a joint family entered into an agreement in writing to submit their disputes relating to the partition of their joint property to the decision of some arbitrators, and the uncle applied under S. 523 to have the agreement filed and the application was registered and numbered as a suit, but pending the proceedings before the arbitrators the uncle died and his daughter's son, alleging himself to be the adopted son of the deceased, applied to continue the suit—*Held* (1) that the suit did not abate, (2) that the contract of submission not being personal to the deceased, was not revoked by the death of one of the parties; and (3) that the procedure prescribed in S 367 C P C was the one that should have been adopted. **Venkata Satyanarayana v Venkata Rangayya 13 M L J 311 = 27 Mad 112.**

Notes:—Ref. (1908) W N 238=30 All 505=5 A L J 658.

182--Arbitration--Submission out of Court, if revocable—Agreement to refer to arbitration, if of personal nature.

The submission of an existing dispute, once validly made, is not revocable without just and sufficient cause, even in the case of a submission which has not been made a rule of Court.

Agreements to refer to arbitration cannot, therefore, be rightly deemed as essentially of a personal nature, revocable at the mere will of a party.

Ramji Ram v Saligram. 14 C L J 188.

Arbitration-*Contd.*

7 Revocation of, or withdrawal from arbitration-*Contd.*

(5) Appointment of new arbitrator, power of

183—An application for an order of reference to arbitration was made by the two defendants in person, but by the Pleader of the plaintiff, who was not specially authorized to join in it. The making of an order was postponed for four days, when the required authorization was produced and the order made. Four days after, and before the arbitrator began proceedings, one of the defendants applied to have another person appointed arbitrator.

Held that the application was, upon the production of the authorization complete and effectual, and that it was not competent to the Court to revoke the order of reference upon the application of one of the parties.

Halimbhai Karimbhai v Shankar Sai. P J (1885) 242=10 Bom 381.

Notes—Fol 1 Bom L R 261 Ref. 3 A L J 185=(1906) W N 51.

(6) Revocation by one party.

184—"Sufficient cause"—Civil Procedure Code, 1859, s 326.—

The fact of one of the parties to the agreement revoking his submission is not a sufficient "cause" within the meaning of s. 326 of Act VIII of 1859. The English cases on the subject considered. **Pestonjee Nusserwanjee v Maneckjee. 3 M H C R 183.**

S. C. on appeal 12 Moore's I A 112=10 W R P C 51.

Santanja v Ramaraya. 7 Mad 257.

(7) Examination of arbitrator as a witness.

185—A reference to arbitration made under an order of Court cannot be revoked at the instance of a party. If an arbitration award is set aside and the matter is tried as a suit before the Court, the arbitrator cannot be examined as a withness as to the grounds of his decision, but only to prove any admission which may have been made before him in the course of arbitra-

Arbitration-*Contd.*

7 Revocation of, or withdrawal from arbitration-*Contd.*

tion, and which might be material evidence.

Nilmonee Bose v Mohima Chunder Dutt. 17 W R 516.

Notes—Ref. 10 Bom 381.

(8) Revocation of agreement to have case decided on the evidence of third person.

186—Agreement to abide by oath of third party——Oaths (Act X of 1873) ss. 8—12—Revocation—of agreement—Civ. Pro. Code 1877, Ch XXVII.

The plaintiffs and some of the defendants in a suit agreed that the matters in difference between them in the suit should be decided in accordance with the statement made on oath by one J after he had made a local inquiry into such matters. The Court trying the suit accordingly directed that J should be examined on a certain day. Before J was examined, the defendants objected to the case being decided in accordance with J's evidence, but the Court disallowed the objection and having taken J's statement on oath decided the case in accordance therewith.

Held, by the Stuart , C J that the provisions of section 8 to 12 of Act X of 1873 were not applicable to the reference of the case to J ; that such reference was in the nature of a reference to arbitration under the Code of Civil Procedure; that it would have been valid and binding on the parties and all the defendants joined in it , but that , as all the defendants did not do so, the proceedings were illegal and they should be set aside and the suit be decided on the merits.

Held, by Oldfield, J., that the reference of the case to J was not made under or governed by the provisions of the Code of Civil Procedure relating to arbitration, and therefore the defendants were competent to revoke the agreement ; and that, assuming the reference was made under the provisions of the Oaths Act there was no rule of law prohibiting the revocation of such a reference, and therefore the defendants were competent to revoke the same. **Lekhraj Singh v Dulhma Kuar. 4 All 302.**

Notes:—Ref: 18 All 46 , 29 All 49. Appr: 3 A L J 654=(1906) W N 280.

Arbitration-*Contd.*

7 Revocation of, or withdrawal from arbitration-*Contd.*

(9) Revocation by Court.

187—Illness of arbitrators—Civil Procedure Code, 1859, s. 318.

Where one of the arbitrators had been ill and the time for sending it is elapsed before they could make their award, the Court superseded the arbitration and recalled the suit.

Joseph v Sreerker. Bourke, O C 359

188—Where a suit is referred, and one of the arbitrators becomes unable to act, the Court can supersede the reference,and decide the case itself. P. R. 66 of 1870,——Where it is apparent that the reference will be fruitless,the Court may itself proceed with the case to final judgment.

Mehtab v Mussammat Madan P R 24 of 1875.

189—Civil Procedure Code, 1882, Sections 98, 510—Dismissal of suit pending reference to arbitration.

Held, that an order dismissing a suit under Section 98 of the Civil Procedure Code cannot properly be made when the suit has been referred to an arbitration which is still pending at the date of the order of dismissal, unless an express order superseding the arbitration for sufficient reasons under Section 510 of the Code has first been passed.

Held, further, on the facts of the case, that the order of the lower Court simply dismissing the suit under Section 98 of the Code could not by itself be construed into an order superseding the arbitration under Section 510 of the Code.

Imam Din v Jawahari, 10 P R 1899.

(10) Withdrawal from arbitration.

190—Civil Procedure Code 1859, s. 326.

Either of the parties in a reference to arbitration may withdraw from the proceedings at any time previous to the making of the award, unless the submission to arbitration has been made a rule of Court under s. 326 of the Civil Procedure Code. **Alla Ayappa v Nundala Peraiya *alias* Perambhotlu. 3 M H C R 82**

But see **Nagasawmy Naik v Rungasamy Naik. 8 M H C R 46.**

Notes:—Ap: 1 N W P 252.

191—C.P.C. O. 23, r. 1 ; the Second Schedule

Arbitration-*Contd.*

7 Revocation of, or withdrawal from arbitration-*Contd.*

(1882—Ss. 373, 325) Application of S. 373 to application S. 525—Award, application to file—Withdrawal:

S. 373 is applicable to an application filed under s. 525 to file an award made without the intervention of the Court and the plaintiff can withdraw the application at any time prior to the delivery of judgment and preparation of the decree. **Gauri Shankar v Maida Koer. 31 Cal 516.**

192—Arbitration reference to application before Commissioner—Civil Procedure Code (Act V of 1908) Sch II—Reference to arbitration, withdrawal from.

An application for reference to arbitration to be operative must be presented to the Court. It cannot be entertained by a Commissioner appointed to examine a witness.

Parties can withdraw from a reference to arbitration, when there has not been a completed agreement for reference, for instance when it is not yet settled upon what terms as to remuneration, the nominated arbitrator is to act.

Asutosh Deb Sarkar v Apurba Kumar Deb Sarkar. 10 C L J 449=4 Ind Cas 370.

(11) Refusal of some arbitrators to act.

193—Civil Procedure Code, 1859, s. 319—Refusal to nominate other arbitrators—Withdrawal from arbitration.

Where some of the arbitrators named in an arbitration agreement refuse to act, and the parties do not agree to appoint others instead of them, it is not incumbent upon the Court to appoint other arbitrators, unless both parties agree, the provision of s. 319 being not obligatory, but simply permissive. *Held* further that, under such circumstances, the refusal on the part of one party to nominate other arbitrators does not amount to a withdrawal from the agreement to proceed to arbitration. **Sada Sookh v Shiva Dyal 1 Agra 109.**

Notes:—Fol: 25 Mad 736.

(12) Withdrawal from arbitration.

194—Ground for withdrawal.

A party is not entitled to withdraw without good cause shown from a submission to arbitration. Where an award was about to be pronounced and a party withdrew on the grounds, first, that the arbitrator was entering into foreign matters; and, second, that a minor was likely to be interested who would not be bound, the grounds were held not to constitute a good ground for withdrawal. **Ram Coomar Shaha v Kala Chand Shaha. 21 W R 395.**

195—Agreement not fully carried out as to number of arbitrators

The parties to the suit agreed to refer the disputes between them in another suit to the arbitration of five persons named by them, and did not agree to accept the decision of any less number of persons so nominated. Three only of the arbitrators nominated were proceeding with the arbitration, and one had declined to act. *Held*, that the suit, which was one to put an end to the arbitration. was maintainable. **Parmeshar Dat v Hari Naik. 7 N W 357.**

197—Agreement to withdraw suit—Failure to make award—Application for restoration to file of Court.

A suit was, by order of Court, referred to three specified arbitrators, who were to make an award within six months, and in case of difference of opinion, all matters in dispute were to be referred to the decision of an umpire. The arbitrators had only one meeting, at which an agreement was come to by the parties to settle all matters in dispute among themselves and withdraw the matters from arbitration, which was accordingly done, but nothing appeared to have been afterwards done. No award was made by the original arbitrators within six months from the reference. On application by the plaintiff to have the suit restored to the file of the Court,—*Held* that the suit was still pending, the arbitrators not having determined it while they had jurisdiction to do so, and it was ordered that it should be brought again before the Court. **Gapi Nath Nandi v Shib Chandra Nandi. 6 B L R Ap 74**

(13) Order dismissing petition to revoke a submission to arbitration.

197 A—Cl. 15 Order of a Judge refusing to

Arbitration-*Contd.*

7 Revocation of, or withdrawal from arbitration-*Contd.*

decide whether arbitrators are going beyond the scope of their authority—Judgment—Appeal—Construction of submission to arbitration—Insurance against fire—Liability of company for further loss.-An order of a Judge dismissing a petition to revoke a submission to arbitration, on the ground that the arbitrators are going beyond the scope of the reference, is a judgment within meaning of cl. 15 of the Letters Patent and as such is appealable. Such an order compels a party to submit to the jurisdiction of arbitrators, though he complains that no such jurisdiction exists.

It decides a question of right, namely, whether or not he is, by the terms of reference to arbitration, deprived of his right at common law to have the dispute decided in the ordinary way in a Court of law. It goes to jurisdiction and is not passed as an exercise of discretion.

Per Chandavarkar J.—When a submission to arbitration is being construed, a cardinal principle to be applied is that by a submission to arbitration a party deprives himself of the right at common law to have the dispute to which the submission relates decided by a Court of law It must therefore appear clearly from the terms of the submission that with reference to any point the party has so deprived himself.

The loss or damage by fire, which is insured against in a policy of insurance, cannot include loss caused by deterioration of the property insured consequent on neglect (if any) of the Insurance Companies to take care of it, if they have taken possession. A loss so caused is not an inevitable or direct consequence of the mischief by fire. It is only where mischief arises from fire (in fire insurance cases) and from the perils of the sea (in marine insurance cases) and the natural and almost inevitable consequence of that mischief is to create further mischievous results, that underwriters become responsible for the further mischief so incurred (1851) 6 Ex. 468 ref. to.

Per Batchelor, J.—The loss insured against is limited to the loss by fire (which includes the loss by water in extinguishing the fire) and cannot conveniently embrace all possible damages. however remote, which could, by ingenuity, be traced up to some connection with the fire as the ultimate *causa sine qua non*. It is impossible to hold that damages arising from the

Arbitration-*Contd.*

7 Revocation of, or withdrawal from arbitration *Concld.*

alleged negligence of Insurance Companies while in possession are properly claimable in pursuance of the contract of insurance for, whereas this contract refers only to loss by fire, those damages would arise from an origin totally different and wholly distinct and separable from the fire, namely a neglect of some duty imposed on the Companies after the loss by fire or water had become an accomplished fact.

The Bombay fire Insurance Co. v Ahmedbhoy Habibhoy. 11 Bom L R 1= 1 Ind Cas 14=34 Bom 1.

Arbitration—Awards.-See— Compromise-compromise of suits under C P C.

37 P R 1895

Arbitration Awards: See-also cases under **Award.**

8 AWARDS.

(A) CONSTRUCTION AND EFFECT ON

(1) Rule of construction.

198—Oral evidence given by Arbitrators—Language of the Award.

An award should be construed, not by the oral evidence given by the arbitrators, but by looking at the language of the award itself **Ganeshee v Chotay Lal. 3 N W P 117**

199—Construction of document—Award—Term in an award granting pre-emption to the co-owners over the joint family property—Property sold through Court in execution of decree—The condition of pre-emption attaches to private and voluntary sale-Court sale not effected by the provision.

An award, which effected partition of certain family property, provided, among other things that,in the case of a sale by any of the co-sharers of his portion of the house of residence, he should sell it to his co-sharer for Rs. 1800, and that he should not sell it to an outsider until the expiration of two mohths from the date of a notice in writting saying that they (co-sharers) were not willing to buy it.

The share of one of the co-sharers was subsequently sold in execution of a decree against him and purchased by an outsider.The other co-sharer then sued to have it declared that the purchase at the Court sale was not binding upon him. *Held*,

Arbitration-*Contd.*

8 Awards *Contd.*

that the privilege, which the award conferred upon the co-sharers of becoming purchasers by pre-emption attached to sales made privately and willingly, and not to sales *in invitum*. **Vithal Narayan Karandiker v Maruti Narayan Kale. 12 Bom L R 582.**

200—An award implies an adjudication or decision by an arbitrator upon the matter submitted to him. A mere petition by the arbitrator reciting that he had induced the parties to settle their dispute by a razinama does not amount to an award. **Thakar Das v Jaswant Rai 1 P R 1904.**

201—Award-Charge in an award — Persons not parties to the reference—Not available:—

The defendant's mother owed a debt to the plaintiff. There was a reference among the members of the defendant's family with a view to partition, and there was a dispute whether the award which was subsequently made a decree of the Court, it was provided that this debt was to be paid to the plaintiff on the responsibility of the defendant's share.

Held, that there was no trust in favour of the plaintiff and she could not take advantage of the charge in the award. She was neither a party to the reference, nor was it intended for her benefit. (11 I A 20=6 All 322 Ref:) **Shrinivasayya v. Sitamma, 5 M L T 199.**

202—Arbitration—Judgment in accordance with award—Decree following judgment.—

An order passed under Section 522 of the Civil Procedure Code in accordance with the award could not be reviewed into an ex-parte one and then set aside even if it was passed in the absence of the defendant, who had put in no objections notwithstanding the service of a notice to file objections, if any, within the prescribed period of ten days.—**Sidhu Ram v Gaman. 98 P R 1900.**

203—Award, essentials of—Valuator and arbitrator, difference between—Civil Procedure Code, Ss. 506, 525:—Ch. XXVII. S 525 and the following sections of Chapter XXVII have to be read with and by the light of the preceding sections in the same chapter. The reference to arbitration in S. 525 must be understood in the same sense as a reference to arbitration under S. 506 of the code, and there should be a matter in difference between the parties in both cases. If there was no matter in difference between the parties, the valuation made by some persons appointed by one or both of the parties is not an award within the meaning of s 525 C P C. Difference between arbitrator and valuator pointed out. 36 Beav 306. 12 East I 18 Q B. D. 7. 28 Cal 155. followed. **Macnaghten v Rameshwar Singh. 30 Cal 831.**

204—Binding character of award—Award not an agreement but a judgment—Parties cannot nullify an award by non-action, but must agree mutually to treat it as nullity.

An award is not a mere agreement but is equivalent to a judgment; it is binding between the parties in all matters which it professes to decide. When once a matter has beeen decided between the parties, the parties ought to be concluded by an adjudication, whatever it may be.

In order that the parties should be remitted to their previous right, it is not enough, that the award was not enforced or that even both parties objected to it. There must be positive evidence that both parties agreed that the former state of things should be restored. (4 Q B 669; 19 Mad 290 Fol.) **Laldas Jibhai v Bai Lala. 11 Bom L R 20=5 M L T 226= 1 Ind Cas 105.**

205—Instrument of partition—Award directing a partition—Stamp.

An award whereby the arbitrators indicate the division of property among the rival litigants is an instrument of partition within the meaning of s. 2, cl 15, of the Indian Stamp Act 1899. **Kalidas v Tribhuwandas. 8 Bom L R 869 =31 Bom 68.**

206—Act VIII of 1859, Section 327.

The plaintiff filed an application under Section 327, Act VIII of 1859, to enforce an award. The award was really a petition from the arbitrators, stating that the parties had by their advice settled the dispute amicably between them, and executed a document embodying the terms of the set-

Arbitration-*Contd.*

8 Awards-*Contd.*

tlement, which the arbitrators presented with their petition to the Commissioner.

Held, that the petition filed by the arbitrators was not an award. **Abdul Rehman Khan v Ghulam Kadir Khan. P R 79 of 1877.**

207—An award drawn up by an unprofessional arbitrator in India is not to be construed with the same strictness as it would be in England, but in accordance with what may reasonably be supposed under the circumstances of the case to have been the intention of the arbitrator.

Abdul Majid Khan v Kadir Begam. 20 All 245.

208—Award.

The plaintiff alleged that certain property was the hereditary property of himself and his brother N; that it had been determined by an award that if the plaintiff or N desired to mortgage or sell their respective shares, they should, in the first instance, mortgage or sell to one another, and, if one party declined to take in mortgage or purchase, that the other should be at liberty to alienate elsewhere; that N had, however, executed a bond in favour of R, in which he had hypothecated the property, and stipulated that the debt should only be recoverable from the property hypothecated; that N had confessed judgment in a suit brought against him by R on the bond, and had allowed a decree to be passed against the property; and that, as the bond had the effect of a deed of sale, and had been executed with an intent to defraud him, he sued to obtain possession of the property and a declaration of his title thereto as purchaser The Lower Courts decreed the plaintiff's claim. R, in special appeal, pleaded that the plaintiff had no cause of action, the property not having been sold. *Held* (Pearson and Spankie, JJ.,) that the mere hypothecation of the property did not give the plaintiff a title to it as purchaser, and that the suit, as brought, must be dismissed.

Held, (Stuart, C J.,) that as the plaint stated matter sufficient to enable the Court to consider the validity of the claim made by the suit, and on the facts and merits to do justice between the parties to the award, the objection to the form of the suit ought not to stand in the way of the plaintiff being decreed his rights under the award.

Rajah Pirthi Singh v Dya Kishen. 5 N W P 226.

(2) Effect of award.

209—Effect.

Held that the parties, having signed the award or arbitration, must be bound by that until it is legally set aside. and the plaintiff's suit to enforce his right, irrespective of the award, was not maintainable. **Golam Ali Khan v Imam Ali Khan. 2 Agra Rep A C 224.**

210—Award, unenforced—Effect of suit on, for possession of immoveable property—Limitation Act, Articles 142 and 144:

If an award is valid, it is operative even though neither party has sought to enforce it either by a regular suit or by an application under S. 525 C P C.. 8 I A 73. s c 18 Cal 414 ref

Per Mukerjee. J.—A valid award operates to merge and extinguish all claims embraced in the submission and after it has been made, the submission and award furnish the only basis by which the rights of the parties can be determined and constitute a bar to any action on the original demand It possesses all the elements of vitality even though it has not been formally enforced and it may be relied upon in a litigation between the parties relating to the same subject matter, and it is binding upon the parties as embodying an adjudication of their rights. A suit on an award is governed by Art 142 or 144 of the Limitation Act. **Bhajahari Saha Bani Kya v Behary Lal Basak. 4 C L J 162=33 Cal 881.**

211—Mere dissatisfaction does not render an award ineffectual—Agreement to repudiate.

Held that an award has the force of a binding contract or final judgment unless there has been an agreement to repudiate it the mere expression of dissatisfaction with it by both the parties, being insufficient to render it ineffectual.

Pokerdas Bolumal. 1 Sind L R 236.

212—Arbitration—Award directing payment to plaintiff within two months by assignment of debts -Failure to make payment—Interest.

Arbitration–*Contd.*

8 Awards—*Contd.*

An award by arbitrators directed defendants to pay certain amounts to plaintiff by effecting a division within two months, if there were no obstruction, and assigning to plaintiff the debts which fell to the share of each of the defendants.

Held, that, on the defendants' failure to pay to plaintiff as aforesaid, the plaintiff was not entitled to interest under the Interest Act after the said period of two months, as the time of payment was not certain. **Rangasamy Mudaliar v Srinivasa Mudaliar. 8 M L T 405**

213—Party added during arbitration.

In a suit pending before arbitrators, a person who is made a co-plaintiff on application, and makes no objection to the arbitration, is bound by the award. **Shitanath Biswas v Kishen Mohun Mokerjee. 5 W R 130.**

Notes—*Fol.* 11 Cal 37 Dist: 28 Cal 303=5 C W N 268.

214—Defence of submission to arbitration and award upon the matter in suit before suit brought.

An award upon a question referred to arbitrators, on whose part no misconduct or mistake appears, concludes the parties who have submitted to the reference from afterwards contesting in a suit the question so referred and disposed of by the award. Two widows of a deceased Hindu referred generally to arbitrators the question of their rights, respectively, in the estate of their deceased husband, including the matter whether there was, or was not, any cause disentitling the widow who afterwards brought this suit for her share in the estate against the other who had obtained possession of the whole. The arbitrators declared her to be disentitled to succeed to any portion of the estate, and awarded her maintenance only. *Held* that, in the absence of mistake or misconduct on the part of the arbitrators, the award was binding on the parties. **Bhagoti. v Chandan. 11 Cal 386: L R 12: I A 67.**

Notes:—Ref: 33 Cal 881=4 C L J 162=11 Bom L R 20.

215—Submission—Reciprocity of obligation of parties to award.

An arbitrator's award declared the right of a member of a Hindu family jointly possessed of village houses and property, such member being deaf and dumb, and not a party to the arbitration and award. He afterwards sued for separate possession as against the others, who in their defence denied his title to inherit by Hindu Law, on account of his physical infirmity which was from birth. The award having been produced at the hearing, held that this member of the family, being a stranger to the submission to arbitration, was under no obligation to abide by the award; and that he, consequently, could not avail himself of what the award contained in his favour.

Hira Singh v Gunga Sahai. 6 All 322 P C =11 I A 20 Affirming, **Ganga Sahai v. Hira Singh. 2 All 809.**

Notes.–Ref: 25 Bom 129; 12 All 1 F B; 10 C L J 41; 14 C W N 75.

216—Award not made on reference by all the parties—An arbitration award, not being one which has been made upon a reference by all the parties to the suit, is not capable of being converted into a final decree under the provisions of Ch. VI Act VIII of 1859, though it is evidence against any party who agreed to the reference.

Beejoy Chunder Banerjee v Bhyrub Chunder Banerjee 15 W R 427.

217—Arbitration award, if binding on a person not party to the reference—Civil Procedure Code (Act XIV of 1882) s. 506—Acquiescence—Conduct of the party.

Mere silence on the part of a person, not party to an order of reference to arbitration, and his omission to inform the arbitrators that he was not a party to the reference cannot make the award of the arbitrators binding him even though during the arbitration, he produced, through a servant, a document before the arbitrators in obedience to a summons and declined to produce others. **Beni Madhub Mitter v. Preo Nath Mandal. 5 C W N 268=28 Cal 303.**

Notes.—Ref: 14 C W N 75; 10 C L J 41.

217 A—Partition by arbitration—Award not binding on the heirs who were not parties to the agreement—Minor. It is a fundamental principle that no one is bound by any contract or by a decision in any proceeding to which he, or some one through whom he claims, was not a party.

Arbitration-*Contd.*

8 Awards—*Contd.*

A partition by arbitration may be binding on a minor, but only when he is not injuriously affected thereby, when it is fair and when he has been duly represented. **Ma Gyi v Maung Po Hmyin. 8 Ind Cas 439**

218—Arbitrator's award—Representation of minor's interest—Ratification—Nullity—Suit to set aside decrees and sales in execution—Minor-Guardian ad litem-Married woman—Guardian of the person of a minor-Civil Procedure Code (Act XIV of 1882) Secs 244 and 457—Guardian and Wards Act (VIII of 1890) Sec. 53.

Where in an arbitrators's award the appellant's sister was described as acting for herself and as guardian to the appellant and at the date of the award an application, which was subsequently rejected, was actually pending in the name of the appellant's sister for a certificate of guardianship of the appellant.

Held, that the statement in the award was unjustified, and that in the absence of ratification the appellant was entitled to a declaration that the award was a nullity as far as the appellant was concerned.

Section 244 of the Civil Procedure Code (Act XIV of 1882) applies to questions arising between parties to the suit in which the decree was passed, that is to say, between parties who have been properly made parties in accordance with the provisons of the Code. Under section 457 of the Civil Procedure Code a married woman is disqualified from being appointed guardian *ad litem;* and that, therefore, the appellant was never a party to any of the suits in the proper sense of the term.

Section 53 of the Guardian and Wards Act, which gives a preference to the appointment of the guardian of the person of a minor as guardian for the suit, leaves section 457 of the Code of Civil Procedure untouched, and that the effect of the two statutes, read together is that a proper guardian of the person of a minor may, if properly qualified, be preferred as his or her guardian *adlitem.* **Rashid-un-nisa v Muhammad Ismail Khan. 10 C L J 318.**

219—Consent to arbitration—Ambiguity in award.

A dispute having arisen as to the boundary of two estates the parties joined in a petition to the Settlement Officer of the district to appoint arbitrators for the purpose of settling the boundary. That officer appointed arbitrators who subsequently made the following award: 'Having in the presence of the karpurdazes of both parties taken down the depositions of the witnesses of both parties on the disputed locality and made investigation and enquiry on the spot, and having observed the aspect of the place, we have ascertained as follows.' They then proceeded to state the boundary Going along West from the high peak of Sathoo Pahar, which is on the South of Luphapara, one comes to a gurh called Rajgurh; on the South of it is Doobhiadidi in Mahomedabad;on the North of that gurh is Kolarkoonda in Belputta; on the West of it is Perma hill, on the East, South, and West is Mahomedabad on the North is Belputta." At the foot of the award were the words, Decision of the arbitrators confirmed," dated and signed by the Deputy Collector. The parties to the award afterwards petitioned the Settlement Officer to lay pillars along the line settled by the arbitrators but he refused the application, but made an order that " if the petitioners construct the pillars themselves, there will be no likelihood of objection hereafter It is not necessary for the Court to pass any order in this matter." *Held* (1) that both parties had accepted the award: (2) that the award was not ambiguous; (3) that the effect of the award was not merely to determine possession at the time, but to determine the right to the land itself. **Ramrunjun Chuckerbutty v. Ram Prosad Dass 13 C L R 26**

220.—Refusal to award interest to Mahomedan-Suit on mortgage.

Plaintiff, who was a Mahomedan, sued upon a mortgage executed by the defendants who were also Mahomedans, to secure certain sums advanced by him, with interest at 24 per cent. The defendents pleaded an award by which the arbitrator, to whom the question of the defendants' liability under the mortgage and certain cross-claims which the defendants urged against the plaintiff had been referred, had found that the plaintiff was entitled to a particular sum under the mortgage for principal, but that, as a Mahomedan, he was not entitled to sum for interest. The plain-

Arbitration-*Contd.*

8 Awards—*Contd.*

tiff contended that the award was bad. *Held* on appeal, that the plaintiff was not entitled, by reason of interest having been disallowed, to treat the award as a nullity, that the omission by the arbitrator to allow interest was a mistake which might be rectified by the Court, and that the award must be taken to be binding on the plaintiff. *Held*, further, that the plaintiff was entitled to proceed on the mortgage, and that the sum found due by the award having been a portion of the mortgage debt, the plaintiff was entitled to the usual mortgage decree for the sum found due with interest at 24 per cent, from the date of the award. **Moonzoorad Dowlah v Mehidi Begum 7 C L R 206.**

Notes.—Ap 7 C L R 267.

221-222—Presumption as to authenticity of old documents—Evidence of possession——Maintenance—Grant of villages for—Nature of grant, whether absolute or resumable.

A grant of villages was made by a taluqdar to his younger son for maintenance. The elder son inherited the family *taluq* In the next generation, in 1869, an award was made by a body of Oudh taluqdars, as arbitrators on the submission of the disputants, who directed that the village "given as maintence be decreed in favour of the grantee to continue as heretofore". The questions raised in that award were, whether the villages had been granted only for life, or were inheritable by the descendants of the grantee and whether the taluqdar, or the holder of the grant for the time being, was liable for the revenue on the villages. The same questions were now raised by the third generation, who were the great-grandsons of the grantor, on the construction of the award. There was no limitation in the original grant of the villages to the grantee personally, nor was the grant expressly declared to be to him and his lineal descendants through males. But possession had followed in that order and the taluqdar had always paid the revenue. The award not having been filed within six months after the passing of the Oudh Estates Act 1869, did not come within s 33 of that Act. *Held*. (1) That the award was not on that account invalid. It was obligatory upon both parties to the submission and upon those whose interests they represented: (2) That evidence of the antecedent possession of the villages, as well as of the quasijudicial acts of the arbitrators, was admissible; (3) That the terms of the award conferred upon the grantee and his descendants, the right to possess the villages free of rent to the talukdar, who remained responsible for the revenue; and (4) That the villages would not revert to the taluqdar's line until the line of the grantee's descendants should have been extinct. **Bhaya Ardawan Singh v Udey Partab Singh 23 Cal 838= L R 23 I A 64.**

(3) Person contesting the decree in accordance with award estopped from appealing against that decree.

222A.—Appealing against decree according to award.

A person who consents to take a decree in accordance with an award to be made by an arbitrator, is estopped from appealing against that decree. **Madhavrao v. Naro. 1876 P J 194.**

(4) Agreement amounting to a conditional sale.

223.—Where certain arbitrators summoned by the revenue authorities under the Regulations, investigated ancestral debts, and ascertained the amounts to be contributed by the other co-sharers to the one who paid it, and they, accepting the award, promised to pay principal and interest on a certain date; and also further agreed that, if they failed to pay on the specified day, their shares should thenceforward become his absolute property,—*Held* that such an agreement amounted to a conditional sale, and was liable to the incidents which under the Regulations attach to such sales, and the suit for possession, without summary process of forcelosure was not maintainable. **Ghosee Lal v Gaind Lal. 3 Agra Rep 184.**

(5) Construction of award made by British India Association.

223A—Award—Construction—British Indian Association, award made by—"In perpetuity," meaning of.

Arbitration-*Contd.*

8 Awards—*Contd.*

Under an award of the British Indian Association, the appellant's predecessor-in-title was granted a village rent free "in perpetuity"

Held, that the award did not confer any under-proprietary right, nor did the use of expression "*in perpetuity*" imply an extension of interest beyond the life-time of the grantee (8 All 39; 12 I A 159; 23 All 7 O C 90 Ref. 23 Cal 838; 23 I A 64 Dist. 3 O C 48 Rel. **Shambhu Nath v Rudra Pratab Narain Singh.**

223B—Bars further proceedings except to enforce award. **Ramchandra v Pandharinath. 1876 P J 173.**

(b) ENFORCING AWARD.

(1) Requisites for enforcing award.

224—Judgment and decree on award.—

By Melvill and Pinhey JJ—Before effect can be given to an award by execution proceedings, there must be a judgment according to the award and a decree following thereon. **Ishwardas Jagjivandas v Dosibai. 7 Bom 316.**

Notes—Ex: 1 Bom L R 84. Ref. 7 Bom 341 F B; Fol: 30 Bom 415=8 Bom L R 218.

225—Suit on award—Want of jurisdiction to arbitrators can be pleaded—Binding character of award—Award operates from its date—Award directing partition effects severance at its date.

In a suit to enforce an award, it is open to the defendant to urge and show that the award is not binding upon the parties for want of jurisdiction in the arbitrators.

An award is equivalent to a judgment, whether it has passed into a decree or not. It is binding upon the parties. When it directs partition to be effected, it dissolves the joint family; and from the moment of its date, it severs their joint interests. 18 Cal 414; 11 Bom L R 20 Fol.

Bhaurao Jivaji Tivle v Radhabai Laxman Jivaji. 11 Bom L R 406=33 Bom 401 =2 Ind Cas 431.

226—Execution·

The parties to a suit referred the matter in dispute between them to arbitration, and the award given in pursuance of such reference was brought into Court by the plaintiff with an application that a decree should be passed in his favour in accordance with the terms of the award as set out in his application. On this application the only order passed by the Court was that the award should be filed. Subsequently the defendant applied for amendment of the so-called decree based upon the award The Court thereupon appended to its former order a copy of the award, adding the words "as detailed below" and it futher added a detail of the costs incurred by each party. On its being sought to execute as a decree upon the award the order amended as above described, it was *held* that this was no decree on an award such as is contemplated by the Code of Civil Procedure, and was incapable of execution. **Badri Das v Sohan Lal. 14 W N 38.**

(2) Award allowing maintenance in perpetuity.

227—Award allowing maintenance in perpetuity—Enforcing an award beyond lifetime of parties.—

The plaintiff and the defendant were members of a Deshpande family in Khandesh. An arbitration award, dated 1838, which was assented to by the ancestors of the parties, provided that the defendant's father should continue to hold the Deshpande vatan, and pay a certain allowance to the plaintiff's father and two uncles, unless they should see fit to make a partition. The plaintiff alleged that the allowance as fixed was payable in perpetuity, and was paid till 1864-65, when it was stopped, and prayed for a decree declaring him entitled to it and arrears for eleven years. *Held* that effect could not be given to the award as a decree. as no Court would pass a decree fixing a grant of maintenance in perpetuity; that an allowance fixed by a decree as maintenance was ordinarily liable to be varied, on the party ordered to pay it showing circumstances rendering it equitable to make the variation; and that, there being no reason to suppose that the arbitrators had any idea of fixing the allowance for a longer period than the lifetime of the parties, and all those parties being dead, no effect could any longer be given to the award. **Madhavrav Deshpande v Ramrav Deshpande. 7 Bom 151.**

Arbitration-*Contd.*

8 Awards—*Contd.*

228—The Second Schedule r 14 (1882 Ss 520 and 521)—Enforcement of award of compensation in a seduction case is not illegal, Courts have only to look to the provision of S 520 & S. 521 Civ. Pro. Code **Mi. Hla Waing v Nga Kan U B R (1908) 2nd Quarter, Civ. Pro. p. 19.**

229—Award, foreign, order on English Arbitration Act, s. 12.

An award was made by arbitrators in English directing Defendant to pay Plaintiffs a certain sum. The award was by an order of the 1st March 1902 of the High Court, Q B D England directed to enforced in the same manner as a judgment.

Defendant left England and the sum was unpaid. Plaintiffs instituted suit in the original Side of the High Court of Calcutta to recover the said sum but at the time of the institution of the suit Defendant neither dwelt nor carried on business nor personally worked for gain within the limits of its original jurisdiction. Plaintiffs' solicitor, however, at an interview in Calcutta with Defendant had given an undertaking to Defendant not to sue him until he heard from Plaintiffs in consideration of Defendant's undertaking to pay Rr. 500 immediately in part payment.

Held, that the Defendant's undertaking on consideration of Plaintiffs' attorney forbearing to sue was not a "cause of action" within the meaning of cl 12 of the Charter and the High Court had not jurisdiction to entertain the suit. (22 Q B D 128; L R 8 C P 107) referred to.

Obiter per Maclean, C J—That the order of the 1st of March 1900, is not such a judgment as to entitle the Plaintiffs to sue upon it.

Deep Narain Singh v Minnie Dietert. 8 C W N 207=31 Cal 274.

(3) Agreement to be bound by majority.

230—When a case has been referred to arbitration, the presence of all the arbitrators at all meetings, and above all at the last meeting when the final act of arbitration is done, is essential to the validity of the award. Where a case was referred by a Court to the arbitration of three persons, and the parties to the reference agreed to be bound as to the matters in dispute by the decision of a majority of the arbitrators, and one of the arbitrators subsequently refused to act, and withdrew from the arbitration, *held*, that the Court could not pass a decree on the award of the remaining arbitrators and could only, under s. 510 of the Code of Civil Procedure, appoint a new arbitrator or supersede the arbitration and proceed with the suit. 6 W R 95 and 6 All 468 referred to. **Nand Ram v Fakir Chand. 7 All 523=5 W N 139.**

Notes—Ap. 12 Mad 113.

(4) Enforcing award made exparte.

231—S. 4—What constitutes written submission—Award made exparte, if valid.—

To constitute a submission within the meaning of S. 4 of the Indian Arbitration Act, it is not necessary that there must be an agreement on a single piece of paper signed by both parties. It is sufficient if the bought and sold notes, containing a term to refer to arbitration, are signed by both parties or their authorised agents. But a mere stipulation inserted by one party and not formally agreed to by the other, does not constitute such a submission.

Although the Court will not decree specific performance of an agreement to arbitrate, yet it will enforce an award when validly made. *Held*, on the facts of this case, that the award, though made *ex-parte*, was valid. 60 L J Q B 640, **Exp**; 25 Q B D 545 Ref. **Ram Narain Ganga Bissin v Liladhur Lowjee. 10 C W N 814 =33 Cal 1237.**

(5) Arbitration entered into by a few persons without the consent of the entire community.

232—Religious Quarrel—Mosque—Consent of Worshippers.—

The Courts will not interfere to enforce performance of an award made under a submission to arbitration entered into by a few persons, without the consent of the entire community, in respect of a religious quarrel relating to a state of things which has been in force at a mosque for fifty years by the common consent of all the worshippers having an interest therein. **Zahid v Peeree. 3 N W P 92.**

(6) Suit founnded on award.

233—Award—Suit for Specific Perfomance of a contract.—

Arbitration-*Contd.*

8 Awards—*Contd.*

A suit founded on an award is not a suit for the specific performance of contract. 16 All 3; 23 Mad 593; 23 All 285 referred to. **Dalsingh Brahaman v Mt Saraswati. 15 C P L R 115.**

(7) Suit on an award not a suit for specific performance of a contract.

233A—Award—Special performance—Suit on an award not a suit for specific performance of a contract—Limitation—Limitation Act IX of 1908 Sch I Arts 113. 116. 120—Specific Relief Act (I of 1877) S 30.

A suit for recovery of money, payable to the plaintiff under the terms of an award based upon a registered agreement to refer to arbitration, and which has not been paid, is not a suit for enforcing the specific performance, but one for compensation for non-compliance with the terms of the award, and for purposes of limitation is governed either by Art 116 or Art 120 of the Limitation Act.

Section 30 of the Specific Relief Act lays down that, when the question is one of specific performance, the Court has the same powers, and should proceed upon the same principles, in the case of an award as in the case of a contract. The way to consider the question is to take the terms of the award before the Court and to see whether, if the same terms had been embodied in a contract between the parties, the suit is or is not one in which specific performance of those terms is claimed and ought to be decreed. **Kuldip Dube v Mahant Dube 8 A L J 1138.**

(8) Suit for specific performance of award.

234—The arbitrator in a dispute between the owner and the lessee of a village made an award on the questions submitted to him to the effect (1) that the lessee should surrender possession at a fixed time within the term of the lease, (2) that the lessee should pay the sum of Rs. 800 to the lessor, and (3) that as to arrears of rent due from the tenants the lessee should obtain decrees and execute a conveyance of them to the lessor who was to pay to the lessee the aggregate amount of the decrees. The other terms of the award having been performed, the lessee sued for specific performance of the remainder. He filed with his plaint a number of decrees obtained by him against the tenants together with a sale-deed conveying those decrees to the defendant and prayed that the defendant might be ordered to accept the conveyance and pay the amount of the decrees. *Held* that even if the award were bad, the defendant having acted on it and accepted the benefits it gave him, had precluded himself from impeaching it; also that the case was not one in which it was possible to assess compensation in money for the breach of the particular condition in the award, and that the plaintiff was entitled to specific performance of the award, and this was made in terms of the order made in (54 L T R 729). **Brijmohan Lal v Shiam Singh 24 All 164=21 W N 208.**

(9) Suit to enforce award not a suit for specific performance.

234A—Art 113—Suit on award is not one for specific performance of a contract.

Held, that a suit to enforce an award cannot be treated as a suit for specific performance of a contract within the meaning of Art. 113 of the second schedule to the Indian Limitation Act, 1877, 23 Mad, 593 foll. 5 All 263, and 16 All 3 distinguished. **Sheo Narain v Beni Madho. 1901 A W N 83=23 All 285.**

Notes—Fol; 33 Cal 881=4 C L J 162: Dist; 26 All 497=(1904) W N 72.

234B—S. 28—Suit to enforce award—Specific performance of an award.

Where in a suit on an award to recover a certain sum of money allowed by the arbitrator, it was contended among other things that having regard to ss. 21 and 30 of the Specific Relief Act, 1877, the plaintiff was not entitled to have the award enforced.

Held, that the objection proceeded on the assumption that the suit was one for specific performance, which, in fact it was not; but it was a suit for the recovery of money and for relief incidental thereto. **Fardunji v Jamsetji 28 Bom 1=5 Bom L R 705.**

(c) POWER OF COURT AS TO AWARDS.

(1) Confirmation of award.

235—Duty of Court.

The Court, in passing judgment on the arbitration award, must confine itself to the plaintiff's

Arbitration-*Contd.*

8 Awards-*Contd.*

claim and give a decision thereon. **Trunath Chowdry v Manick Chunder Dass. 14 W R 466.**

236—Remitting award.

The Court accepting the award is the proper Judge of the propriety of remitting it. **Secundur Beg v Mussammat Rejee. P R 12 of 1869. Choohur Sing v Jeet Singh P R 64 of 1870**

Notes—Fol: 1 P R 1882; Ref: 92 P R 1885, 92 P R 1903.

237—The Second Schedule; r. 12 S. 104, O 43. r. 1 (1882 Ss. 518, 588 (26))—Order amending award—Appeal—Court's power to amend and correct award.

Where a Court amends an award of arbitrators under S. 518, C. P. C., (1882), an appeal lies from such order under S. 588, cl. 26 of the Code.

An issue whether a particular property was endowed property, and whether it was partible or not was referred to arbitrators for determination. The arbitrators decided that it was not endowed property, but held that it should not be partitioned and must continue as endowed property. *Held*, that the award contained an obvious error, which the Court was competent to modify and correct under S. 518 of the Code **Jane Durlabh Shankarji v Jani Lajja Shankarji. 2 Ind Cas 858.**

238—Duty of Court.

If a Court regards an award as not open to objection, such Court must deliver judgment in accordance with the terms of such award, and not modify the same. **Luchman Narain v Pyle. 2 N W 150.**

239—Decree not according to award.

The matter in dispute was referred to arbitration, and the award directed that plaintiff should recover a certain amount to be realized from certain property mortgaged to the defendant. The Court passed a decree for the amount against defendant personally. *Held*, that the Court had no jurisdiction to pass a decree that was not according to the award. **Girdhari Lall v Imrat Mul. P R 39 of 1873.**

240—The Second Schedule r 20 (1882 Ss 525 and 526)—Destruction of award after presentation in Court—Whether ground for refusing to file award—Whether parties can be referred to regular suit—Records. An application was made to file an award under S 525 C P C. The Court declined to file it on the ground that the records of the case containing the award were destroyed by fire. *Held*, that, since the award had already become part of the record of the Court, the Court could not refuse to file it under S 526, C P C and refer the parties to a regular suit. 12 Mad 331 Dist

The mere fact of the destruction of the records of the case does not necessarily show that the investigation will be either long or difficult. 7 Bom L R 644, Ref: **Lekhraj Khubchand v Khubchand Manghir Mal 1 Sind L R 167**

241—The Second Schedule r 6 (1882 S 529) —"If no application has been made to set aside." —It is incumbent on the Court to give time to make such an application Otherwise the proceedings will be irregular. **Risal Singh v Bhola Ram 1906 A W N 221.**

242—Adding to award on confirmation.—

The Court can only give judgmennt in accordance with the award, and cannot add an order for interest to it, if interest has not been given.

Mohun Lall Shaha v Joynarain Shaha Chowdhry 23 W R 105

243—The Second Schedule r 16 (1882 S 522)-Review of judgment by Judge passed by his predecessor—Application to have award filed-Decree in terms of award passing of—Decree in terms of award. application to District Judge to pass. One R S applied to the District Judge under s 525 Civil Procedure Code to have an award filed, which was made by an arbitrator on reference in dispute between the appellant and B, the District Judge made the following order. "The claim of SR is decreed in terms of s 526 Civil Procedure Code, and the costs in this case be borne by the defendant" Subsequently the widow of B applied for execution of the decree, but on objection being taken to the effect that the terms of the award were not incorporated in the decree the application was dismissed. On this the widow filed an application under s 205 C P Code, before the Judicial Commissioner which was dismissed. The widow of B then filed an application before the District Judge to have the case decided in terms

Arbitration-*Contd.*

8 Awards-*Contd.*

of the award and that the decree may be drawn up in accordance with the provisions of ss 522 and 526 C P Code. It was stated on her behalf that the application was under s 623 C P Code for review of judgment. The District Judge dismissed her application on the ground that he had no jurisdiction to review the original judgment. The widow of B applied for revision of this order on the ground that the District Judge failed to exercise the jurisdiction vested in him by law. Held that the Judge could not review the judgment passed by his predecessor. Held further that the original application to have the award filed was never fully disposed of as effect was not given to it under the provisions of s 522 C P Code, no decree having been drawn up in terms of it. Held, also that the lower Court should have treated the application as one to have the procedure on the original application completed, and should have passed a decree in terms of the award. **Gulab Kuar v Thakur Sheo Ratan Singh** **5 O C 27.**

244.—The Second Schedule r 14 (1882 S 520) Where in the case of a reference to arbitration by parties, with respect to partition of property and adjustment of accounts, an award embodying matters not referred to arbitration is delivered, the Court has the discretion to remit or not to remit such an award. But, when once a decree has been passed in terms thereof, the Chief Court has no power to interfere in revision, 25 P R 1902 (P C) Refd to, 89 P R 1902 (F B), not followed, 92 P R 1903 (F B) Fol. **Sant Singh v Jiwan Singh.** **63 P L R 1905=41 P R 1905.**

245.—Plea of jurisdiction on limitation.

When an award has been made, no plea of jurisdiction or limitation can be raised before the Court, which is to pass its decree according to the award. **Ameen Chund v Mendhoo Khan** **1 Agra, Rev 53.**

246.—The Second Schedule r 20 (1882 S 525) Award relating to property partly outside the jurisdiction to file award and pass decree. A Court has jurisdiction to file an award and pass a decree in terms of the award, though the matter to which the award related was the partition of property, including immoveable property, part of which was situated outside the jurisdiction of the High Court, because the right to have the award filed had originated within the jurisdiction 2 Cal 445 ref to **Seshayya Chettiar v Chengayya Chettiar** **24 Mad 31.**

246A.—Award—Civ Pro Code 1882, s 520—Limitation—Court not competent after award to dismiss suit on point of limitation.—

After a suit has been referred for decision to arbitrators with the consent of parties and of the Court and an award has been delivered, it is not competent to the Court to dismiss the suit on a point of limitation. S D A N W P 1864, 472, Ref. **Ramjatan Rai v Sheobalak Rai** **A W N 1897, 162,**

247.—Decree not in accordance with award—Appeal.

The arbitrators to whom the matters in difference in two suits for money were referred to arbitration made an award for payment to the plaintiff of certain sums by the defendant, and further directed that these sums should be paid by certain instalments. The plaintiff preferred objections to the award in so far as it directed payment by instalments and the Court, holding that the arbitrators had no power to make such a direction modified the award to that extent, under s 518 of the Code of Civil Procedure. On appeal, the District Judge, while allowing the power of the arbitrators to direct payment by instalments, reduced the number of instalments which had been fixed. *Held* that the decree of the first Court not being in accordance with the award, an appeal lay to the Judge with reference to s 522 of the Code. *Held* also that as it was clear that the reference to arbitration gave the arbitrators full powers not only as to the amount to be paid, but also as to the manner of payment, the lower appellate Court was wrong in reducing the number of instalments which had been fixed.

Per MAHMOOD, J.,—The word "award" used in the last sentence of s 522 of the Code must be understood to mean an award as given by the arbitrators, and not as amended by the Court under s 518 The words "in excess of or not in accordance with, the award", used in s 522 were intended to enable the Court of appeal to check the improper use of the power conferred by s 518. **Jawahir Singh v Mul Raj** **8 All 449= 6 W N 210.**

Arbitration-*Contd.*

8 Awards—*Contd.*

248.—Arbitrators, when functus officio—Signing award after being filed in Court—Dissentient arbitrator.

As soon as the award is filed in Court, the powers of the arbitrators come to an end. They are afterwards *functus officio*, and it is not open to a dissentient arbitrator to come in afterwards and sign the award, nor has the Court any power to allow him to sign it. **Ramesh Chandra Dhar v Karunamoyi Dutt.** **33 Cal 498.**

249.—Power of Court to order sale—Award without power to sell—Power of Court to go beyond award when made a decree of Court.

Where the partners of a firm in their partnership deed agreed to refer their disputes to arbitration, and the reference made in pursuance of this agreement gave the arbitrators power to make partition, but omitted a power to sell: *Held* that on the award being made a rule of Court, that the Court had no power, under s. 326, Act VIII of 1859, to order the sale of certain property of which the arbitrators were unable to make partition, and the sale of which they recommended on that ground. **Chunimony Dassee v Nistarinee Dassee.** **3 C L R 357**

250.—Sch II r 15. S. 115 (1882 C. P. Code Ss. 521 and 622)-Arbitrator-Award-Setting aside of—Misconduct, Corruption—Illegal exercise of jurisdiction—Erroneous view of misconduct—Wrong conclusion upon fact or error of law-Interference by High Court.

The term "misconduct" in S. 521 C. P. C., does not necessarily imply corruption.

S. 521, C. P. C. does not deal with questions of jurisdiction, but specific grounds on which awards may be set aside.

If a Subordinate Court in setting aside an award under s. 521, C. P. C, on the ground of misconduct of the arbitrator, takes an erroneous view of what amounts to misconduct, it forms a wrong conclusion upon the evidence in the case or at the most falls into an error of law. Such Subordinate Court cannot, in such a case, be considered to have acted illegally in the exercise of its jurisdiction and the High Court will not therefore be justified in interfering under S. 622 of the Civil P. Code. (II Cal 6 Fol.) **Kali Charan Sirdar v Sarat Chunder Chowdhry.** **7 C W N 545=30 Cal 397.**

C C. 106

Arbitration-*Contd.*

8 Awards—*Contd.*

(2) Court having no power to go behind the award.

251.—Grant of right of way not given by award—Award for partition—Subsequent suit for right of way not of necessity.

Where the house and lands of a joint Hindu family were partitioned by the Court according to an award made by an arbitrator to whom the parties had agreed to refer the matter,—*Held*, in a subsequent suit, that the Court could not go behind the award and allow one of the members of the family to claim a right of way from the family house to a public road, through the lands allotted by the award to another member, such right of way not having been granted by the award, and there being no such right of way of necessity. **Gopal Chunder Roy v Brojendro Coomar Roy.** **5 C L R 338.**

(3) Award to be filed in Court having jurisdiction over the matter.

252—The Second Schedule r. 20 (*1882* S. 525.

Having jurisdiction over the matter to which the award relates. The Court in which the award should be filed is the Court having jurisdiction over the matter to which the arbitration related and not the amount allowed under the award.

Subraya Prabhu v Manjunatha Bhakta. **29 Mad 44.**

(4) Jurisdiction of Court to direct payment of remuneration to arbitrators.

253.—Arbitrators, remuneration of—Jurisdiction of Court to direct payment of sum ordered to be deposited in Court as remuneration—Interlocutory order—Revision—Civil Procedure Code, 1882, Sections 507, 508, 519 622.

Held, that on a reference to arbitration, the Court, in the absence of any agreement by the parties, either spontaneously or in answer to a demand by the arbitrators, to pay any sum as remuneration to the latter, has no jurisdiction, either special or general, to make an order for deposit in Court of a sum for that purpose, or to direct its payment to the arbitrators. **Mul Chand v Narinjan Das.** **P R 94 of 1894**

Arbitration-*Contd.*

8 Awards—*Contd.*

(5) Jurisdiction of Court to decide whether agreement on which award is based was against public policy.

254.—The Second Schedule r. 14 (1882—Ss. 520, 521, 525, 526—Private) arbitration-Award—Filing in Court—Stifling a criminal prosecution—Agreement, invalid—Compoundable case—Public policy.

Section 526 of the Civil Procedure Code is not exhaustive, and does not affect the inherent jurisdiction of the Court to decide a fundamental objection which goes to the root of the matter, e.g., that the agreement on which the award is based was against public policy and not therefore enforceable in a Court of justice.

The Court when invited to enforce the award is not limited to the ground mentioned in sections 520 and 521 of the Civil Procedure Code.

The same transaction may give rise to a civil as also to a criminal liability and a reference to arbitration for the settlen ent of the civil dispu e alone would be valid but not if the object of the reference was to stifle a criminal prosecution also.

But in order to make the award invalid, it is essential for the defendant to prove that the criminal prosecution stifled was for a non-compoundable offence, that is for an offence of a character the compromise of which is regarded by the Criminal Code as forbidden by law or as against public policy. 25 Cal 757; 20 Mad 89: 17 All 21; 28 All 62; 22 All 224, Rel on. 6 Q B 308; 66 R R 392; 9 Q B 371; 72 R R 298; 11 Bom 566; 22 All 224; 28 All 718; 9 P R 1906, Dist 3 C W N 5; 81 P R 1875; 82 P R 1904; 7 M H C R 378; 28 Bom 326 Fol. **Rai Charan Purkait v. Amrita Lal Gain.** **11 C L J 131=5 Ind Cas 98.**

(6) Determination of Court to go on with suit after first arbitration.

254A.—Determination of Court to go on with suit after first arbitration—Court not bound to consider result of second arbitration.

Where the Court determined to go on with the suit after an award had been made under an arbitration, it had nothing to do with a fresh attempt at arbitration and was not bound to consider the result of the second arbitration. **Mt. Hasanbibi v Talewarkhan,** **4 C P L R 105.**

Arbitration-*Contd.*

8 Awards—*Contd.*

(7) Power of Court to award costs contrary to the arbitration award.

254B.—S. 89, 2nd Schedule—Rule 16 (2)—Arbitration.

The Court cannot order costs to be paid contrary to the award if the whole case is referred to arbitrators. **Chuni v Dhan Divi.** **97 P L R 1909=111 P W R 1909.**

(8) Power of District Judge to reverse decree of Munsiff and enter judgment in accordance with award.

254C—award set aside by Court of first instance—District Courts setting aside such decision—Decision on merits.

Where a suit was referred to arbitration and an award was made thereon, the defendant applied to set aside the award. The award was set aside, and, the suit having come on for decision on the merits, it was determined in favour of the defendent. The plaintiff appealed and the District Judge, in appeal decided that the Munsiff was wrong in setting aside the award and, without going into the merits, reversed the decree of the Munsiff and entered judgment in accordance with the award in favour of the plaintiff: *Held*, the District Judge had authority to inqure into, and decide as to the propriety or otherwise of a decision of a Munsiff setting aside an award. 3 All 636, 5 All 293. 11 Cal 172, 14 W R 327. 8 C W N 392, 26 Bom 551, 22 Mad 202 Fol. 28 All 408, 4 A L J 256 Diss. **K. Achuthayya v N. S. Thimmayya.** **3 M L T 315=18 M L J 228=31 Mad 345.**

Notes—Fol 5 A L J 644=A W N 1908, 242=4 M L T 400.

(d) VALIDITY OF AWARDS AND GROUND FOR SETTING THEM ASIDE

(1) Reversal of award.

255.—Civil Procedure Code, 1859, s. 324.

An award is not reversible unless the provisions of s. 324, Act VIII of 1859, apply. **Reeddy Kisto Muzoomdar v Puddo Lochun Muzoomdar.** **1 W R 12.**

Notes.—*Dist*: 9 All 253. *Ref*: 7 W R 401.

256.—Sch. II r. 16 (1882 S. 523)—General-Decree in terms of an award—Judicial officer de-

Arbitration-*Contd.*

8 Awards—*Contd.*

ciding a case as an arbitrator—Government Order, No. 222 A. of 1862, prohibiting such an officer from accepting the office of an arbitrator—Proceeding not rendered abortive.

If a presiding Judge is appointed an arbitrator in his personal capacity, the parties cannot impeach whatever award may be made by him, on the ground that he was the presiding Judge.

In a suit brought in the Court of the Subordinate Judge of Benares, before any of the matters in issue were decided, the parties appointed the Subordinate Judge as the sole arbitrator and the office was acceptsd in ignorance of the G. O. No. 222 A. dated Sept. 1862, prohibiting all Government servants from accepting the office of arbitrators. The Subordinate Judge decided the case as arbitrator, and passed a decree in terms of the award. Held, in view of the G. O., he ought not to have entertained the arbitration. Held also, that the arbitration proceedings were not rendered abortive, by reason of the G. O., and no appeal lay from the decree passed in terms of the award. **Parbati Kuar v Baikuntha Nath. 4 A L J 89=A W N (1907) 35.**

(2) Application to set aside award.

257—Extension of time for applying to set aside award—Civil Procedure Code, 1859, s. 324.

In an application to set aside an order made by a Judge in chambers, extending the time (of ten days) for making an application under s. 324 of Act VIII of 1859 to set aside an award on the ground of misconduct of one of the arbitrators and of the umpire,—*Held*, that the words of the sections being in their ordinary import obligatory,and there being nothing in the other parts of the Code to show that such construction was at variance with the intention of the Legislature, and a similar provision having been held by the Courts in England to be imperative, that the application to set aside the award must be made within the ten days, provided the Court be then sitting, and if not on the first day of its sitting after that time and that there is no power to enlarge the time to make such application. **Edalji Shaporji v Talsidas Sundardas. 2 B H C R 285, 2nd Ed. 270**

Edulji Shapurji v Tulsidas Sunderdas. 1 Ind Jur N S 234

Arbitration-*Contd.*

8 Awards—*Contd.*

258—Limitation Act Art 91—Award—Cancelling or setting aside an award—Enforcing the terms of the award — Arbitrator — Arbitrator's powers to vary the law—Custom. A person who contends that an arbitrator has no power to make an unauthorised addition to an award already made and sought to be enforced by him is not in any sense seeking to cancel or set aside the award within the meaning of Art 91 of the Limitation Act. 1877, nor does the contention that one of the clauses of the award is *ultra vires* and invalid bring the case within the purview of the article. **Jaffri v Ali Raza. 3 Bom L R 311=11 M L J 149=5 C W N 585=28 I A 111=23 All 383.**

Notes.—Ref: 26 Bom 577. Ref 23 Cal 498=33 Cal 881=4 C L J 162.

259—Where an application to set aside an award discloses, no legal ground for the order applied for, an order ignoring the petition (*e. g. shamil mist rahe*) is correct. If a specific allegation of misconduct or corruption is made by the applicant, the Court should, before passing a decree, record whether or not the allegation is supported. Open disregard by arbitrators of proved law or custom does not amount to misconduct under S. 324 of Act VIII of 1859: *Semble*, it might be ground for remitting the award under S. 333. The Court accepting the award is the proper Judge of the propriety of remitting it.—**Secundur Beg v Mussammat Rajee P R 12 of 1869.**

260—Award—High Court—Revision.—

An application under S. 622 of the Procedure Code to set aside an award is not allowable. In the case of an award revision is more objectionable than an appeal. **Ghulam Jilani v Muhammad. 4 Bom L R 161=12 M L J 77=29 I A 51=29 Cal 167=6 C W N 226.**

(3) Ground for setting aside award.

261—Delay in returning.—

An award made by the consent of the parties cannot be set aside merely by reason of its having been sent in a week later than the date appointed, when such delay is not owing to misconduct or corruption. **Ameen Chund v Mendhoo Khan. 1 Agra Rev 53.**

Arbitration-*Contd.*

8 Awards—*Contd.*

262—Arbitration—Award—Minor bound by the award—Grounds for setting aside award—inequality of benefit under award—Erroneous view of law taken by arbitrators.

An award, which was open to no reproach but which affected the interests of a minor, was set aside at the minor's instance on the grounds that he (the minor) derived an inequality of benefit under it and that the arbitrators had, in making the award, taken an erroneous view of the law. On appeal:—

Held, that neither ground was sufficient to invalidate the award: since the validity of the award must be determined in the light of the circumstances as they existed at its date, and not as they transpired some years after it had been passed by the arbitrators. (2 M I A 181, 249 Fol)

Sakrappa Lingappa Hebsur v Shivappa Basappa. 12 Bom L R 984

263—Setting aside award.—

The parties referred the matter in dispute to arbitration in the original Court, and the award was in plaintiff's favor. This award the Court set aside on defendant's objections that evidence had been excluded and the arbitrators had not acted together; and after a full investigation dismissed plaintiff's suit. The plaintiff objected to the award being set aside, but afterwards adduced evidence and offered no further objection. The Lower Appellate Court considered the award final, and gave plaintiff a decree in terms of the award. Defendant appealed to the Chief Court. *Held*, that plaintiff's acquiescence in the proceedings after the award was set aside debarred him from insisting upon the award. *Semble* that the award was properly set aside on defendant's objections to it being made out—**Moti v Utma. P R 117 of 1876**

264—Misconduct of Arbitrators.—

An award cannot be set aside on the ground of the arbitrators' ignorance of the law.—

Futtoo v Gholam Sultan. P R 47 of 1867

265—Where the gist or object of a submission to arbitration was that certain accounts should be examined, and the arbitrators did not inspect them, the award and the decree based upon it were set aside by the Chief Court.—**Charanji Lal v Ramji Das. P R 5 of 1876.**

266—The Second Schedule r. 15 (1882 S 521)—Arbitrator, holding private and secret enquiries—Misconduct. An arbitrator making private enquiries is guity of legal misconduct for which an award is liable to be set aside.

Daya Kishan v Dharam Das. 4 A L J 159=A W N (1907), 75.

267—Fraud—To set aside an award, there must have been some fraudulent suppression of evidence or other malpractice of the successful party which should be definitely stated in the plaint. **Hur Churn Dass v Hazaree Mull. I Ind Jur O S 12.**

268—Non delivery of—Non delivery of verdict—Liability to be sued—Fraud.—

Defendant passed a bond, in 1889, in favour of plaintiff, payable in two years. In 1893, the plaintiff brought a suit on the bond; but soon withdrew it as the parties agreed to refer their disputes to the arbitration of defendants I to 4. The arbitrators delivered no written award; and in consequence the plaintiff brought a suit against the defendants I to 5, alleging that the arbitrators gave only an oral award and that acting in collusion with defendant 5 they omitted to give a written award whereby his original claim was time-barred. The lower appellate Court awarded plaintiff's claim against defendants I to 4, but dismissed it against defendant 5.

Held dismissing the claim as against defendants I to 4, that they could not be presumed to have acted fraudulently merely because they failed to satisfy the Court that their delay was due to the negligence of the parties.

Savalappa v Devchand 3 Bom L R 691= 26 Bom 132

269—Expert Committee's decision of matters of skill-Effect of Error and Fraud on their decision—Committee chosen by parties.

In the absence of proof of fraud either in the inception or in the proceedings of an expert committee selected by the parties for giving an opinion as to matters in dispute between the parties, the parties are bound by its decision. Mere error would not be sufficient to upset the decision of an

Arbitration-*Contd.*

8 Awards—*Contd.*

expert tribunal voluntarily set up for the decision of matters of skill. **Pestonji Jehangirji v. Firm of Jaisingdas Hansraj. 8 C W N 57; P C**

270—Sale—Award in fraud—Assignee of auction purchaser.

The *locumtenens* of a purchaser at a sale in execution of a decree is not bound by an award in fraud of the decree to which the judgment-debtors were parties. **Alfatun v. Rao Karan Singh. 7 N W P 362.**

271—Inconsistency in award.

An award of arbitrators cannot be set aside on the ground of its being inconsistent, because the plea of the defendant was proved as to part of the case, and not as to the other, **Debraj Roy v. Kartick Chunder Sircar. W R 1864 153**

272—Civil Procedure Code 1859 ss. *322*, 323, *324*.

Where by the terms of a reference to arbitration all matters in difference are referred to the arbitrator the Court will not modify (s 322), remit (s. 323), or set aside (s. *324*) the award, on the ground that the arbitrator in his discretion has awarded damages to the plaintiff, and at the same time make him pay all the costs, when it is not shown that he exercised the discretion given him improperly. **Mohendronath Bose v. Nussee Mangee 1 Ind Jur N S 224**

Notes.—Ref: 3 Cal 312.

273—Arbitration—Award misconduct of Arbitrator-Confirmation of Award-Confidential Communication-Letter written without prejudice —Limitation—Act IX of *1871* Sch Cl 155—Misconduct of party to suit. Refusal to pass judgment on award—Appeal. Where the matters in dispute in a suit are, before judgment, referred to arbitration and an award made the refusal of the Court to pass judgment on the award is a judgment upon the whole subject matter of the suit and an appeal will lie therefrom. The fact that an arbitrator innocently makes a mistake in receiving as evidence a document which according to law, ought not to have been received is not sufficient ground to justify the Court which made the reference in refusing to pass judgment according to the award. 6 W R Mis 83 distinguished. **Howard V Wilson. 4 Cal 231=2 C L R 488.**

Notes.—Diss 11 Cal 172; Dist: *9* All 253: Ref: 11 All 375.

274-Arbitrator having interest in the matter at issue—Civil Procedure Code 1859 s 324.

A Court should make full enquiry into the objections made to an award before setting it aside, and should not hastily assume that the mere circumstance of the arbitrator having some interest in the matter at issue would necessarily bring the award within the provision of s *324* of Act VIII of 1859 and render it liable to be set aside. **Senuk Kachee v. Oree Doobey 2 N W 241**

275—Interested arbitrator—Pleader of one of the parties.

In a case where the arbitrator was the retained pleader of one of the parties and no disclosure of this fact was made to the other party, it was held, that the Court was justified in holding that the award was not valid and not binding on the other party. **Kali Prosanno Ghose v. Rajani Kant Chatterji 25 Cal 141**

Notes—Fol 25 Cal 757 F B; 29 Cal 278. Over: 29 Cal 167 P C=6 C W N 226=29 I A 51. Not Fol: 10 C W N 601. Ref: 29 Bom 285; 6 Bom L R 1132.

276—Where an award which purported to be a considered award of the arbitrators framed after consideration of the statements of the parties and the evidence of witnesses was found in reality to be merely the adoption by the arbitrators of an agreement arrived at and signed by the parties, *held* this would not prevent the award being a valid and binding award. **Gobardhan Das v Jai Kishen Das. 22 All 224=20 W N 52.**

277—The plaintiff and defendants in a suit agreed to refer the matter in dispute between them to the arbitration of one S F. After the reference had been made the parties came to an agreement and submitted this agreement to the arbitrator who drew up his award in accordance with its terms. The award, however, also dealt

Arbitration-*Contd.*

8 Awards—*Contd.*

with certain matters which arose subsequently to this agreement. *Held* that the award was a good award and was not vitiated by the fact of its having been founded on a previous agreement between the parties. **Mihr Ali Shah v Muhammad Husein Shah. 12 W N 79**

278—Award based on agreement.

The parties to this suit referred their differences to an arbitrator who made an award in accordance with a compromise to which the parties had agreed and sent the award to the Court. and a decree was passed in accordance with its terms by the Court. The lower appellate Court on the ground that the arbitrator had not himself decided the case judicially and had no jurisdiction to accept a compromise, held that there was no valid award and no decree was consequently passed in accordonce with the award within meaning of s 522 of the Code of Civil Procedure. *Held* that the award was valid and the decree passed thereupon could not be questioned in appeal on the grounds taken. **Deo Narain Rai v. Jaisri Rai 5 W N 259.**

279—Arbitrary decision—Civil Procedure Code 1859 s 324.

It is no ground to set aside an award of arbitrators, under s, 324 Act VIII of 1859 that the arbitrators decided the case against the written statement of the defendant. **Gooroo Churn Dey v. Ramdhone Paul 7 W R 28**

(4) Misconduct of arbitrators

280—Refusal to amend award.

The refusal of arbitrators to amend a clearly bad award is misconduct under s. 224,Act VIII of 1859. **Deb Narain Singh v. Rajmonee Koonwar 3 W R 168.**

Notes.—Ref:8 W R 171.

280A—Application to set aside an award disclosing no legal ground, effect of—Duty of Court in case of a specific allegation of miscouduct—Open disregard of proved law not a misconduct.

An order ignoring an application to set aside an award disclosing no legal ground for the order applied for, was upheld in this case correct. A

Arbitration-*Contd.*

8 Awards—*Contd.*

specific allegation of misconduct or corruption by the applicant will oblige the Court, before passing a decree to record whether or not the allegation is supported. Open disregard by arbitrators of proved law or custom does not amount to misconduct under s. 324 of Act VIII of 1859 (*Semble* it might be ground for remitting the award under s.323). The Court accepting the award is the proper Judge of the propriety of remitting it. **Secundur Beg v. Mussammat Rajee 12 P R 1869.**

281—To refuse to amend an award remitted on account of illegality, is misconduct under Section 324, Civil Procedure Code.—P R 101 of 1868. Mere delay or inattention on the part of arbitrators, does not amount to misconduct.— **Wali Muhammad v Sohara, P R 41 of 1875.**

282—S. 526 — Misconduct of arbitrators—Incomplete award.

The plaintiff and defendant referred the matters in dispute between them to arbitration. and agreed to accept and abide by whatever settlement their respective nominees should make, and to sign whatever releases they might be required to sign. The arbitrators made an award directing the plaintiff to pay 8,250 dollars to the defendant. and that the parties should sign mutual releases as they, the arbitrators, should draw them up. A draft of release was afterwards drawn and signed by both arbitrators allowing the plaintiff a certain set off, but the defendant's arbitrator only signed it under pressure put on him by the plaintiff's people, and on a bond of indemnity being given him to save him from the consequences:—

Held, that the settlement regarded as including the release was not binding on the defendant, and that the award, apart from the release, was not a final award. **Shivji v. Jairam, 1884 P J 224.**

283—Neglect of some arbitrators to attend—Civil Procedure Code, 1859, s. 324.

The neglect of some of the arbitrators to attend meetings of the arbitrators is misconduct within the meaning of s. 324, justifying the setting aside of the award by the Court which appointed the arbitrators,but not by a Court of Appeal. **Sreenath Ghose v. Rajchunder Paul, 8 W R 171.**

Arbitration-*Contd.*

8 Awards—*Contd.*

Notes:—Fol: 14 W R 33; 10 Bom 381. Ex: 9 B H C R 177; 22 W R 418; 18 All 422 F B.

284—*Held*, that the award made by one of the arbitrators, and the umpire in the absence of second arbitrator who declined to attend, is not a valid award. **Basunt Rai v Gridharee Singh, 3 Agra Rep 93.**

285—Power of Court on appeal.—

But where the decree is appealed from, the Appeal Court has power to take cognizance of the question of misconduct of arbitrators. See s.363, Act VIII of 1859. **Ramyyad Singh v. Nirunjun Koer. 22 W R 420.**

Ram Guttee Mundul v. Thakoor Dass Mundul, 22 W R 418.

286—Refusal to call witnesses.—

Refusal by an arbitrator to call witnesses produced by either party amounts to judicial misconduct within the meaning of s. 521 of the Civil Procedure Code. **Rughoobur Dyal v. Maina Koer, 12 C L R 564.**

287—Suspicion of partiality.—

An award cannot be set aside by the Court on the mere surmise that the arbitrator has been partial. **Nainsukh Rai v. Umadai, 7 All 273=1885 W N 12.**

Notes:—Fol: 10 All 8, Dist: 9 All 253.

288—Misconduct of Arbitrators.

The general rule is that when there has been a reference to arbitration, as it is not ordinarily the intention of parties that some matters only should be determined and that they should be at liberty to go to law for the rest, the arbitrator is bound to make a final decision upon all matters referred to him in order that his award as to any should be effectual. But where the submission is so worded as to empower the arbitrator to make one or more awards at his discretion, the arbitrator may make a valid and final award on one of several matters only. In India however, where the submission to arbitration is generally not written by one conversant with law.the court would rather look to what was probably the intention of the parties and what the justice of the case requires. And where upon a consideration of the circumstances of the case and the nature of the property to be divided, it may reasonably be taken to be the intention of the parties that the arbitrator should make several awards, the Court would uphold them in the same way as if the arbitrator had been expressly empowered by the terms of the submission to make more than one award. Where the parties fail to bring a question before the arbitrator, the fact that he does not decide it. does not detract from the finality of the award. To induce a court to set aside an award on the ground of misconduct there must be some thing more than suspicion. Moreover the misconduct charged must amount to corruption or fraud or something from which corruption or fraud might be inferred. Where the members of a joint family agree to divide their joint property, set about dividing it themselves, or with the aid of a Punchayet, and actually divide some of it, the portion so divided must be held to have ceased to be joint property, and to have been completely divided. The fact that the partition of the whole property is not completed, will not render ineffectual the partition actually carried out, unless the justice of the latter partition depends on the partition of the rest 13 Moor's I A 509; 6 Bom 663; referred to and followed **Makundram Sukal v. Saligram Sukal, 21 Cal 590=2 C P L R 202 =21 I A 47.**

Notes—See 22 W R 447=7 W R 28, 273=23 W R 429=10 All 137 =6 W R 95=4 Cal 231=11 Mad 85.

289—Power to set aside award after judgment given on it—Award—Act VIII of 1859, ss. 324, 325—Jurisdiction.—

Two out of three arbitrators appointed in the case submitted their award before the Munsif. The defendant, against whom the award had been made, applied to the Munsif to set aside the award on the grounds of corruption and misconduct, and that the award was a nullity, inasmuch as only two out of three arbitrators had made the award. The Munsif overruled the objections, and passed a decree in terms of the award. On appeal to the Judge, the order of the Munsif was set aside on the ground that the award was illegal, as two only of the three arbitrators originally appointed had made the award, and the evidence did not prove the plaintiff's case. On an application to the High Court to set aside the order of the Judge.—*Held*, that, under s. 325, Act

Arbitration-*Contd.*

8 Awards—*Contd.*

VIII of 1859, the Judge had no jurisdiction to set aside the award when the Court of first instance had passed judgment according to the award. **Ilahi Bax, 5 B L R Ap 75.**

Elahee Buksh v. Hajoo, 14 W R 33.

290—Misconduct.—

This word in s. 521, Cl. (c) of the Code of Civil Procedure does not necessarily imply moral turpitude and should be construed in the sense in which it is used in English Law with reference to arbitration proceedings. It includes neglect of the duties and responsibilities of the arbitrators, and of what Courts of Justice expect from them before allowing finality to their awards. An arbitrator to whom the matters in dispute in a suit were referred under s. 508, Code of Civil Procedure, and who was directed by the order of reference to file his award by the 22nd September, applied on the 17th September for an extension on the ground that a very full investigation was necessary which could not be made within the prescribed time. On the 20th September, without waiting for the order of the Court, he intimated to the parties that he proposed to hold an enquiry in the case on the 24th, and it appeared that he did not expect this intimation to reach them before the 21st or 22nd. On the 23rd he informed the plaintiff's pleader that a new date would be fixed for the enquiry, of which notice would be given to the parties. Notwithstanding this, on the 23rd the arbitrator took evidence for the defendant in the absence of the plaintiff and his pleader. Up to this time the order of the Court extending the time had not been received. The time was extended to the 26th of October. On the 27th September he directed the parties to be informed that the investigation would be held on the 5th of October. On the 4th, the plaintiff presented a petition asking the arbitrator to summon witnesses and to take documentary evidence, and upon this nothing definite was settled at the time ; but after the pleaders had left, the arbitrator rejected the petition, on the ground that the evidence sought to be produced was unnecessary. On the same date and on the 5th and 6th he took evidence for the defence in the absence of the plaintiff and his pleader. On the 10th he rejected plaintiff's petition for further time to produce evidence and complaining of his having taken evidence in the plaintiff's absence and having received in evidence a fabricated document. On the 25th October, the arbitrator delivered his award in defendant's favour. On plaintiff's objection, the Court set aside the award and directed the trial of the suit to proceed. *Held* that though no cause of "corruption" was made out, "misconduct" had been established. **Gunga Sahai v Lekhraj Singh. 9 All 253**

Notes:—Ap: 13 Bom 160 ; 12 All 328 F B ; 24 All 67 F B ; 24 All 195. Dist: 9 M L J 334. Ref: 25 Cal 354 ; 16 Bom 91 ; 21 Bom 159 ; 376 ; 24 Bom 260 F B ; 1 Bom L R 799 F B ; 10 All 289 ; 11 All 194 ; F B ; 17 All 294 F B ; 11 C W N 147=4 C L J 537 ; 29 All 457 F B ; 4 A L J 455 F B.

291–Arbitration—Arbitrators omitting to examine all the defendants' witnesses—Misconduct—Civil Procedure Code (Act XIV of 1882), Sections 521, 622—Lower Court overruling plea of misconduct and giving judgment in term of award—Ground for revision—Material irregularity—Court giving wrong decision upon legal question.

In a suit in which arbitrators were appointed and delivered an award in favour of plaintiff it was objected by the defendant that the arbitrators had only examined two out of five of his witnesses, though they were present, and defendant desired to have them examined. The lower Court found that the witnesses were present as alleged, but held that the arbitrators were not bound to take all the evidence produced, but only so much as they considered necessary for the purpose of justice (which they had done), and finding no misconduct proved, made a decree in terms of the award.

Held, that the decision of the lower Court was clearly wrong, as it is the duty of an arbitrator to take the evidence of witnesses produed before him by a party, and the refusal to do so is misconduct on the part of the arbitrator within the meaning of Section 521 of the Civil Procedure Code.

But *held* further, that the error of the lower Court was not open to, or which could be remedied in revision, as that Court considered the objection of the defendant, and adjudicated upon it,

Arbitration-*Contd.*

8 Awards—*Contd.*

and the mere circumstance that his adjudication was erroneous, was no ground for revision under Section 622 of the Civil Procedure Code.

Pir Bakhsh v Baba Nihal Singh 58 P R 1889,

292—Arbitrators not acting in strict conformity to the rules of evidence.

On an allegation that the arbitrators decreed a claim without any legal evidence it was held, it is not a valid objection to an award that the arbitrators have not acted in strict conformity to the rules of evidence. **Guppu v Govindacharyar 11 Mad 85.**

Notes:—Ex: 15 Mad 384. Ref : 25 Cal 757 F B ; 18 Mad 423 F B ; 17 Bom 357 ; 20 Bom 596 ; 9 Bom L R 757 P C.

292A—Award— Decree—Appeal— -Waiver—Estoppel.

When the validity or legality of an award is questioned, an appeal lies from a decree passed in accordance with it. (25 Cal 141, Fol.) The examination of a witness by two out of three arbitrators in the absence of a third and the refusal of the arbitrators to examine witnesses already examined amount to misconduct within the meaning of s. 521, Civil Procedure Code 1882. (7 W R 269; 8 W R 171, 12 Mad 113, Dist.) Though an arbitrator may have been guilty of some irregularity in the course of reference, it will not vitiate the award if the conduct of the parties be such as to show that they waive any objection on account of it. Waiver must be clearly made out, full knowledge of the defect must be proved, and where a party objected to evidence received in his absence, etc, his not receding from the reference and allowing the remaining business to be transferred *ex parte* was not treated as an acquiescence in the irregularity. U B R 1897 –1901, Vol 1, 290 Ref.)

Ma Mi Tu v Maung Naing. U B R 1897—1901 Vol II. 14.

Notes.—Overruled U B R 1905, 4th Qr Civ. Pro Code, 40.

293—Civil Procedure Code S. 521—Misconduct of arbitrators—Absence of one of the arbitrators

C, C 107

Arbitration-*Contd.*

8 Awards-*Contd.*

A suit was referred to three arbitrators for decision. Objection was taken to the award on the ground that one of the arbitrators was absent during the examination of witnesses. Held the award should be set aside by reason of arbitrators having been guilty of misconduct within the meaning of S. 521 (a) of the Code of Civil Pro.

Thammiraju v Bapiraju, 12 Mad 113.

294—Sch II r. 15 (1882 S. 521)—Arbitrators —Award—Misconduct of arbitrators—Revision.

An order under S. 521, Civil Procedure Code setting aside an award made under Chapter XXXVII of the Code on a reference to arbitration in the course of a suit on the ground of the arbitrators' misconduct is not subject to revision under S. 622 of the Code of Civil Procedure, 1882.

Damodar v Raghunath. 4 Bom L R 267= 26 Bom 551.

Notes—Ref: 31 Mad 345=18 M L J 228.

295—C. P. C Sch II S. 521—Arbitrator receiving evidence from one party in the absence of the other—Judicial misconduct— Setting aside award—Appeal—Appellate Court's power to go behind first Court's order setting aside award.

A Court is perfectly justified in setting aside the award of the arbitrators, on the ground that the latter had been guilty of judicial misconduct in having taken the evidence of one party in the absence of the other which was wholly unavoidable. and in having omitted to give the latter sufficient opportunity to produce his own evidence.

Quære.—Whether an Appellate Court had power to go behind the order of the first Court, setting aside such an award. (2 All 181, 3 All 636. 28 All 408, 22 Mad 202, 8 C W N 390, Ref.)

Soba Ram v Ram Das. 66 P R 1907= 159 P L R 1908=148 P W R 1907.

296—Misconduct of arbitrators—Application to have award set aside-Ground for setting aside award.

On an application to have an award set aside by reason of misconduct on the part of the arbitrators, their action alleged was *held* not to amount to misconduct, and, therefore, the defendants were not entitled to have the award set aside.

Toolsee Money Dassee v Sudevi Dassee 26 Cal 361=3 C W N 347.

Arbitration-*Contd.*

8 Awards-*Contd.*

Notes:-Fol: 11 M L J 346; 25 Mad 555. Dist: 9 C W N 502.

297—Misconduct of arbitrators—Functions of Court:—

If the arbitrators had heard only one side and declined to hear the other, that would be misconduct within the meaning of S. 521, C. P. C. A Judge cannot constitute himself a Court of appeal from the decision of the arbitrators.—

Sundara Mudali v. Ponnusawmi Mudali. 13 M L J 275.

See decision on appeal. **27 Mad 255.**

298—An award can only bind the parties to the arbitration.

A verbal submission to arbitration, as a result of which title to immoveable property is likely to be affected, is valid.

The allowing an amendment of pleadings is in the discretion of the Court; but the discretion is judicial and not arbitrary; and an erroneous exercise of it is capable of correction by a Court of appeal.

Leave to amend ought to be granted unless the party applying is acting *mala fide* or by his blunder has done some injury to his opponent which cannot be compensated by award of costs; otherwise, whether the original omission arose from negligence, carelessness, or accidental error, the defect may be allowed to be remedied if no injustice is done to the other side

Though an arbitrator may have been guilty of some irregularity in the course of the reference, it will not vitiate the award, if the conduct of the parties be such as shews that they have waived any objection on account of it. The waiver must be clearly made out, and the party must be shown to have full knowledge of the defect which he is said to waive.

The arbitrator must be careful to see that his award is a final decision of all matters requiring his determination, and his failure to determine any of them may completely vitiate his award; this would be specially the result where there is such a connection and inter dependence between the various matters covered by submission that the decision and disposition of some of them only, to the exclusion of others, would operate to produce injustice between the parties. But this principle has no application, if the submission can be construed to empower the arbitrator to make several awards. An award is none the less final, though it does not execute itself or preclude all future controversies; if it leaves nothing to be done but the performance of some ministerial act it is not faulty for want of such finality and certainty; the principle applicable is *Certum est quod certum reddi potest.* (That is sufficiently certain which can be made certain).

The Court is always reluctant to entertain the objection that the award, as distinguished from the submission, is unreasonable.

An award will not be set aside if the question undecided was not notified to the arbitrator as a matter in difference or the parties showed by their conduct that they did not mean him to decide it. (12 M I A 112 Ref. (1878) 10 Ch D 393 Ref)

Ramji Ram v Salig Ram. 14 C L J 188.

298A—Award, grounds for setting aside of —Arbitrators, powers and duties of—Misconduct of arbitrator—Civ. Pro. Code, 2nd schedule, paras 14, 15 and 20 — Limitation Act, Art. 158.

Subject to any limitations contained in the instrument of his appointment and to any statutory directions as to the manner in which he is to discharge his duties, an arbitrator may conduct his proceedings in any manner he thinks fit, so long as he acts in accordance with the principles of justice, equity and good conscience He is not fettered by rules of practice which Courts of law adopt for general convenience, nor bound by the adjective law laid down in the Code of Civil Procedure and the rules made under it, or the rules relating to evidence to be found in the Indian Evidence Act. He may also, in forming his judgment act upon merely moral considerations of which a Court of law could not take cognizance.

Where the award is good on the face of it, the parties cannot object to the arbitrator's decision either upon law or fact, and the Courts will not ordinarily review his discretion, provided he acts within his authority and behaves fairly to each party. Nor will they interfere with his judgment or any mere ground of mistake.

Arbitration-*Contd.*

8 Awards—*Contd.*

An arbitrator called as a witness in an action on an award might be examined as to every matter of fact with reference to the making of the award, and whether in his estimate of the compensation he took into consideration any matters not included in the reference and therefore not within his jurisdiction, but he cannot be questioned as to the elements which he took into his consideration in determining the quantum or compensation, or so as to scrutinise the exercise of his discretionary power to award compensation.

Held further, that the principles accepted in the English law for regulating the conduct of the arbitrators are not inapplicable to arbitration proceedings held in this country. Nor are the powers of the Courts in India to review the proceedings of arbitrators any more extensive than they are in England.

Held also, that Art. 158, Limitation Act, cannot apply to a written statement which a defendant is required to file in answer to an application for the purpose of having the award made a rule of Court. **Badruddin Hasan v Amir Begam. 14 O C 308**

299—Sch II (Ss. 510, 514)—Supersession of arbitration—Partiality of arbitrator—Grounds of supersession.

When once a suit has been referred to an arbitrator, it cannot be superseded except upon grounds mentioned in S. 510 or S. 514 of the Code of Civil Procedure. **Kothandarama Aiyar v Sivagnana Desikar. 11 M L J 128.**

299A—Omission to disclose—Interested character of arbitrator.

Omission of an arbitrator to disclose the fact that he was consulted, engaged, or retained by the defendants' respondents, previous to the arbitration, is such a misconduct as to vitiate the award. 25 Cal 141 Fol. **Maung Lu Gyi v Maung Lu Ngwe. U B R 1897—1901 Vol II, 13.**

300—On the following facts viz.

The first meeting of the arbitrators was held on the 9th January without any notice to the defendants. It was alleged that nothing was done at this meeting. On that day the arbitrators sent a notice to the appellants appointing the next day (10th) at 6-30 P.M. for the next meeting. The defendants' attorney thereupon wrote protesting, and asked the arbitrators not to proceed, as they intended to apply to the Court. No notice of this protest was taken by the arbitrators, and they proceeded with the arbitration on the 10th in the absence of the defendants. On the 11th the defendants' attorney received a notice that the arbitrators would hold a meeting on the 12th at 8 A.M. A meeting was held on that day in the absence of the defendants, and an award was made decreeing the suit. *Held* that, the arbitrators did not give the defendants a fair and reasonable opportunity of being heard, and were guilty of such misconduct as was sufficient to vitiate the award. *Semble*—The *ex-parte* meeting on the 10th was alone sufficient to warrant the Court in setting aside the award. **Toolseymony Dassee v Sudevi Dassee. 3 C W N 361.**

Notes:—Fol: 29 Cal 278.

301.—Ground for setting aside award—Arbitrator receiving evidence from one side in absence of other side—Misconduct—Civil Procedure Code (1882) s 521.

An arbitrator ought not to hear or receive evidence from one side in the absence of the other side without (if he does) giving the other side affected by such evidence the opportunity of meeting and answering it. This proposition is, however, subject to the qualification that the parties may agree that a reference may be conducted in any particular way, and such an agreement may be either express or implied from their conduct during the arbitration, and they may also expressly or by their conduct waive their objection to an irregular course of conduct on the part of the arbitrator. Where an arbitrator received certain papers and documents from the defendants in a suit referred to his arbitration, together with a letter from the defendants containing certain documents sent to him and made his award without giving the plaintiffs an opportunity of seeing the said papers and documents, and of meeting the inferences deducible from them. *Held* that there was such a breach of duty on the part of the arbitrator as entitled the plaintiffs to have the award set aside.

Cursetji Jehangir Khambatta v. Crowder. 18 Bom 299.

Arbitration-*Contd.*

8 Awards—*Contd.*

302—Misconduct—Failure to take evidence.

The word "misconduct" as used in s. 521 of the Code of Civil Procedure is not confined to misconduct of a fraudulent or improper character but it includes action on the part of an arbitrator which is, upon the face of it, opposed to all rational principles which should govern the procedure of a person to whom matters in dispute have been referred for decision Where an arbitrator has taken no evidence upon such matters, and has not allowed a party an opportunity of proving his contention, he is guilty of "misconduct" within the meaning of the section, and the Court, upon objection being made, should consider whether there has been any real arbitration proceeding, and whether the arbitrator has arrived, at his conclusion upon legal and proper materials. Where the lower Court had failed so to consider such an objection the High Court in the exercise of its revisional powers under s. 622 of the Code of Civil Procedure set aside the decree affirming the award and the award itself, and directed the case to be restored to the lower Court's file for determination.

Deoki Nandan v Raj Kumar. 9 W N 124.

302 A—Arbitration out of Court—Filing of award—Civ, Pro. Code (Act V of 1908) Sch XI s. 20—Arbitrator, duty of—Misconduct of arbitrator—Award based partly on private enquiries, if valid—Award, a final decision.

In arbitration proceedings, both sides must be heard, and each in the presence of the other. However immaterial the arbitrator may deem a point, he should be very careful not to examine a party or a witness upon it except in the presence of the opponent. If he errs in this respect, he exposes himself to the gravest censure, and the smallest irregularity is often fatal to the award.

Where the award recites on the face of it that the arbitrator held, partly on evidence taken before him and partly on private enquiry, that the will executed by a certain person was genuine: *Held*, that it was not competent for him to do so and the award was vitiated.

An arbitrator must be careful to see that his award is a final decision on all matters requiring his determination. The obligation so to decide depends upon the question whether the submission requires that all or only some of the matters in dispute are to be determined by him. The position is different where the arbitrator is empowered to make one or more awards at his discretion.

Where the award leaves undecided one of the cardinal points in controversy, the award is incomplete and cannot be sustained. **Ganes Narayan Singh v Malida Koer. 13 C L J 399.**

303—Misconduct—Failure to hear evidence.

Whether the arbitrators should or should not hear evidence and the parties by counsel or otherwise must depend on the particular circumstances of every case, the arbitrators exercising in judicial manner, their discretion in the matter. The refusal to hear evidence in a case where the arbitrators cannot decide a matter in dispute without hearing evidence would amount to a misconduct on the part of the arbitrators. It is improper for the arbitrators not to hear evidence to ascertain as to who are the persons liable on a contract entered into in the name of a firm. An award made against a firm, without ascertaining who are the persons who constitute it, is, on the face of it, bad, and no Court can make a decree, in such circumstances upon the award against a firm. **Hurdwary Mull v Ahmed Musaji Selaji. 13 C W N 63=1 Ind Cas 371.**

Notes:—Ref 36 Cal 388, 13 C W N 297; 1 Ind Cas 391.

303 A.—Arbitration—Award——Appeal——Revision—Hearing original and making fresh award—Taking evidence in absence of parties—Corruption or misconduct—Civ. Pro. Code, 1908, second schedule, paras 15 and 16.

Held, that a decree passed in accordance with an award after finding that there was no misconduct or corruption of the arbitrators, to whom a case is referred for arbitration on the application for the parties, is neither subject to appeal nor to revision, and that an Appellate Court's action to interfere with it in any way even in the consent of the parties is *ultra vires ab initio* *Held*, also, that, on the objection of any party, the arbitrators can reconsider their award after it is made, but before it is submitted to the Court. Thus a fresh award is valid and legal even if it is different in its terms from the original one. *Held*, further that it does not

Arbitration-*Contd.*

8 Awards—*Contd.*

amount to misconduct of an arbitrator if he takes evidence in the absence of the parties, with their express or implied consent. (92 P R 1903, 25 Cal 141, Fol.; 148 P W R 1903, 18 Bom 299, Ref.) **Dial Chand v. Khuda Bakhsh. 73 P W R 1910=6 Ind Cas 963.**

304.—Civil Procedure Code, ss. 508, 514, 521—Omission to fix time for delivery of award—Extension for time after expiration of period fixed—Invalidity of award when not made within time fixed by Court—Costs.

The provision contended in s. 508 of the Civil Procedure Code, requiring the Court to fix a reasonable time for the delivery of the award, is not imperative, but directory, and non-compliance with it does not make the order of reference abortive and any subsequent arbitration proceedings ineffectual and bad. Under s. 514 of the Code, the Court may extend the time for making the award after the time fixed therefor has expired. The last paragraph of s. 521 does not imply that an omission by the Court to fix a positive date within which the award is to be filed is fatal to the validity of the award. Where an order extending the time for delivery of an award was made after the time fixed therefor had expired, and did not fix any positive date for the filing of the award:—*Held* that the adoption of the award by the Court amounted to an enlargement of the time for delivery of the award to the date on which it was in fact delivered, and to a ratification of what had been done by the arbitrators, and that the parties, having made no objection to the action of the Court, must be taken to have waived any objection to the award. The mere circumstances of an arbitrator having first tendered and then withdrawn his resignation does not formally divest him of his character as arbitrator. 23 W R 429 referred to. **Har Narain Singh v Bhagwant Kuar. 10 All 137=1888 W N 28.**

Notes:—Fol. 18 Mad 22.

305.—*Held* on appeal to the Privy Council (reversing the above decision).

When once an award has been delivered, it is no longer competent to the Court to grant further time, or to enlarge the period for the delivery of the award under s. 514 of the Code of Civil Procedure. Where an award was not made within the period fixed by the Court's order, but was made after the date given on the last order extending the time for its delivery,—*Held* that the award was invalid. The decree of the Court dealing with the award as if duly made within the time could not be treated as enlarging it. The judgment in 8 All 548, approved. Order to be that the suit should proceed. Neither party to be entitled to costs in either Court below after the first judgment with regard to the stage at which the objection was taken; and the costs prior to that to abide the issue. **Har Narain Singh v Chaudhrain Bhagwant Kuar. 1 All 300=L R 18 I A 355.**

306.—S. 221—Arbitration.

The principle of the ruling of the Privy Council in 10 All 137; is applicable also to arbitrations under s. 221 of Act No. XIX of 1873.

Gauri Shankar v Babban Lal. 14 All 347=12 W N 20.

307.—Omission to fix time for delivery of award—Award not signed by the arbitrators in the presence of each other—Civil Procedure Code (1882), ss. 508 and 516.

An award is not invalid merely because no time has been fixed for the making of the award, s. 508 of the Code of Civil Procedure being directory and not mandatory. 10 All 137, followed.

Muthukutti Nayakan v Acha Nayakan. 18 Mad 22.

308—Civil Procedure Code Ss. 514, 521.—Extension of period fixed for submitting an award period fixed for making it had expired.

There is nothing in s. 514 to limit the period within which time may be extended by the Court to the period mentioned in the previous order, nor would it be reasonable to limit it. The real test is whether the time was in fact extended so as to validate an award which the arbitrators would have had no jurisdiction to make at the time when they made it. So where an award was made after the time had been enlarged and within the time so enlarged, the award is good and valid, and a party will not be entitled to have such award and a decree made upon it, set aside. **Lakshminarasimham v Somasundaram. 15 Mad 384.**

Arbitration-*Contd.*

8 Awards—*Contd.*

309.—S. 514 C. P. C.—Extension of time.

A Court has power to act under s. 514 of the Code of Civil Procedure at any time before the award is actually made, whether the time previously limited for making the award has expired or not. **Ram Manohar Misr v Lal Behari Misr. 14 All 343=12 W N 18. Mangal Sein v Gobind Ram. 6 W N 151. Lalti Dai v Baldeo Sahai. 1 W N 25. Har Narain Singh v Bhagwant Kuar. 10 All 137=8 W N 28.**

310—Award—Delivery of—Civil Procedure Code (1882) Ss. 508, 521.

The plaintiff and the defendant agreed to refer a suit to an arbitrator which was accordingly so referred. The award was made within the period fixed by the order of reference, but was not submitted to the Court until two days later. Held, the award was valid under C. P. C. S. 508. **Arumugam Chetti v Arunachalam Chetti. 22 Mad 22.**

Notes.—Ref: 26 All 105. Fol: 2 A L J 20; 27 All 459=2 A L J 201=(1905) W N 47; 8 C W N 916.

311.—The Second Schedule r. 3 (1882 Ss. 508 514, 521)—Award, delivery of. within time.

An award delivered to the Court peon on the date fixed for its delivery is a good award even though it reached the Court on the day after the date fixed owing to the fact that it was given to the peon after Court hours. **Sita Ram v Bhawani Din Ram. 1904 A W N 205= 26 All 105.**

312.—S. 541—Award—Delivery of.

The making and the delivery of award are different acts to the transmission or filing of it. **Trimbak v Dadaji. 1889 P J 73.**

(5) Validity of award.

313—Omission to fix time for sending in—Act VIII of 1859, s. 318.

Where no time had been fixed in the order directing the award for sending in the award, the award is, under s. 318, Act VIII of 1859, invalid. **Gangagobinda v. Kaliprasanna Naik. 1 B L R S N 13: 10 W R 206.**

Arbitration-*Contd.*

8 Awards—*Contd.*

314—Oral award, validity of.

An oral award is as valid as a written one. though it may be more desirable to have a written award. **Savalappa v Devchand 3 Bom L R 691= 26 Bom 132.**

315—Sch. II. S. 1—Award—Reference by parties interested—Defendant who did not appear not joining—Whether reference valid. A suit was brought against several persons, one of whom was a minor.

An official of the Court was appointed guardian *ad litem* for the minor defendant, but he did not put in an appearance. The parties, with the exception of the said minor. applied to the Court to refer the matters in dispute to arbitration. The reference was made and an award was given by the arbitrators, whereby the minor was exempted from the plaintiff's claim. Objections being taken to the award, *held* that the minor, not having put in an appearance, nor contested the suit, was not a person interested in the matters which were referred to arbitration, within the meaning of S. 1. Sch. II of the Code, and his not joinig in the reference did not invalidate it. 24 All. 229, *appl:* **Ishar Das v. Keshab Deo 7 A L J 807=7 Ind Cas 68.**

316—The Second Schedule r. 3 (1882 S. 508)—Provisions mandatory and imperative—No time fixed in the order of reference—No award. The provisions of S 518 of the Code of Civil Procedure are mandatory and imperative.

Where the Court appointed an arbitrator but did not fix the time within which the award was to be filed, and the arbitrator filed the award that very day:—*Held*, that the proceedings were obnoxious to the mandatory provisions of S. 508 and the award was no award in law. (L. R. 18 I. A. 55=13 All 300=8 All 548 Foll. **Lachman Das v. Apprakash. 5 A L J 144=A W N (1908). 59=30 All 169.**

317.—Ch. II — Arbitration — Award—r. 3 (1882 Ss. 518, 521, 522, C. P. C.—Appeal.

An award passed without the submission to arbitration of all the parties interested in the subject-matter of it, and without an order of the Court as prescribed by S. 508, referring the mat-

Arbitration-*Contd.*

8 Awards-*Contd.*

ter in dispute to the determination of arbitration and fixing a time for the making of an award, is not an award in law.

Held, therefore, that, where an award is made without the submission of all the parties, and without fixing a time for the making, and a decree is made in accordance with it, an appeal is not thereby barred. **Negi Puran v Hira Singh. 6 A L J 333=1 Ind Cas 146**

317A.—Arbitration—Extension of time to an arbitrator to make and file an award—Delegation of power by Court to arbitrator to extend time—Award, validity of—Civ. Pro. Code (Act V of 1908). Sch II, Rr. 3 (1), 8.

When a case is referred to arbitration, the Court should itself fix a date for making the award, and where the award is not completed within the time fixed, the Court itself should, in extending the time, fix a particular date for the making of the award, and not leave it to the discretion of the arbitrator to enlarge the time for himself.

Time can only be extended until the award has not been made and filed; no extension can be allowed in a case where the award has been made and filed beyond time.

Where an award has not been properly made and filed according to law, it is a nullity and the decree passed on the basis thereof should be set aside. **Gur Das v. Garul Dhuj. 9 Ind Cas 241.**

317B.—Arbitrator—Award—Validity—Delegation. Though an oral award may be given and a note or minute of it taken for record, still if the arbitrators resolve that their award is to be in the form of a document to be signed by them as the final expression of their decision, nothing but that document can be treated as the award. One arbitrator cannot delegate his powers of decision to another. When the arbitrators have been appointed by agreement, and no provision has been made for a difference of opinion, the award is invalid, unless it is unanimous. (U. B. R. 1892—1896, Vol. II, 18, 276, *Ref.*) **Ma Thet Tin v Ma Saw Kin U B R 1902—1903, Vol II. Arbitration p.1**

Arbitration-*Contd.*

8 Awards-*Contd*

317 C.—Award objected to on the grounds that one of the arbitrators was interested in the case.

If parties appoint an arbitrator with full knowledge of material facts as to his connection with or even interest in the subject matter, they cannot object to the award on the ground of that connection or interest. **Ah Kin Shok v Maung Ta Hin. U B R 1897—1901, Vol. II, 8.**

317D.—Arbitrator not bound to give award on each point—Award on whole case—Error in law, effect of, on award.

Where a case is referred to arbitrators, they are not bound to give an award on each point: they have to give their award on the whole case. They are Judges of law as well as Judges of facts, and an error in law does not vitiate an award. **Gulam Jilani v Muhammad. 4 Bom L R 161.**

318.—Order of reference—Civil Pro. Code 18 9 s. 315.

Where the lower appellate Court omitted in its order refusing the case to arbitration to fix a time for the delivery of the award, as directed by section 315 of Act VIII of 1859, but both the parties permitted the reference to proceed and took part in the proceedings without making any objection until after the award was delivered, and when the omission in the order of reference could work no injury to either party, the High Court saw no reason why the omission should be held to avoid the award. **Mubarik Ali v Kadir Baksh 7 N W P 351**

319.—Award made out of time—Civil Procedure Code (Act XIV of 1882), ss. 506, 514.

An appeal was preferred against a decree of an original Court dismissing a suit, and the Appellate Court sent the case back for the purpose of certain evidence being taken, and certified to it. Pending that being done, the parties applied to the Appellate Court to refer the case to arbitration, and that Court referred that application to the original Court for disposal, although the case was still pending on its own file for disposal. Subsequently another application was made to the original Court to refer the case to arbitration, and on the 10th May the record was sent to the arbitrator with directions to submit his award within seven days On the 12th Sep-

Arbitration-*Contd.*

8 Awards—*Contd.*

tember, as the award had not been sent in, the original Court passed an order recalling the record, and subsequently the award of the arbitrator, dated the 12th September, was filed. The original Court thereupon forwarded the record to the Appellate Court for its decision. Objections were taken to the award, but overruled, and the Appellate Court passed an order directing the case to be sent back to the original Court, with orders to pass a formal decree in accordance with the award of the arbitrator. *Held* that the award was bad in law, because the time within which it was directed to be made had never been enlarged, and the Court's order of the 12th September recalling the record could not be taken as an indication that the time was enlarged. **Bhugwan Dass Marwari v Nund Lall Sein. 12 Cal 173.**

320.—Arbitrator exceeding his powers.

Held that, where a decree was strictly in accordance with the award it cannot be set aside in appeal on the ground that the arbitrator had exceeded his power or that it was submitted after the time fixed for its delivery, (although the Court had enlarged the time, after the period fixed had expired.) **Mangal Sein v Gobind Ram. 6 W N 151.**

321.—The Second Schedule r. 5 (1882 Ss. 510, 514)—Delegation by arbitrator—Award not submitted by the arbitrators within the time limited by the court.

The parties to a suit for winding up a partnership agreed to refer the suit to arbitration, and two arbitrators were appointed by the court The parties subsequently agreed that the matters in dispute should be settled by one, who was within a certain time to send his opinion to the arbitrators in order that they might submit to the Court an award in accordance therewith, sent in his opinion to the arbitrators some days before the time fixed by the Court for the submission of the award but the arbitrators did not submit their award within time. *Held* that the agreement of the parties to let the matters in dispute be settled actually by arbitration could not possibly have the effect of superseding the appointment of arbitrators by the Court. Before the court could proceed to hear the suit, it was necessary that it should itself make under either S. 510 or S. 514 an order superseding the reference to arbitration. **Jumna Kunwar v Nasil Ali. 1902 A W N 72=24 All 312.**

Arbitration-*Contd.*

8 Awards—*Contd.*

322.—Award made out of time—Civil Procedure Code, s. 521—Arbitration.

Under s. 521 of the Civil Procedure Code, the rule that no award shall be valid unless "made" within the period fixed by the Court, is equivalent to a rule that the award must be "delivered" within that period. Upon a reference to the arbitration of three persons, the Court ordered that the award made by them should be filed on the 19th September 1885. The award was not filed on that date but was signed by two of the arbitrators on that date, and by the third arbitrator on the 20th September, on which day it was filed. It had been agreed that the opinion of the majority should carry the decision. *Held*, that the award was not "made within the period fixed by the Court" within the meaning of s. 21 of the Civil Procedure Code. **Behari Dass v Kalian Das. 8 All 543.**

Notes:—Diss: 13 Bom 119; 27 All 459=2 A L J 201=(1905) W N 47: 22 Mad 22. Ref: 26 All 105.

323.—Reversed on appeal to the Privy Council which held that time could not be extended after the delivery of the award, and that an award after the fixed time is invalid.

Raja Har Narain Singh v Chowdhrain Bhagwant Kuar. 13 All 300 P C.

324.—The Second Schedule r 3 (1882 Ss. 508, 514, 516 and 521)—'making' of the award, what is—Award completed and signed by the arbitrators before the time fixed——Filing thereof after period fixed—Validity of award——Meaning of 'made' in S. 521.

An award completed and signed within the period fixed by S. 508 of the Code is perfectly good and valid, notwithstanding the fact that it reaches the Court after the period so fixed. The word 'made' in S. 521 does not mean 'making' and 'delivery,' because these two words indicate two different stages. 'Made' means that the mind of the arbitrators has been declared; such declaration requires authentication by signatures. The validity of an award depends upon the

Arbitration-*Contd.*

8 Awards—*Contd.*

'making' (*i. e.*) the completion and signing thereof, by the arbitrators, and not the filing thereof in Court. 22 Mad 22 and 13 Bom 119 Fol. 13 All 300 Ref. to; 8 All 543, Diss. **Asad-ullah v Muhammad Nur. A W N (1905) 47=25 All 459=2 A L J 201.**

325.—The Second Schedule r. 3 (1882 Ss. 508 514 and 521)—Limitation Act, Sch. II. Art. 158—Award made and filed after expiry of time fixed-Appeal.

Where an award is made after the expiry of the time prescribed by the Court for the making thereof, the Court ought to take judicial notice of its invalidity notwithstanding the fact that neither party has taken any objection thereto. A decree passed on such an invalid award is appealable to such a case. 13 All 300, 11 Mad 85, Fol. 15 Mad 384, 14 All 343. Ref. 29 Bom 285, 16 Cal 482, 24 Cal 469, 17 Bom 357 and 18 All 422, Ref, 13 All 300, Fol. **Kewal Lodhi v Baij Nath. 2 N L R 81.**

326—Award not made within time.

An award which is invalid under s 521 Code of Civil Procedure, because not made within the period allowed by the Court is not an award upon which the Court can make a decree, and a decree passed in accordance with such an award is not a decree in accordance with an award from which no appeal lies. **Chuma Mal v Hari Ram 8 All 548=6 W N 179 Behari Das v Kalyan Das 3 All 543=6 W N 179.**

Notes—Ap: 13 All 300 P C; 26 All 105. Fol: 30 All 169=(1908) W N 59=5 A L J 144.

327.—Award made out of time—Civil Procedure Code, ss. 508, 521, 522, 622——Act VIII of 1859, s. 318.

An order of reference to arbitration was made on 21st January. Six weeks' time was allowed for the return of the award. No application was made for extension of time. The award having been returned on 8th May, the Court refused to give judgment in accordance with it, under s. 522 of the Code of Civil Procedure, on the ground that it was not valid *Held*, on an application under s. 622 of the Civil Procedure Code, that the award was invalid. **Simson v Venkatagopalam. 9 Mad 475**

C. C 108

Arbitration-*Contd.*

8 Awards—*Contd.*

Notes.—Dist: 15 Mad 384. Ex: 11 Mad 85. Ref: 13 Bom 119.

328.—Making and filing award Award made, but not filed within the time specified by order of Court-Civil Procedure Code (Act XIV of 1882), ss. 508, 514, 521.

A suit for dissolution of partnership and all matters in dispute between the parties thereto were, by Judge's order, dated 18th July 1887, referred to the arbitration of A and B. The time for making and filing the award was by subsequent order extended to the 18th May 1888. The award was made on that day, but was not filed until the 18th June. The second defendant obtained a rule calling on the other parties to show cause (*inter alia*) why the award should not be set aside by reason of its not having been filed in time. *Held* that, the omission to file the award on or before the 18th May 1888 did not render it invalid. The word "made" in ss. 514 and 521 of the Civil Procedure Code (Act XIV of 1882) does not include the filing of the award. **Umersey Premji v Shamji Kanji. 13 Bom 119.**

Notes:—Ap: 22 Mad 22. Ref: 26 All 105. Fol: 8 C W N 910; 27 All 459=2 A L J 201=(1905) W N 47.

329.—Arbitration——Awards——Validity of awards & ground for setting them aside—Sch. II r. 15 (1882 S. 521)—"Made within the period allowed by the Court"-Award submitted after time though made and signed in time—Validity.

An award made and signed but not submitted to the Court within the time allowed for delivering the same in Court is valid in law. (13 Bom 119; 22 Mad 22 Rel.) **Dabender Nath Chatterjee v Sarbamangola Debi. 8 C W N 916.**

Notes.—Ref: 10 C W N 601=2 C L J 153.

330.—Arbitration, reference of case to—Award of arbitrators—Acceptance of award on date of delivery by both parties—Subsequent objections to award by both parties—Court setting aside award and adjudicating on case—Estoppel.

To a suit by plaintiffs, who were the collaterals of one R *K*, deceased, for possession of four houses and one shop belonging to the latter, the defendant pleaded that he was the adopted

Arbitration-*Contd.*

8 Awards—*Contd.*

son of R. K., and as such excluded the plaintiffs. On the day fixed for hearing evidence both parties agreed to refer the case to the decision of arbitrators who were present in Court, and preferred a request that the arbitrators might be asked to file their award that day. A referring order was accordingly, drawn up to this effect, it being further recited that the arbitrators had already made inquiries. The arbitrators filed their award the same day, finding all issues in favour of defendant, but nevertheless giving one of the houses and Rs. 175 to plaintiffs. The parties were examined by the Court, and expressed their acceptance of the award, but the Court, instead of passing a decree in terms of the award, adjourned the hearing for objections to be filed. On the 2nd June the defendant objected to the effect that, as all the issues had been found in his favour, the award of the house and cash to plaintiffs was proof of the arbitrators' partiality towards plaintiffs. He therefore prayed that the award might be set aside or amended. On the 4th June plaintiffs also filed objections to the award, and charged the arbitrators with misconduct in that they had decided the case without inquiry. On the 10th June both parties were examined and stated that they wished the award to be set aside, whereupon the Court, after questioning the arbitrators, set aside the award on the ground, *inter alia*, that both parties were agreed that the arbitrators had decided the case without inquiry and wished the award to be cancelled. The Court then proceeded to inquire into the case, and on the merits held that plaintiffs' claim should be decreed as defendant's adoption had not been proved. On appeal the Divisional Judge agreed with the first Court on the facts, and held further that defendant was not competent, after his objections to the award and in the face of his prayer to have it set aside, to ask the Court of Appeal to pass a decree in terms of the award. Defendant appealed to the Chief Court, and contended, *inter alia*, (1) that when on the date of award both parties accepted it, the case should not have been adjourned in order to enable objections to be filed, but a decree should forthwith have been passed in accordance with it, and (2) that the Court setting aside the award on the ground of the arbitrators' misconduct in deciding it without inquiry, the parties having expressly asked for the award to be filed the same day.

Arbitration-*Contd.*

8 Awards—*Contd.*

Held, that the Court had committed an irregularity in adjourning the case for objections when both parties expressed their acceptance of the award.

Held, further, on the facts of the case, that the arbitrators had not been guilty of the misconduct attributed to them

But held, that the Court, both in adjourning the case and in finding misconduct on the part of the arbitrators, had acted within its jurisdiction, though erroneously, and that the error which it had committed amounted merely to an irregularity of procedure from which no substantial injustice on the merits had been proved to result.

Held, also, that though the proceedings had been irregular, the defendant was estopped by his conduct from taking exception to them after their conclusion merely on the ground of an irregularity which had been committed at his instance. **Sheo Narain v Sheo Ram. 15 P R 1899.**

331.—Denial of genuineness—Want of consent.

The objections which can be raised against an award are such as at the outset are fatal to it, e.g., objections which deny its genuineness or deny that the objector was a consenting party to the arbitration. **Protap Chunder Roodro v Huro Monee Dosia. 24 W R 188.**

332.—Parties not all joining in reference.

A plaintiff and some of the defendants to a suit applied to refer the suit to arbitration (certain other of the defendants not having joined in the application): an award was passed and a decree made in accordance with such award. The plaintiffs objected to the validity of the award on the ground that all the parties to the suit had not joined in referring the suit to arbitration; the objection was dismissed, and judgment given in accordance with the award. *Held* that, under the special circumstances of the case, justice was so clearly in favour of the view that the award was good, that the Court, although not entirely approving of certain decisions of the High Court, (5 W R 130, 6 W R 25, 10 W R 463, 4 C L R 65), which laid down that such an award is good, notwithstanding that some of the parties to the suit

Arbitration-*Contd.*

8 Awards—*Contd.*

may not have joined in the reference to arbitration), did not think fit to differ from those decisions on that occasion. **Joy Prokash Lall v Sheo Golam Singh. 11 Cal 37.**

Notes.—*Appl:* 16 Cal 482. *Ref* 24 Cal 903 F B, 25 Cal 141; 757 F B; 27 Cal 61; 20 Bom 596; 9 C W N 873.

332A.—Arbitration—Consent of all parties necessary to reference—Civ Pro Code, 1882, S. 506.

The appointment of arbitrators being virtually a statutory delegation of authority by a Court of justice to persons who are appointed by the parties as their Judges, such delegation must be in strict conformity with the provisions of the statute which allows such delegation; and therefore, if "all the parties" do not consent to refer to arbitration, the arbitration is invalid under S. 506, Civ. Pro Code, and the award that follows thereupon is, therefore, also not binding on the parties. 4 All 302, 10 W R 463, Rel on.

Deo Nandan v Bhirgu Rai. A W N 1887, 215.

Notes:—Ref 24 All 329.

333. The Second Schedule r 1 (1882 S 596)-Validity of the award when one of the parties not joining submission-Arbitration.

In a suit to enforce a mortgage a joint written statement was filed on behalf of the mortgagor, his sons, and grandsons. The suit was referred to arbitration, but the submission was not signed by one of the defendants. Their pleader, however, signed it on behalf of all the defendants. An award was made. Objections preferred to it by the defendant who had not signed it. were overruled, and a decree was passed in accordance with the award against all the defendants.

Held, there was no reference to arbitration on behalf of the defendant who had not signed the submission, and there being no award in law it could not bind any of the defendants. 24 All 220.

Dist. **Kadhu Singh v Daryao Singh. 4 A L J 347 = A W N (1907) 147 = 29 All 423.**

334.—The Second Schedule r. 1 (Act XIV of 1882—S. 506)—Reference to arbitration, not concurred in by all the parties—Validity—Award, ground for setting aside.

When a reference to arbitration is made in the course of a suit and an award made upon it, the award cannot be set aside on the ground that all the parties to the suit did not concur in the reference. (33 Cal 899 follo.) **Lal Mohan Pal v Surya Kumar Das. 11 C W N 1152.**

Notes—Comp; 10 C L J 41.

335.—Parties not all joining in reference—Submission to arbitration by one of several defendants.

A having brought a suit against B and two of his tenants for possession of certain lands of which he alleged he had been dispossessed by the defendants in 1879, it was arranged between A and the defendant B that the matter should be referred to arbitration. Arbitrators were accordingly appointed, and their award having been given in favour of A. judgment for the plaintiff was recorded in terms of that award. B then appealed on the ground that the other defendants had not joind in the agreement to submit the matter to arbitration, and the judgment was set aside, and the case remanded for re-trial. On remand the plaintiff's suit was dismissed, and the order of dismissal was upheld by the lower Court. *Held*, on further appeal by the High Court, that the fact of the tenants not having joined in the submission to arbitration did not vitiate the award and that, as between A and B, the original decision of the Court of first instance in terms of that award must be restored. **Bishoka Dasia v Anunto Lall Pain. 4 C L R 65.**

Notes – Fol. 11 Cal 37.

335A— Civ. Pro. Code, 1882, ss. 506, 522—Reference to arbitration—Reference not at instance of all parties to suit—Decree in terms of award—Appeal.

In a suit for an account of a partnership business, the matter in dispute was referred to arbitration at the instance of the plaintiff and some of the defendants. The legal representative of one of the defendants, who had died, was not a party to the reference. The arbitrators having made an award, a decree was passed in terms thereof. The question was whether there was an appeal

Arbitration-*Contd.*

8 Awards-*Contd.*

against the decree. *Held*, that the petition requesting the Court to refer the matter to arbitration in a case for winding up of a partnership should not have been granted except on the application of all the parties. The legal representative of the deceased defendant not being a party to it, the reference was illegal and the award was void. There was therefore an appeal against the decree notwithstanding that it was in conformity with what purported to be an award.

Indur Subbarami Reddy v Kandadai Rajamannar Ayyangar. 26 Mad 47= 12 M L J 396.

Notes:—Diss, 6 M L T 176; Ref. 17 C P L R 147, 17 M L J 394; Fol 32 Mad 510=19 M L J 480.

336—Arbitration—Consent of all the parties to the suit—Section 506, Civil Procedure Code—Appellate Court remanding an appeal under Sec. 562 as regards one defendant and dismissing the appeal as regards the other defendants—More than one decree in same suit.

J. sued D. B, the mother of the girl, and the girl's three uncles, for Rs. 1,000 damagas for an alleged breach of a betrothal contract. After settlement of issues, the plaintiff and the three male defendants agreed to refer the matters in dispute to arbitration under the provisions of the Civil Procedure Code. D. B., the mother, did not sign the agreement, but K. M., one of the uncles stated that he was representing her and that he joined her in the reference to arbitration with her full knowledge and consent.

An award was given in favour of the plaintiff, upon which judgment and decree followed against all four defendants.

Upon appeal by the defendants, the Divisional Judge held that the award was inoperative as regards D. B., unless it could be shown that she had ratified the submission to arbitration, but that the award was good as regards the parties who had consented to the reference. The Divisional Judge accordingly remanded the case under Section 562, Civil Procedure Code, for decision as regards D. B. and dismissed the appeal as regards the three male defendants.

Held, on further appeal, that the decree of the Divisional Judge was bad in law. He could not legally dispose of the appeal finally as regards the three male defendants and re-open the case by a remand as regards the fourth,—the almost inevitable result of such procedure being that eventually there would be more than one, and possibly conflicting, decrees in the one suit.

Observations on the question whether D. B. was a party to the reference to arbitration. 4 P. R., 1882 (F. B), and 170 P. R., 1883, referred to.

Khan Muhammad v Jalalud-din P R 3 of 1892.

337—The Second Schedule r. 15 (1882 S.521)—One plaintiff not joining reference—Whether a ground to set award aside.

S 521, C. P.C., does not contemplate the setting aside of an award on the ground that all the parties to the suit were not parties to the reference to arbitration. Where, therefore, one of the defendants, added under S. 32. C. P. C., and who subseqently withdrew from the suit, did not join the reference which was followed by an award, *held*, that the award could not be set aside. 18 All 19 and 22 All 366 Dist: 32 Mad 14 and 18 M L J 228, Ref. **Ramjiwan v Nawal Singh. 5 A L J 644=1908 A W N 242=4 M L T 400.**

338.—Arbitration— Awards——Validity of awards and ground for setting them aside—The Second Schedule r. 1 (1882 S 506)—All the "parties"—Reference to arbitration—Award.

S. 506. C. P. C., requires that all parties to the suit should join in making an application for an order of reference to arbitration; and consequently an award made on a reference by Court pursuant on an application by only some of the parties to a suit in which a party who had appeared and put in a written statement and was interested in the result of the suit, had not joined is illegal.

Quære:— Whether it is necessary that parties who had not appeared and apparently had no interest in the suit should join in the application. 26 Mad. 47, 9 C. W. N. 873, Fol. 24 All. 229, Ref.

Rangasami Aiya v Swami Aiya 17 M L J 394.

339—Parties not all joining in reference—Award made without all parties consenting to arbitration,—

Arbitration-*Contd.*

8 Awards—*Contd.*

Quære, Per Jackson J:—

What is the effect of an award arrived at in a pending suit which was referred to arbitration by an order of Court otherwise than by consent of all the parties' **Doorga Churn Thakoor v Kally Doss Hazrah** **10 W R 463.**

Notes:—Con: 16 W R 21,

340—Parties not all joining in reference Award without consent— Some arbitrators only acting.

Where parties do not give their consent to the appointment of arbitrators and the judgment proceeds on the arbitration award, the decree is not binding on those parties. Where four arbitrators had been appointed and only two acted, the award was held to be invalid. **Rash Beharee Roy v Doorgabur Roy** **14 W R 211.**

Notes—Dist: 24 Cal 251.

341-Award by the arbitrators where reference is to five—Illegal order.

The parties to the suit agreed to refer the disputes between them to the arbitration of five persons named by them; and did not agree to accept the decision of any less number of persons so nominated. Three only of the arbitrators nominated were proceeding with the arbitration, and one had declined to act. The Court which made the reference released, in favour of the suit in which the reference was made, the attachments existing on debts due to the defendant in that suit at the instance of the three arbitrators who proposed to authorize the plaintiffs to collect those debts, and directed the debtors to pay their debts to the plaintiffs. It was held that the reference permitted the arbitrators nominated,to authorize either of the parties to collect the debts attached, inasmuch as the agreement was unaccompanied by any stipulation that a less number than the whole of the arbitrators could determine whether such permission should be given, the act of the three arbitrators which led to the issue of the order could not be supported, and that the last portion of that order was *ultra vires*, and must be declared void. **Parmeshar Dat v Hari Naik** **7 N W 357.**

342—*Held*,that an award, made by two only of the three arbitrators appointed, was invalid and the Court in case an arbitrator refuses to act should proceed under s 510 of the Code of Civil Procedure. **Sat Kumar v. Atma Ram,** **5 W N 60.**

343—Arbitrators appointed by parties.

Held, that an award otherwise good does not become invalid simply because one arbitrator only was appointed by the parties instead of 3 or 5 (s. 222, Revenue Act) or because it was dictated to and taken by the Settlement Officer and is not in the hand-writing of the arbitrator himself. **Jatan Singh v. Mahadeo Singh,** **6 W N 180.**

344—Award—Collective deliberation necessary:—An award arrived at without collective deliberation is bad —**Poona City Municipality v. Ramchandra,** **10 Bom L R 617.**

345—Award made by more arbitrators than were appointed.—

An award was held invalid, among other reasons, because it purported to be the award of four persons, whereas the order of reference was addressed only to three. **Phiran v. Baharan,** **7 N W 367.**

346—Presence of arbitrators at meeting of award.—

When a case has been referred to arbitration, the presence of all the arbitrators at all meetings and above all at the last meeting when the final act of arbitration is done, is essential to the validity of the award. **Nand Ram v Fakeer Chand,** **7 All 523=1885 W N 139.**

Notes:—Ap: 12 Mad 113.

347—Suit to set aside—Evidence recorded by umpire alone—Duty of arbitrators—Invalid award.

In a suit to set aside an award, on the ground that from the commencement to the close of the proceedings, the arbitrators did not attend a single sitting and that the umpire alone recorded the evidence in the case. *Held*,that until all the arbitrators and the umpire attend every sitting, hear all the evidence, bring their minds to bear on the points at issue, and give an award according to their judgment on the merits of the evidence, there can be no award, in fact, made by them **Harpal Singh v. Amir Singh,** **10 C 181.**

Arbitration-*Contd.*

8 Awards-*Contd.*

348—Omission of provision for difference of opinion and award by majority—Ground for setting aside award.—

Where an order of reference to arbitration does not provide for difference of opinion among the arbitrators, and for authorizing a majority to decide the case, the award will, on objection taken, be set aside. **Futteh Singh v. Gango, 4 W R 4.**

Notes:—Dist: 8 W R 171: 8 C L J 475.

349—Omission of provision for difference of opinion.—

The mere absence of a clause in the order of reference proving for a difference of opinion between the arbitrators cannot vitiate the award where there is no such difference of opinion.

Gour Chunder Bhuttacharjee v. Sodoy Chunder Nundee, 17 W R 30

Notes:—Fol: 8 C L J 475.

350—Award by majority of arbitrators.—

Where several arbitrators are appointed, and the parties do not agree to be bound by the act of the majority, the award, in order to be valid and binding, must be concurred in and executed by all the arbitrators. **Surubjeet Narain Singh v. Gouree Pershad Narain Singh, 7 W R 260.**

351-Award made by majority of arbitrators.-

Where the terms of a submission to arbitration give no authority for the majority of the arbitrators to make the award, it should be made by the whole of the arbitrators. An award made by the majority only would not be a valid award.

Junglee Ram v. Ram Heet Sahoy, 19 W R 47

351*A*—Civil Procedure Code, (Act VIII of 1859), Section 325—Act X of 1877, Section 522—Reference to three arbitrators without provision for award of majority being binding—Effect of.—

Arbitration-*Contd.*

8 Awards-*Contd.*

Held, further, that the legal effect of an agreement, where there is no provision that the award of the majority shall be binding, is that only a unanimous award is binding.—

Hardhyan v. Mehr Chand. P R 57 of 1879.

352-Civil Procedure Code (Act XIV of 1882), Section 509—Validity of award of majority of arbitrators, when the agreement was that, in the event of difference of opinion, the decision should rest with the majority — Dissenting arbitrator omitting to record opinion.—

Held, that there is nothing in Section 509 of the Civil Procedure Code to render the award of a majority of the arbitrators, where it has been provided that the decision should rest with the majority, invalid, because no separate opinion has been given by the dissenting arbitrator. P R 55 of 1882, distinguished. **Kanhya Lal v. Seth Harbhagwan Dass P R 112 of 1885.**

353—Award made by majority of arbitrators—Civil Procedure Code. 1882, ss. 506, 509, 510—Refusal of minority of arbitrators to act.—

Where the parties agreed to refer a suit to arbitration, but no provision was made that a decision should be with majority and the plaintiff's arbitrators withdrew *Held*, that under the circumstances the award of the majority or decision of the uttar-panchayattar of common arbitrator was not binding.

Gurupathappa v. Narasingappa, 7 Mad 174.

354—S. 509 C. P. C.—Award by two of three arbitrators—Validity (Act X of 1877).

An appeal was referred to the arbitration of three persons declaring the decision to rest with the majority. There was a difference of opinion among the arbitrators, two of them agreeing. The award of these two was remitted to the three to reconsider "with the option of refusal to do so allowed". The same two arbitrators "repeated their former decision, and declared their inability to come to any other conclusion". The third again differed "but did not record an amended award or a refusal to reconsider". *Held*, that the award was valid. **Lalti Dai v Baldeo Sahai, 1 W N 25.**

355—The refusal of a Court to set aside an award of arbitrators on account of the absence

Arbitration-*Contd.*

8 Awards—*Contd.*

of the arbitrator of one of the parties, is not absolutely illegal. **Ramnath Devidatt v. Dhanji, (1880) Select Case Part X No. 15.**

355*A*.—Arbitration - Illegal award — Judgment—Appeal — Effect of certain arbitrators resigning before enquiry completed.—

Where an award is illegal, an appeal against the judgment based thereon can be maintained. Although it is true that the question referred to arbitration may be decided by a majority of the arbitrators, still all the arbitrators should be present, or else the award will be of no effect. In the present case, two issues were referred to the arbitration of four persons and an umpire. One of the issues only was determined by them, two of the arbitrators and the umpire being of one opinion and the other two of a different opinion. The Court thereupon returned the case to the arbitrators, for a finding on the other issue. The finding was returned by the umpire and the two arbitrators who agreed with him in the first issue; and the other two arbitrators did not take any part in the matter, and in fact, gave in a formal resignation. *Held*, that the award was not proper, and that a decree cannot be passed thereon. **Gayadin v. Hanumandin, A W N (1884), 50.**

356—S. 510 C. P. C.—Arbitrator forced to act—Validity of award.

It is an essential principle of the law of arbitration that the adjudication of disputes by arbitration should be the result of the free consent of the arbitrators to act, and the finality of the award is based entirely upon the principle that the arbitrators are Judges chosen by the parties themselves, and that such Judges are willing to settle the disputes referred to them. Where certain matters were referred to arbitrators who refused to act and the Court of first instance passed an order directing them to proceed and to make an award, and they, on the passing of such order, made an award. *Held*, that all proceedings, taken by the arbitrators in obedience to the order of the Court directing them to arbitrate against their will were null and void.

Shibcharan v. Ratiram, 7 All 20 = 4 W N 212.

Dukhu v. Blinak, 4 W N 209.

Arbitration-*Contd.*

8 Awards—*Contd.*

357.—The Second Schedule r 16 (1882 S 522) —Arbitration—Refusal to act—Decree on award. Where an arbitrator after completing his enquiries falls ill and returns the file, but subsequently within the time fixed by the Court for delivery of the award, signs and submits an award, it cannot be held that he has refused or neglected to act, and the award is valid. The mere fact that an arbitrator declines to sign the award, which has been arrived at by a majority of the arbitrators does not show that he refused to act as arbitrator **Ghissa v Bhawani Das 1 A L J 688.**

358.—Award partly by fresh arbitrators appointed against consent of parties—Civil Procedure Code 1877, s 510.—

Where two of five arbitrators nominated by the parties to a suit and appointed by the Court had not consented before, and after appointment declined to act, and the Court appointed two arbitrators in their place against the consent of one of the parties to the suit,—*Held* that, under the circumstances, the appointment of the new arbitrators was not warranted by the provisions of s. 510 of the Code of Civil Procedure and that the order of reference to such arbitrators, the award made by them, and the decree passed upon the award, were illegal. **Pagardin Ravutan v Moidinsa Ravutan 6 Mad 414.**

Notes.—*Fol:* 18 Cal 324, *Ref:* 11 Mad 220 F B; 15 Mad 348, 17 Mad 498; 6 A L J 351.

359.—Arbitration—Judgment according to award—Act VIII of 1859 ss 325,327—Application to have an award filed in Court—Appeal.

Where there has been an award, and the decree passed by the Court below is in accordance with that award, that judgment is final. But where it can be shown that there was not in fact any award on which a judgment could be based, there is no final decree, and an appeal will lie.

The fact that the arbitrators themselves clearly doubt the correctness of their decision is a strong objection to the finality of an award. It is one which tends to show that the award is not valid and on this ground an appeal will lie against an order granting an application to have an award filed in Court. (21 W R 248; 15 W R 9 F B; 8 B L R 315 Discussed). **Bunyad Mahton v Nathoo Sahoo 1 C L R 455 = 3 Cal 375.**

Arbitration-*Contd.*

8 Awards—*Contd.*

Notes:--Appl: 3 All 427. Dist: 6 Mad 414. Expl: 7 Cal 166. Ref: 13 C L R 14; 10 Cal 74; 4 All 283. 18 All 422 F B.

360.—Arbitrator's award made after the death of one of the parties——— *Nunc pro tunc*, whether applicable to the award—Submission to arbitration, revocation of, by the death of a party.

Where a submission to arbitration has been made a rule of Court, the death of one of the parties does not work a revocation.

Where, on agreement to refer having been filed in Court appointed an arbitrator, who after finishing his enquiries and having the arguments of the pleaders of the parties reserved his report and award and then one of the parties died.

Held,—that, under the circumstances of the case, the death of a party did not make the award void, and the doctrine of *Nunc pro tunc* was applicable as in the case of a judgment of Court.

Hara Krishna Mitra v Ram Gopal Mitra
14 C W N 759=6 Ind Cas 170

361.—The Second Schedule r. 5 (1882 Ss 517, 521)—Arbitrator becoming incapable of acting—Order superseding arbitrator—Decree in accordance with award—Appeal—Revision—Objection for the first time on appeal or revision. On an arbitrator becoming incapable of acting, the Court ordered a new arbitrator to be appointed, in his place. On the award being delivered, objections were preferred by the plaintiff, which were disallowed, and a decree in accordance with the award was passed. It was not objection that S 510 of the C P C under which the lower Court acted, was not applicable to the case. The plaintiff contended that the decree was wrong and must be set aside on appeal or at any rate on revision.

Held, that the contention was not valid. It was too late to raise the objection that s 510 was not applicable to the case, that no appeal lay and that the Court would not exercise revisional powers. **Harnam Singh v Harnam Singh**
27 P L R 1910.

362.—Civil Procedure Code Act XIV of 1882 section 522-Appeal from judgment on award-Award-Second appeal.

Where an award has been made, judgment passed upon such award is final unless the award be invalid, 8 B L R (F B) 315.

A question in a suit having been referred to the arbitration of five persons, being provided that if any two of the arbitrators appointed were absent the arbitration should be continued by the other three. Two of the arbitrators named were pleaders in the suit on either side who with the consent of both the parties ceased to act and the award was made by the remaining three arbitrators. The court of the first instance held that the award was invalid.

Held, that a second appeal lay and that under the circumstances the award was valid.

Debendra Nath Shaw v Aubhoy Churn Bagchi. 9 Cal 905=12 C L R 525.

Notes:--Ap: 11 Cal 37; Ref; 25 Cal 141; 15 Mad 348; 17 Bom 357; 20 Bom 596.

363.—On appeal from the decree of the first Court the parties to this suit agreed to refer the matters in difference to three arbitrators. The order of reference did not, as required by s. 509 of the Code of Civil Procedure, provide for difference of opinion among the arbitrators. The arbitrators at first declined to act for want of leisure. But the case was returned for their decision. Two of the arbitrators now made an award, the third merely signifying his dissent. *Held* that the award was invalid as it was made by only two of the three arbitrators and also because they were forced to act. **Dukhu v Bhinak 4 W N 209.**

364.—Art 158.—Where in accordance with an award irregularly made, a decree was passed by the Court from which the defendant appealed:—*Held*, that the defendant was not precluded from appealing because he had not applied to set aside the award within the 10 days allowed by Art. 158, inasmuch as that article applied to applications referred to in s 522 of the Code of Civil Procedure, *i. e.* applications to set aside an award on any of the grounds mentioned in s 521 and the defendant did not contest the award on any of those grounds. **Muhammad Abid v Muhmmad Asghar 8 All 64=6 W N 2.**

Notes:—Dist; 29 Cal 36; 8 C L J 475.

Arbitration-*Contd.*

8 Awards-*Contd.*

365—Civil Procedure Code (Act XIV of 1882) Sections 508, 523, 524—Application to file agreement to refer—Court omitting to pass legal order of reference—Court accepting separate award from umpire on disagreement of arbitrators—Illegal award—Proper order to pass on setting aside such award.

Plaintiff's application that an agreement to refer a dispute between the parties to arbitration should be filed in Court under Section 523, Civil Procedure Code, having been granted, the Court directed the arbitrators to decide the matter in dispute, without recording any order of reference as required by that section, and on their finding awards disagreeing with each other, caused an umpire to be appointed under the terms of the agreement, and accepted a separate award from him, in accordance with which judgment was passed. On appeal, the Lower Appellate Court, finding that there was no award which was capable of enforcement, there being no award of the majority as required by the agreement to refer, set aside the decree and dismissed the plaintiff's application, though the appeal took no objection to the order directing the agreement to be filed.

Held, that the proper course was to pass an order remanding the case to the first Court, in order that after making an order of reference (see Sections 523 and 508 of the Code), it might proceed with the case under the provisions of S. 524. P R 191 of 1882 distinguished.

Ralla Ram v Badhawa Mal. P R 67 of 1886.

Notes. Ref: 22 P R 1891.

365 A—Arbitrators appointed without intervention of Court -Disagreement — Appeal from order of Court filing award-Code of Civil Proced ure ss 525, 526, 522.

When parties have agreed to refer a matter to arbitrators appointed without the intervention of a Court and the agreement makes no provision for difference of opinion, it must be presumed in the absence of evidence to the contrary that unanimity was intended. (U B R 1892-1896 Vol. II, 18 U B R 1897-1901 Vol II 5 Fol) s. 522 no doubt applies. Where the Court has made a reference to arbitration Ss. 526 and 522 do not operate to bar an appeal from an order filing such an award, when the objection is that by reason of want of unanimity the award is void. (25 Cal 141; 16 Cal 482 Ref). **Maung Tha Aung v Maung Tha Shun. 2 L B R 105**

Arbitration-*Contd.*

8 Awards—*Contd.*

365B-S. 316 C. P. C, 1859—Deed of reference containing a provision in case of disagreement among arbitrators—Court itself deciding case —Finality of proceedings:—

A reference to arbitration recited that, if there be a difference of opinion between the arbitrators, an umpire should be appointed either by the arbitrators themselves or by the Court, or that the Court itself might decide the case. On the arbitrators differing in opinion, the Court adopted the last alternative. *Held* that, under the circumstances of the case, the decision was not final under s. 316 of Act VIII of 1859, that the arbitration was inoperative and that the decision passed by the Court was open to appeal.

Kanh Singh v Ruttun Singh 96 P R 1868.

366—Act X of 1877, Sections 509. 523—Application to file agreement to refer—Absence of provision for difference of opinion—Court appointing umpire on difference of the opinion taking place—Fruitless reference.—

An application was made to file, under Section 523 of the Civil Procedure Code, an agreement to refer a dispute to arbitration, which contained no provision for a difference of opinion between the two arbitrators therein appointed. It appeared that some days after the order of reference had been made, the Court, owing to an expected difference of opinion between the arbitrators, without the agreement of the parties either in person or by their pleaders specially authorised in writing in this behalf, decided that an umpire should be appointed, in accordance with whose award the Court disposed of the case.

Held, reversing the orders of the lower Courts that the reference had become fruitless in consequence of the disagreement between the arbitrators originally appointed, and that the plaintiff's application under Section 523 of the Civil Procedure Code must be dismissed. **Mussammat Begam Bibi v Ghulam Ghaus. P R 191 of 1882.**

Notes.—Dist. 67 P R 1886.

Arbitration-*Contd.*

8 Awards—*Contd.*

367—Agreement to refer containing provision for appointment of umpire—Difference of opinion—Opinion of majority—Umpire's decision valid as a binding award.—

In a suit in which the parties agreed to arbitrate, it appeared that the agreement to refer contained a provision that if the arbitrators (two in number) differed, an umpire would be appointed. An award having been filed in which the umpire coincided with the defendant's arbitrator, it was objected (*inter alia*) by the defendant, and the objection was allowed by the lower Court, that as no provision was made in the application for arbitrators that the decision of the majority should prevail, the award was not a valid one.

Held, that (subject to proof of misconduct) the award was a valid one and binding on the parties, not because the umpire happened to agree with one arbitrator, and thus formed a majority, but because the arbitrators having differed, the opinion of the umpire was entitled to prevail. **Gulam Singh v Duni Chand. 46 P R 1889.**

368—Umpire appointed contrary to agreement—Decision by majority of arbitrators.—

B submitted to arbitration the matters in dispute between himself and the other parties to a suit, on the terms that an umpire should be selected from seven persons whom he named. Those terms were not objected to by the other side. Arbitrators were agreed upon, and R, one of the seven persons named in the submission, was appointed an umpire. But R and some of the arbitrators declined to act. Fresh arbitrators were then chosen, but no umpire; and the arbitration being equally divided in their opinion on the case, the Court of its own motion appointed as umpire L, who was not one of the seven persons named in the submission. B objected to L's appointment, but the Judge overruled the objection and passed judgment in accordance with the umpire's award. *Held* on appeal that, as it was stipulated as an essential part of the submission that an umpire should be chosen from seven persons named, the power of the Court to appoint an umpire, under s. 319 of the Civil Procedure Code, was controlled and limited by that stipulation; and that, the umpire not being one of the seven persons named in the submission, there was no valid award. **Barracho v De Souza. 7 M H C R 72.**

Arbitration-*Contd.*

8 Awards-*Contd.*

369—Award by umpire and one arbitrator—Refusal of arbitrator to attend.—

Held that an award made by one of the arbitrators and the umpire in the absence of second arbitrator, who declined to attend, was not a valid award **Busunt Rai v Gridharee Singh. 3 Agra 93.**

370—Civil Procedure Code—Reference to arbitration—Umpire—Consultation between arbitrators and umpire.—

The award of an umpire, appointed under Chapter XXXVII, Civil Procedure Code, is not invalid merely because he has not conferred with the arbitrators, when no provision that he should do so is contained either in the agreement to refer or the order appointing him. **Karim Bakhsh v Subhan Ali 6 P R 1891.**

371—Act X of 1877 Sections 523, 524—Refusal of one arbitrator to act—Award filed by remaining arbitrator and umpire—Validity of award.—

Where an agreement to refer to arbitration, which was filed in Court under Section 524 of the Civil Procedure Code, clearly contemplated that both of the arbitrators appointed by the parties should take a part in the decision of the case and should file either a single award or separate awards, *held* that an award filed by one arbitrator and the umpire, the second arbitrator having taken no part in the proceedings, was not binding on the parties **Ganda Mal v Fatteh Ali Shah. P R 55 of 1882.**

Notes—Dist: 112 P R 1885.

372—See 11 r. 16 (1882 S 522)—Appeal—Award—Decree in accordance with award—Award bad in law.

A submission to arbitration provided for the appointment of two arbitrators, one to be chosen by each party, and an umpire, and it was further provided that in case of a difference between the arbitrators "the opinion of the arbitrator with whom the umpire agrees shall be considered conclusive." At the last sitting of the arbitrators an application was made for an adjournment on the ground of illness of one of the parties. No order was pass-

Arbitration-*Contd.*

8 Awards—*Contd.*

ed upon this application; it was simply recorded. The umpire thereupon requested the arbitrators to record their opinions separately or jointly, and make the same over to him the same day at or before 4 o'clock. The defendant's arbitrator left the meeting and did not record any opinion upon the subject-matter of the arbitration; but it did not appear that there was any disagreement between the arbitrators. The plaintiff's arbitrator recorded an opinion and the umpire apparently without communicating with the other arbitrator, accepted that opinion and submitted an award, upon which a decree was passed. *Held*, that this was no award in law, and that an appeal could lie from a decree passd in accordance with it. **Hafiz-ullah v Rahmaullah. 1903 A W N 159.**

373—Award by umpire where arbitrators cannot decide.—

Where the parties prayed the Court to appoint two arbitrators and an umpire and to refer the case to them for decision, and undertook to abide by such decision as might be passed by them unanimously or by the majority of them—*Held* that an award by the umpire alone, the arbitrators being unable to decide, was valid. **Kupu Rau. v Venkataramayyar. 4 Mad 311.**

374—S. 515 C. P. C. — Award by umpire alone.

In a reference to arbitration two arbitrators were appointed by each party and it was agreed that if two of the arbitrators should differ from the other two, the question was to be settled by an umpire who should agree with the opinion of one set of the arbitrators and had no power beyond that. *Held*, that an award by the umpire which agreed with the award of neither of the two sets of arbitrators was illegal. **Jannat Bibi v Abdul Aziz. 7 W N 197.**

375—Partial disagreement of arbitrators.—

A partial dissagreement of two arbitrators does not nullify their award as a whole.

Panaoolah v Tumeezooddeen. 2 W R 32.

376—Finality of judgment in accordance with award—Arbitrators stating special case—Court refusing to accept award in such form and remitting it for further consideration—Subsequent award following opinion of Court on special case—Validity of such award—Misconduct—Reference of whole matter in difference in case—Validity of such reference—Award by two out of three arbitrators who have not consulted with the third—Such award not a nullity—Civil Procedure Code (Act XIV of 1882, Sections 506, 508 517, 520, 522).—

After a case had been referred to two arbitrators, the said arbitrators submitted an award in the from of a special case (Section 517, Civil Procedure Code),saying that they wished to know upon which side the burden of proving a certain point would fall, as that side would fail, which had to establish the point. The Court told them that the burden lay upon the plaintiff, and remitted the award for further consideration. Finally, a difference of opinion having arisen, an umpire was appointed by the Court, and one arbitrator and the umpire gave an award in favour of the defendant. Plaintiff filed several objections, which were overruled after taking evidence, and a decree made in accordance with the award.

Held, *Per* Curiam, that no appeal lay merely because the Court had given its opinion on the question put in the special case, which the Court refused to receive, and that if it was misconduct in the arbitrators to seek an opinion from the Court (which was not affirmed) an objection should have been taken in the lower Court on this ground, which was not done.

Held further, *per* Plowden,J., that a reference of the whole matter in difference in a particular case may be a reference of a particular matter within the meaning of Sections 506, 508 of the Civil Procedure Code.

Held, also *per* Plowden,J, that an award of two out of three persons is not a nullity merely because the two have not consulted with the third before making it. Their conduct is probably misconduct but it ought to be alleged accordingly, and if found to be misconduct, it is a ground for avoiding the award.— **Khilu Ram v Jivan Singh 55 P R 1889.**

377—The Second Schedule r. 4 (1882 Ss .509, 525)—Difference of opinion no provision for—Judgment not in accordance with award-Appeal. When the arbitrators have given an unanimous

Arbitration-*Contd.*

8 Awards-*Contd.*

award, the award is not a nullity because no provision has been made in the order of reference for a contingency that has never arisen *viz*, that the arbitrators might have differed. (1871) 17 W. R. 30 foll.: (1865) 4 W. R. 4; (1870) 14 W. R. 150 (1855) 8 All. 64 dist. S. 522 of the Code of Civil Procedure does not allow an appeal on the ground that the judgment is in excess of the award but only on the ground that the decree is so. **Bepin Behary Sen v Krishna Behary Sen 8 C L J 475.**

378—Omission to sign award at same time—Procedure—Act VIII of 1859, s. 395.—

An award of arbitrators, to be legal, must be completed and signed by each in the presence of the whole of them. **Jay Mangal Singh. 3 B L R A C 82= 11 W R 433.**

379—Omission to sign award at same time—Act VIII of 1859, s. 327.—

Where on a reference to arbitration, the case had been regularly heard by all the arbitrators sitting together, and an award had been drawn up and signed by them, the mere omission of the arbitrators to sign the award at the same time and in each other's presence does not invalidate the award. **Bhobosundari Dasi v Makhun Lal Dey. 8 B L R 128.**

But see per Norman J., in **Jey Mangal Singh v Mohan Ram Marwari. 8 B L R 130 note, and 319 note; 12 W R 397**

380—Publication of award.—

In India, or in England it is necessary to the validity of an award that it is not only signed and executed by the person making it, but also published. By publication is meant generally speaking, a delivery to some of the parties to the award; and, probably, a holding of it by the arbitrator after notice to the parties, for the purpose of delivery might be held to effectuate the award. **Fatima Kubra Bibi v Shah Wilayat Husain. 19 W N 30.**

381—It is necessary as provided by s. 516 of the Code, that all the arbitrators agree to the terms of the award, but there is no provision of law requiring them to sign it in the presence of each other. 8 B L R 125 followed. **Muthukutti Nayakan v Acha Nayakan 18 Mad 22.**

Arbitration-*Contd.*

8 Awards-*Contd*

382—Force of arbitration—Award-Excess of authority—Signature in award.

An award of arbitrators derives its binding force as against the parties entirely from their previous submission and their subsequent signatures in token of consent in no way affect the character of the award. It is neither more binding upon the parties when signed by them nor less binding when they do not sign it. It is binding in the former case because it is a judgment of a tribunal to which the parties had unconditionally submitted before adjudication and not because they have subsequently the justice of the decision. An award does not require registration. When arbitrators were actually appointed to divide the property and not to fix the extent of the shares of the parties, it was *held* that they exceeded their authority so far as the fixing of the extent of the shares was concerned; and that they did not make complete division of the property. The award was therefore not a valid award. 2 Cal 386 dist; 9 Bom 50 dissented from. **Jagannath v Rambux 6 C P L R 95.**

383—Omission of all the arbitrators to sign award—Draft of award signed by all the arbitrators—Fair copy signed by only four.—

Where, in a suit to recover a sum of money on an award, the five arbitrators came to a decision, and made, dated and signed a rough draft of their award, and the defendant then withdrew from the submission, and a fair copy was then made, bearing the same date as of the rough draft but signed by only four of the arbitrators,—Held that the award was complete at the date of the rough draft and that its validity was not affected by the subsequent occurrences The validity of an award cannot be impeached because the arbitrators afterwards do an act required neither by the law nor by the terms of the submission.

Kula Nagabushanam v Kulaseshachalam 1 Mad H C R 178.

384—Award not signed by all the arbitrators—Civil Procedure Code, 1859 s. 312—Division of award.

The parties to certain suits having agreed to submit to arbitration, the suits were so referred under Act VIII of *1859*, s. 312. After this reference, the parties agreed by an ikarnama to sub-

Arbitration-*Contd.*

8 Awards—*Contd.*

mit the same suits, together with other matters, to the arbitration of five persons, the effect being to withdraw the first submission and substitute the new agreement. Before these arbitrators arrived at a final conclusion, the parties by a solenamah compromised the whole of the subjects of dispute, and afterwards an award was drawn up in the terms of the solenamah and signed by two of the arbitrators and the head arbitrator. When the award was brought before the Subordinate Judge, he considered it had been made *ultra vires* in respect of those matters which were not involved in the suits originally referred, and accordingly made a decree only in those suits corresponding with the terms of the award. Some of the defendants applied to the Subordinate Judge to have the effect of a decree given to the portion of the award which was left outstanding by the first decision. This application was decreed and the remainder of the award enforced. An appeal to the Judge was dismissed with costs. *Held* that the award was illegal because it was not signed by all the arbitrators, and there had been no agreement to abide by the decision of the majority, or that the voice of the umpire should prevail. *Held*, however, that, as the parties concerned did not take steps to set the Subordinate Judge right, the High Court could not interfere, but that the effect of the decision was to dispose of the award altogether, and not to divide it into two parts one of which might form the foundation of a future judgment. *Held* that the application to give effect to the unenforced portion of the award ought to have been dismissed. **Nem Roy v Bharut Roy.**
22 W R 129.

Notes.—Ref: 25 W R 376.

384A—Civ. Pro. Code, 1908, sch II, r 16—Refusal of arbitrator to sign award—Legality of award—Decree passed on such award—Appeal.

Held that no appeal lies from the decree of a Court passed in accordance with an award, in a case where five arbitrators were nominated and two of the arbitrators appointed by one party refused to sign it, but no misconduct was alleged against the umpire and the other two arbitrators who did sign it. **Kamta Prasad v Jodha Singh,** **7 A L J 890= 7 Ind Cas 99.**

Arbitration-*Contd.*

8 Awards—*Contd.*

385—Signing award after tender of resignation by one arbitrator.

Where one of the arbitrators, before duly signing the award, tendered his resignation in a letter to the Judge, but was induced to withdraw it, and afterwards signed the award,—*Held*, that the arbitrator who first tendered and then withdrew his resignation did not formally divest himself of his character of arbitrator, and was therefore not *functus officio* when he signed the award, which was consequently valid.

Joymungal Singh Bahadoor v Mohun Ram Marwaree. **23 W R 429**

Affirming decision of High Court in.
15 W R 38

Notes.—See 12 WR 397.

385—Resignation of arbitrator and subsequent withdrawal of resignation—Power to withdraw resignation.

An arbitrator has full power to retract his resignation of office before it is accepted. An award signed after the withdrawal of such resignation is a valid award. **Joymungul Singh v Mohun Ram Marwaree.** **15 W R 38.**

386—387—Award irregularly made.

Where an arbitrator imported into his proceedings a previous enquiry alleged to have been made by him, and relied upon admissions made in the former proceedings, his award was held to be bad and the decision based upon it was set aside. **Kanhye Chand Gossamee v Ram Chunder Gossamee.** **24 W R 81.**

Notes—Ref: 12 C L R 564.

388—Award made on special form of oath—Power of arbitrators to administer other than prescribed form of oath—Oaths Act (X of 1873), s. 13.

The matters in dispute in a suit were, by the desire of the parties to the suit, referred to arbitration. During the investigation of the matters by the arbitrators the plaintiff offered to be bound by the oath of the defendant administered on the Koran. The defendant agreed to take such oath, and such was accordingly administered to him by the arbitrators, and his evidence taken and an award made, based on the evidence so

Arbitration-*Contd.*

8 Awards—*Contd.*

taken. On special appeal to the High Court by the plaintiff, he objected for the first time, the objection not having been taken in his memorandum of special appeal, that the arbitrators were not legally competent to administer such oath, and the evidence so taken could not form a valid basis of an award, and the award was therefore void. *Held per* Pearson J, Spankie, J., dissenting, with reference to the legal competency of the arbitrators to administer the oath that the objection was good, and that the arbitrators had no power to administer the oath. *Per* Pearson J., that the statement of the defendant made on an oath illegally administered could not form a valid basis of an award, and the award was void and should be set aside. *Per* Spankie, J., that the plaintiff having offered to be bound by the oath, and the defendant having agreed to take it, the plaintiff was bound by the evidence given on such oath ; and that, as the arbitrators had by law and consent of parties authority to receive the evidence of the defendant, the substitution by them of an oath on the Koran for an affirmation did not, under the provisions of s. 13, Act X of 1873, invalidate such evidence, and consequently render the award based on such evidence, void.

Wali-ul-lah v Ghulam Ali. 1 All 535.

389--Award, vague and indefinite—Civil Procedure Code (1882) Ss. 520, 521, 525, 526.

An arbitrator whom certain disputes were referred to by the parties made his award in due course. On the application of the plaintiffs to have the award filed in Court the defendants objected on the ground that the agreement of submission was vague and indefinite and did not clearly set out the matters in dispute. The objection was overruled by the Subordinate Judge and the award filed and a decree passed thereon. On appeal it was held that, the objection was well founded as the agreement of submission did not show what power was conferred on the arbitration in dealing with the subject matter in dispute. The award should not therefore be allowed to be enforced under the provisions of s. 526.

Bindessuri Pershad Singh v Jankee Pershad Singh. 16 Cal 482

Notes—Ref : 21 Cal 213 F B; 25 Cal 141 ; 20 Bom 596 ; 14 All 414.

390—Private award—Indefiniteness—Act X of 1877, s. 525.

Arbitration-*Contd.*

8 Awards—*Contd.*

A private award following upon a submission to arbitration made by the parties without the intervention of the Court, *held*, to be too indefinite to be converted into a decree in a summary proceeding under Section 525 of the Civil Procedure Code. **Dharam Das v Ajudhia Pershad P R 77 of 1882**

391—Award referring parties to separate suit.

An arbitrator submitted his award, but with regard to certain properties not part of the partnership property the subject matter of the suit, he referred the parties to a fresh suit.

Held there was nothing illegal in the arbitrator's referring parties to a separate suit. The award was good & legal **Venkayya v Venkatappayya. 15 Mad 348.**

Notes:—Ref: 22 Mad 172, Ref : 25 Cal 141 ; 18 All 422 F B.

392.—Award covering matters not in dispute.

The scope of the present suit was limited to one plot of land but during the pendency of the case in appeal before the lower appellate Court the parties agreed to refer all disputes between them to the arbitration of certain persons. The matters thus submitted went far beyond the scope of the suit and though the agreement was presented to the District Judge, no such application as is contemplated by s. 506 of the Code of Civil Procedure was made to him, and there was nothing to show that the parties meant to submit the particular dispute (before the Court) to arbitration under chapter XXXVII of the Code. The Judge however made an order of reference which failed to specify the matters referred. The award was objected to, but the District Judge passed a decree in the terms of the award. *Held*, that there being no legal award. the suit should have been tried on the merits.

Rhairo Singh v Rupa Singh 4 A W N 312.

393--s. 520 (d)—Award beyond terms of reference—Ultra vires award.

An award that goes beyond terms of reference to the arbitrators is to that extent *ultra vires*. **Raja Mohammed Mumtaz Ali Khan v Sakhawat Ali Khan (P C). 5 C W N 881.**

Arbitration-*Contd.*

8 Awards—*Contd.*

394—Reference to arbitration made by an unauthorised agent—Knowledge and tacit ratification by principal—Estoppel.

A suit was defended by an agent (am-mokhtar) on behalf of the defendant, the agent applied for a reference to arbitration, although the *am-mokhtaranamah* did not so empower him The defendant objected on the above ground after the award was submitted. The objection was overruled and the Court passed a decree accordingly with one slight modification in favour of the defendant. *Held* that, although the agent had no authority to apply for a reference, the defendant, having been aware of the proceedings and tacitly ratified the action of his agent, could not be allowed to question the legality of the award, and the award was not void *ab initio*. 9 Mad 451 referred to **Saturjit Pertab Bahadoor Sahi v Dulhin Gulab Koer. 24 Cal 469**

Notes:—Fol: 1 Bom L R 261. Dist: 28 Cal 303; 5 C W N 268; 7 C W N 343.

395—Execution of decree—Costs, question as to, referred in, by agent of judgment-debtor having no express power to refer it to—Subsequent ratification by principal of his agent's reference of the question of costs to arbitration—C P Code Ch. XXXVII.

The respondents held a decree against the husband of appellant No I, in which there was a question as to costs incurred in an appeal to the Privy Council. In execution-proceedings of this decree, the decree-holders and the agent of the judgment-debtor applied to have this question of costs referred to arbitration. The agent was not specially authorised to refer the matter to arbitration. The reference was, however, subsequently ratified by his principal, the judgment-debtor.

The award was objected to, on behalf of the appellants, on two grounds. Firstly, that Chapter XXXVII of the Code of Civil Procedure relating to arbitration did not apply to execution-proceedings: secondly, the award was illegal and void *ab initio* because it was made on the application of an agent not specially authorised in writing to make such an application.

Held, that Chap XXXVII of the Code of Civil Procedure relating to arbitration applies also to execution-proceedings.

Held, further, that where the principal, subsequent to the reference, ratified the conduct of his agent, such ratification cured the defect in procedure. (17 All 106 (P C) Exp. 9 Mad 451; 24 Cal 469 and 23 Bom 629 Refd). **Mussammat Sattar-un-nissa v Shaikh Muhammad Ruhulla. 8 O C 263.**

395A—C P C O 23 r 2 (1882 S 375) Oral submission—Arbitration Act (IX of 1899)—Necessity for submission in writing—Award on oral submission—Validity—Civil Procedure Code (Act XIV of 1882), S. 375—Adjustment of suit—Award on oral submission not an adjustment.

The parties to an administration suit, consented (at the hearing), to its being referred to the Commissioner, to take the usual accounts and to determine their respective shares.

Accounts and objections were filed before the Assistant Commissioner, and the parties appeared before him, when it was orally agreed, to save the costs of a lengthy inquiry, that the Assistant Commissioner should deal summarily with all matters in dispute and draft terms by which the parties were to be finally bound, and the Assistant Commissioner personally explained to defendants 1 and 6 that they would be bound by his decision even if he decided to give them one rupee. To this they agreed. The Assistant Commissioner, in due course, arrived at a decision, but defendants 1 and 6 considered that it awarded them an insufficient amount and declined to be bound by it. Upon application being made by plaintiff that an adjustment of the suit might be recorded under S. 375 of the Civil Procedure Code, on the basis of the Assistant Commissioner's decision.

Held, that there had been no adjustment of the suit. There had been no written submission to arbitration as provided by S 4 of the Indian Arbitration Act, and, consequently, there had been no legal and valid reference to arbitration, and the Assistant Commissioner's award [for it really was an award and nothing else] had no legal foundation, and could have no legal consequence. As there had been no reference to arbitration and no award, there had been no adjustment.

Arbitration-*Contd.*

8 Awards—*Contd.*

Semble, that the Indian Arbitration Act applies to such an arbitration.

Where a special procedure is provided for extraordinary extra-judicial methods of setting disputed claims, *semble*, that it was the intention of the Legislature, that that procedure and no other was to be followed.—20 Bom 304 and 26 Bom 76, commented on and distinguished.

Rukhanbai v Adamji Shaik Rajbhai. 10 Bom L R 366=33 Bom 69= 1 Ind Cas 622.

396—Award made in reference to arbitration by one partner without authority—Specific Relief Act, s. 21.

A partner has no power in the absence of special authority, to bind the firm by a submission to arbitration of a suit which has been brought, and an award was in such arbitration invalid. 3 Bing 101 and 2 Mad 228, referred to. **Ram Barose v Kallu Mal 22 All 135.**

(6) Decree passed without allowing time for objections to award.

396 *A*—Sch. 11. r. 16—Limitation Act (IX of 1908), Art. 158—Award—Decree passed without allowing time for objections—Illegality.

An award of arbitrators having been passed on 27th September, 1909, the Court passed a decree in accordance therewith on 29th, September, 1909:

Held, that the decree was liable to be set aside as it was given before the time, allowed by law for hearing objections to the award, had passed.

Yelu Pillay v Appasami Pandaram 9 Ind Cas 197=9 M L T 301= 21 M L J 444.

(7) Order rejecting objections to award

396B—Sch. I, Art. 13—Revision—Civil cases — Arbitration — Application for revision against an order rejecting objections to an award and passing a decree in accordance with an award.

An application for revision against an order rejecting objections to an award, in a case referred to arbitration through Court and passing decree in accordance with the award, is chargeable with *ad valorem* Court-fee under Art. 13 of Sch I of the Court Fees Act, when the subject-matter of the case exceeds Rs 25. The fact that no decree was framed at the date of making the application does not affect the question of Court-fee.

Narpat Rai v Devi Das. 4 P L R 1911= 9 Ind Cas 388=13 P W R 1911.

(8) Effect of one of the two defendants not joining in reference.

396C—Schedule II, S. 1—Award—Reference by parties interested—Defendant who did not appear, not joining in the reference—Validity of reference.

The question whether a party is interested or not in a reference to arbitrations depends upon his position at the time when the reference was made. The Code does not contemplate a reference to arbitration between the plaintiff and one defendant, and a trial between the plaintiff and another defendant.

A suit was brought against two persons. The plaintiff and one of the defendants referred the matters in dispute to arbitration. The award was given by two of the arbitrators, whereby the non-joining defendant was exempted from the plaintiff's claim, and the suit was dismissed. Objections were taken to the award but they were overruled and a decree was passed in accordance with the award.

Held, that the reference was invalid and the award which followed thereon was not a valid award. 32 All 657 Dist. **Haswa v Mahbub. 8 A L J 645**

(9) Limitation for application to set aside award.

396D—Art 158—Award—Application to set aside—Date of submission—Date of notice—Starting point—Limitation

Under Art, 158 Limitation Act 1908, an application to set aside an award, under cl. 15 Civ. Pro Code 1908 Sch II, must be made within 10 days from the time 'when it is submitted to the Court', and not within 10 days from the time of the giving of notice issued under cl 10 of Sch II of Civ. Pro. Code.—1897 Sind S C R 1 diss; 29 Cal 36 Cal 167, 5 C W N 813; 23 Cal 563 and 2 B H C R 270 (275) Ref. **Haji Mansoor v Mahomedin Sahebdin 5 S L R 125.**

Arbitration-*Contd.*

8 Awards-*Contd.*

(10) Effect of mistake of law on the validity of award.

397—Arbitration—Award—Mistake of law.

M S D and R believing that they were entitled to shares in certain property but having a dispute as to the extent of their respective shares entered into an agreement to refer to arbitrators the decision of the question what share, in the estate each of them was entitled to. The matter was referred to arbitrators, who gave an award declaring the share of each. The award was accepted and acted upon. M S and D, then brought a suit against R to recover their share of profits in the estate awarded to them. This suit was principally objected to on the following grounds:—

1. That both the parties erroneously supposed when reference was made to arbitrators that they were all entitled to a share in the estate:

2. That as a matter of fact the Defendant R was alone entitled under Hindu Law to the whole estate; and

3. That as both parties made the reference under a mistake of fact, the award is ineffectual.

Held that the question whether R alone or he and M S and D, was or were entitled to the property is a question of law and the mistake as to the correct answer to that question is a mistake of law. *Held* further that, an award cannot be set aside because the parties were influenced by a mistake when they made the reference. The agreement to refer might be set aside on this ground, but not the award. **Manbodh v Baribahu and Ramdayal** **3 C P L R 89**

(11) Legality of the second award differing from the first award which was incomplete.

398—Court passing judgment in terms of award in absence of parties—Irregularity—Objection taken in second appeal—Court returning first award as incomplete—Arbitrators filing second and different award—Legality of such award.

Held, that the objection that an award was confirmed and judgment passed thereon in the appellant's absence is not one that can be allowed to prevail in second appeal, when not taken in the appeal to the lower Appellate Court. It is at most an irregularity in the procedure and not a fatal error.

Where the Court refused to accept an award of arbitrators because it was incomplete, being made without investigation, and the arbitrators were ordered to file an award after investigation on the spot, whereupon they held a second award, which after a clear ten days had elapsed without objections being filed by the defendant, was confirmed and judgment given in accordance therewith, *held*, that the second award could not be considered a nullity merely because it differed from the first award. **Kala Singh v Pohu P R 50 of 1881.**

(12) Finality of award of proprietary right

399—Award—Finality—Proprietary right—Devolution of property—Hindu Law.

The finality of an award of proprietary right cannot be questioned on the ground that the devolution of property is opposed to Hindu Law. I C P L R 130, 8 C P LR 10; 13 C P L R 81 referred to. **Mt Janki v Pusa alias Umrao. 14 C P L R 94.**

(13) Award by arbitrators in excess of their authority

400—The Second Schedule r 14 (1882-S 520)—Award by arbitrators in excess of their authority—"Such other and further relief" meaning of. Plaintiffs sued for a declaration that the alienee of a Hindu widow got no more than the life-interest of the widow, and that the alienation was invalid and inoperative except for her life-time. They also added a prayer for "such other relief as the Court deemed fit."

The matter 'in dispute in the case' was referred to arbitration. The arbitration passed the following award, 'we direct that defendant No 1 do pay Rs 1,500 to the plaintiffs and that the sale for which the suit is brought be declared valid, binding and absolute.' *Held* that the arbitrators had exceeded their jurisdiction, and that the words "such other and further relief" though wide cannot be held to include a request to the Court to create an obligation which is not alleged to exist. 31 Cal 433 (440), 24 All 229, 10 A and E (1841),

Arbitration-*Contd.*

8 Awards—*Contd.*

139 Ref. **Tikam Das v Phatumal. 1 Sind L R 209**

400A— (2)—Agreement—Matters beyond jurisdiction—Effect of award.

Where an award deals with matters beyond the jurisdiction of the Court and is thus partly illegal it is illegal as a whole. (5 P R 1883 Fol.)

Fateh Singh v Karm Chand 56 P R 1886

Notes —Dist: 32 P R 1888

(14) Decree neither in excess of nor in accordance with award.

401—S 115 (1882 s 622)—Decree neither in excess of, nor in accordance with award—No revision

There is no revision of a decree in pursuance of an award which is neither in excess of, nor in accordance with, the award. **Ghulam Jilani v Mahammad Hassan 4 Bom L R 161 = 6 C W N 226 = 12 M L J 77 = 29 I A 51; P C = 28 Cal 167.**

On an appeal 35 Cal 648 = 35 I A 88.

Notes.—Ref 1 S L R 86 Fol 4 A L J 105 (N); A W N (1903) 4.

(15) Limitation for application to set aside award.

402.—Art 158—Arbitration—Award, application to set aside. Time from when limitation begins to run.

An application to set aside an award must be made within ten days from the time the award arrives at the Registrar's Office for the purpose of being filed, and not from the time when it is filed.

Sm Nobin Kally Dabee v Ambica Churn Banerjee. 5 C W N 813.

(16) Withdrawal of suit allowed after arbitration award.

403.—S. 373—Arbitration Award—Withdrawal of suit after, if may be allowed.

The powers relating to withdrawal of suits conferred upon the Court by sec 373, C P C, are when an award of an arbitrator to whom the case is referred for arbitration has once been duly made by the arbitrator, limited by the particular provisions contained in Chapter XXXVII, C P C. So where, upon an award made by the arbitrator, the Plaintiff put in a petition of objection to the award, and subsequently on his putting in a petition for permission to withdraw the suit with liberty to bring a fresh suit, the Court granted such prayer under Section 373, C P C: *Held*—That the order of the Court was without jurisdiction. **Debi Churn Manna v Bipra Prosad Jana 7 C W N 186.**

(17) Enquiry as to matters outside jurisdiction not affecting validity of award.

404.——Arbitration——Award——Question arising between two firms—Enquiry as to matters outside jurisdiction—Not affecting validity of award—Such enquiry when necessary and proper—Its scope—Firm—What it means—S. 239, Contract Act, 1872-Whether affected by O. XXX Civ. Pro. Code, 1908—Guarantee broker paying claim in full—Award in respect of claim so paid, valid—Accountability as between guarantee broker and person paid——Guarantee broker, also partner—Effect-Disputes under several contracts -Single submission and one award—Validity—Civ Pro Code, provisions of—Not strictly applicable to arbitration proceedings-Questions affecting arbitrator's jurisdiction—Not final

The mere fact that arbitrators had taken evidence, which proved to cover matters outside their jurisdiction, would not necessarily invalidate the award to make their proceedings improper, if the award itself is within their jurisdiction

Where the arbitrators have to decide between two firms, they must perforce enquire who the partners are, to discover whether they have jurisdiction, whom they must serve with notices of meetings, and the scope of their enquiries. They may have even to take evidence outside the jurisdiction of the subject which they have to decide.

It is because a firm is merely a collection of the individuals having implied power of agency, one for the other, that a submission to arbitration in the firm's name does not necessarily bind the partners.

Arbitration - *Contd.*

8 Awards—*Contd.*

Section 239, Contract Act, makes it clear that a partnership is a collection of individuals "called" collectively a "firm". A firm has no existence as legal entity-as a corporation.

The provisions of O. XXX Civil Pro Code, 1908, do not alter the legal condition of a partnership. The firm's name is merely a legal devise for collectively connoting the individuals composing it.

Where G & Co., received in full the amount owing to them by B & Co, from the guarantee brokers, and after such receipt obtained in award against B & Co., *held* that such receipt would not invalidate the award, as G & Co., would have to account to the brokers for anything which they received from B & Co.

The fact that the guarantee broker is also a member of the firm B & Co., will not alter the application of the rule.

The decision of the arbitrators on a question of their own jurisdiction is not final and can be raised in the objections raised to the filing of the award.

One submission of disputes, under several contracts, and a single award are not invalid.

The provisions of the Code of Civil Procedure cannot be applied strictly to proceedings in arbitration.

Where the question whether, as between the various partners in the firms, any agreement existed by which the liability of each was limited, is one going to the root of the jurisdiction of the arbitrators, the Court must independently consider the question apart from the decision of the arbitrators, which does not bind the Court.

1900 A C 464, Fol: (1899) A C 255 6 Comm Cas 174 Fol: 3 Russ 499; (1908) 2 K B 907, Ref to. **Messrs D. Graham & Co. v Kewalram. 4 S L R 196= 9 Ind Cas 712.**

(18) Appeal from decree in terms of revised award.

404A.—Civ Pro Code, 1882, Ss 520 and 522—Award remitted by Court for revision—Decree in terms of revised award—Appealability of remittal-Construction of Section 522. Civ Pro Code.

When an award, remitted by Court under S. 520, Civ Pro Code, is revised by the arbitrators, and a decree has been passed by the Court in terms of the revised award, the terms of s. 522, Civ Pro Code, preclude an appeal on the ground that the order of remittal is wrong and that the award as originally submitted should have been accepted and acted upon. (22 Mad 203, Dist.) When the decree is in accordance with award, the policy of the law is to refuse appeal on the ground that an order under s. 520, Civ. Pro Code, has been improperly refused The provisions of s. 522, Civ Pro Code, should be strictly construed. (29 Cal 167 Ref:)

Subbiah Iyer v Subramania Aiyer. 4 M L T 328=18 M L J 485= 31 Mad 479.

(19) Appeal from decree passed in accordance with award.

404B.—Award—Decree passed thereon—Appeal—Appeal from Governor-General's Agent in Bhopal to the Privy Council—Native State.

No appeal lies from a decree passed in accordance with the award made by an arbitrator to whom matters in dispute in the suit had been referred for decision. *Quære:*—Whether an appeal lies to His Majesty in Council from a decision of the Governor-General's Agent at Schore in Bhopal. **Kansraj v Sundar Lal. 12 C W N 585, P C=7 C L J 520= 138 P L R 1908=10 Bom L R 581= 18 M L J 266=99 P W R 1908= 14 Bur L R 146=4 M L T 25= 80 P R 1908=35 Cal 648=35 I A 83.**

Notes.—Appl. 1 Ind Cas 693; Ref, 12 O C 40.

(20) Appeal from decree passed in accordance with invalid award.

404 C.—Arbitration—Invalid reference and award—Appeal from decree passed in accordance with such award.

Where there is no valid reference to arbitration and no valid award, the decree passed in accordance with it cannot be maintained, and

Arbitration—*Contd.*

8 Awards—*Contd.*

an appeal lies against the decree. (6 A L J 338, Ref.) **Shib Lal v Chaturbhuj. 6 A L J 496=2 Ind Cas 363=31 All 450.**

(21) Appeal from judgment disallowing objections to award.

404D.—Arbitration——Judgment affirming award——No opportunity afforded of substantiating objections—Appeal—Civ. Pro. Code, 1882, s. 522.

Where certain objections to an award alleged misconduct and corruption on the part of the arbitrator, and others involved questions of fact and law, and the Judge overruled such objections without giving the objector any opportunity of substantiating them, and gave judgment affirming the award, *Held* that, as there was no judicial disposal of the objections, the Judge was not competent to give judgment in the matter, and his decree was a bad one in law, and an appeal lay therefrom, notwithstanding the concluding portion of s 522 of the Civ. Pro Code.

Ram Manohar Misr v Lal Behari Misr. A W N 1889, 15.

404E.—Appeal—Award, application to file, order refusing—Civ. Pro. Code (XIV of 1882), s. 525.

An appeal lies against an order refusing to grant an application to file an award under s. 525 of the Civ. Pro. Code (29 Cal 167, Ref; 3 C L J 450=33 Cal 757, Fol.; 6 All 186=26 All 205, Not Fol.) **Sheo Sahai Mahton v Kirtarth Bhagat 7 C L J 486.**

404F.—Civil Pro. Code, 1882, s. 526—Order refusing to file award—Appeal.

An appeal lies against an order refusing to file an award under s 506 of the Code, inasmuch as it is a decree. (25 Cal 757, 33 Cal 757, 27 Mad 255, Fol.; 28 All 21, Diss.; 29 Cal 167, 18 Cal 414 Ref.) **Maung Nge v Ranganatham Chetty. 4 L B R 130**

(22) Appeal from order overruling objections to award.

404G.—Reference to arbitration—Filing of award and decree passed in accordance with it, over-ruling defendant's objections—Appeal—Civ. Pro. Code, 1877, ss. 520, 521.

Arbitration—*Contd.*

8 Awards—*Contd.*

Where a Subordinate Judge, overruling certain objections made by the defendant, made a decree in favour of the plaintiff, in accordance with the award, *held* that it was not competent to the District Judge to hear an appeal from such decree. (4 All 283=A W N 1882, 34, Fol.)

Assadullah Khan v Ahmadullah Khan. A W N 1882, 95.

(23) Application to set aside award on the ground of forgery of Arbitrator's signature.

404H.—Application to set aside award——Civil Procedure Code S 521—Arbitrator's signature, forgery of—Objection after time.

Where an award on the face of it bears the signatures of all the arbitrators, but one party objects that the signatures of some of the arbitrators were not genuine but forged, the objection is one which ought to be urged within ten days under Art 158. So held by *Maclean C. J.*, and *Rampini J*, *Gupta J* dissenting 8 All 64 distinguished. Per *Gupta* J:—Art 158 applies only to objections under S. 521, C P C, and not to objections which if proved will make out the award to be a nullity, for in these latter cases there is no award to set aside. **Ram Narain v Baij Nath. 29 Cal 36.**

(24) Contesting order of Court setting aside award.

404 I.—Award—Appeal

It is competent for an appellant, in his appeal against a decree, to contest an order of the Court setting aside an arbitration award. (9 All 447, 10 All 97, 14 Bom 232, 7 Cal 148, 23 Cal 335, 24 Cal 725, 7 M I A 302, 14 W R 327, Rel. on.)

Maung Ta Hin v Ah Kin. U B R 1897—1901, Vol II, 310.

(25) Disallowing application alleging misconduct on the part of arbitrators.

404J.—Arbitrators—Award—Decree——Allegation of misconduct on the part of arbitrators—Appeal.

No appeal lies from a decree which follows an award made according to law, even where the Court passing the decree disallows the appli-

Arbitration-*Contd.*

8 Awards—*Contd.*

cation by one of the parties who seeks to attack the award by reason of the arbitrator's alleged misconduct. **Walji v Ebji. 6 Bom L R 1132= 29 Bom 285.**

(26) Judge of Court in the nature of award.

404K.—Arbitration—Suit part-heard—Agreement of parties to be bound by Court's decision after local inspection—Judgment of Court—Nature—Award—No review—No appeal—No second appeal—Power of High Court to revise—S. 622, Civ. Pro. Code, 1882 (=s 115, Civ. Pro. Code, 1908).

Where, in a part-heard suit before a Munsif, both the parties agreed to be bound by any decision of the Court which it may arrive at after an inspection of the locality in dispute, and also agreed not to raise any objection to the same or to prefer an appeal, and where the Court, after making a local inspection, gave a certain judgment: *Held*, that the Munsif's judgment was in the nature of an award, and that it was not open to the Munsif to alter that award when made or to review his decision. (9 Cal 575, Ref.) *Held*, also, that no appeal lay to the District Judge and that the District Judge acted without jurisdiction when he entertained the appeal and made an order of remand. (23 Bom 752, Fol.) *Held*, also, that no second appeal lay to the High Court but that the High Court was competent to interfere *suo motu* under s 622, Civ. Pro. Code, 1882 (=s. 115, Civ. Pro. Code, 1908).

Baikantha Nath Goswami v Sita Nath Goswami. 38 Cal 421.

(27) When award can be questioned by way of appeal.

404 L.—Judgment to follow award—When award can be questioned by way of appeal.

A judgment in accordance with an award cannot be appealed against, except in cases of the illegality of the award, or of irregularity in the procedure of the Court. The only ground for appealing against a judgment following an award is that the decree is in excess of the award or that it is not in accordance with it. (23 W R 429, 8 B L R 315, 16 Cal 482. 17 Bom 357, 6 Mad 414, 11 Mad 144, 15 Mad 348, 4 All 283, 6 All 174, 8 All 449, A W N 1892, 151, Ref.; 14 P R 1882, F. B, Disappr) **Ghulam Jilani v Muhammad Hassan. 74 P R 1894, F B.**

Notes:—Ref: 1 P R 1908, F B=58 P W R 1907; 3 P R 1910 Rev.: Disappr: 84 P R 1901=113 P L R 1901.

See also cases under:—Appeal—Arbitration.

(28) Waiver of objection.

404M.—Award—Irregularity of procedure-Objection waived by parties.

Any irregularity of procedure may, according to the rulings of the English Courts, be waived. Case where it was held that in attending and taking part in the proceedings, when and after witnesses are examined by one or two of the three arbitrators, in the absence of the others or other, the defendants-respondents in this case waived any objection which they might have taken to the proceedings on this ground. (15 Cal 319 Ref.)

Maung Myin v Maung Yan Aung. U B R 1897—1901, Vol 11, 21.

9. PRIVATE ARBITRATION.

(1) Mode of submission to arbitration.

405.—Civil Procedure Code. 1882, s.525 (1859, s. 327).

In arbitrations not started with the sanction of the Court, it is not necessary that the agreement should be reduced to writing before it can be binding. **Mudhoo Manjee v Nilmonee Singh Deo. 18 W R 533.**

406.—The Second Schedule r. 1 (1882 Ss. 506, 522 and 523)—Arbitration without intervention of Court, reference to, after institution of suit—Specific Relief Act, S. 21—Award.

In a suit by a co-sharer against the lambardar for his share of the profits, the matter in dispute was referred by the parties to private arbitration after the institution of the suit. *Held*, that the suit was not barred by S. 21, Specific Relief Act, as the agreement to refer to arbitration was not in existence at the time when the suit was instituted. *Held*, further, that when parties to a suit have made a reference to arbitration without the intervention of the Court, they cannot revoke the reference, and, if a valid award has been made, a decree can and should

Arbitration-*Contd.*

9 Private Arbitration—*Contd.*

be made in accordance with the award. **Raza Ali v Fida Ali. 4 O C 17.**

406A—Award, private arbitration—Partial enforcement of award by Court—Jurisdiction of Court to give a decree on portion of award—Award, rule of construction of—Liberal construction—Arbitrator. power of–Substantial and complete justice if sufficient—Award, beyond reference if enforceable—Objection to the award, if can be taken by the party in whose favour it is made—Civ Pro Code (Act XIV of 1882) S 525

An arbitrator is not bound by mere rules of practice which Courts have adopted for general convenience, and he has greater latitude than Courts of law to do complete justice between the parties according to equity and good conscience. In this view Courts are never astute to entertain technical objections to awards.

The Courts will not review awards upon the merits, they will not constitute themselves as Courts of appeal to examine whether or not the conclusion at which the arbitrator arrived was sound, both in point of law and in point of fact.

An arbitrator cannot, however, go beyond the precise questions submitted; it will not do for him to determine any claims or demands, though existing between the parties to the submission, save only those which they have agreed that he shall decide. The submission furnishes the source and prescribes the limits of the authority of the arbitrator. The arbitrator is inflexibly limited to a decision of the particular matters submitted; he cannot take upon himself an authority which the submission does not confer

Where the matter in controversy submitted to the arbitrator was whether the plaintiff had a right of way over a specified strip of land, and not whether the plaintiff should have access to a particular part of the village across the land of the defendant, the arbitrator was bound to base his decision upon an investigation of the first question and he had no authority to lay out a new path on a piece of land over which neither party alleged a right of way.

It is only the party prejudiced by the exercise of excessive authority by the arbitrator who is entitled to object to the award by reason of it; the party in whose favour the erroneous action of the arbitrator operates cannot be heard to impeach the validity of the award on this ground.

Semble:—It is not competent to the Court, in a proceeding under S 525 of the Code of 1882, to direct that the award be filed in part; the Court is bound to refuse an application made to it for filing the award, if in its opinion the award is open to attack in part. (1891) App. Cas 31; Ref: (1839) 10 A & E 139; (1837) 3 Bing N C 898; (1835) 3 Cl and F 639; (1872) L R 5 H L 418, L R 5 Exch 221 Ref: (1846) 12 Q B 562; (1837) 7 A & E 595; (1840) 6 Bing N. C 277, (1827) 5 Pickering 213;(1836)13 Maine 367,Ref: 6 Bom 663; 3 Mad 68, 29 Mad 303; 27 All 536 Ref. **Narsingh Narain Singh v Ajodhya Prasad Singh. 15 C L J 110.**

407—Oral submission.

A submission of private arbitration may be perfectly valid though not put in writing and a private award made in pursuance of such submission will be respected and treated as valid by the Courts if duly performed and the possession of the contested property be held under them. The arbitrators may be competent to prove, as well the submission as the finding of the award, though no ikrarnamah was ever executed **Bahal Singh v. Shibo Ram Singh. W R 1864. 76.**

(2) Matters for submission.

408—Subject-matters of suit and other matters in dispute.

There is nothing in Act VIII of 1859 to prevent parties who have a suit pending in Court from submitting the subject-matter of that suit and other matters in dispute to arbitration under s. 327. **Thakoor Doss Roy v Hurry Doss Roy W R 1864 Mis 21.**

(3) Agreement to refer to private arbitration by parties engaged in litigation.

409—Civil Procedure Code (Act X of 1877), ss. 523 and 525.—Under ss 523 and 525 of the Civil Procedure Code (Act X of 1877), parties to a suit as well as persons not engaged in litigation may agree to refer matters in dispute between them to private arbitration without the interven-

Arbitration-*Contd.*

9 Private Arbitration—*Contd.*

tion of the Court, and may apply to have the agreement filed, and the mere fact that a suit is pending with respect to the matters in dispute is not of itself a sufficient reason to induce the Court to refuse to file the agreement. **Harivalabdas Kalliandas v Uttamchand Manekchand 4 Bom ,1**

Notes.—Ap:6 Cal 251;26 Bom 76. Ref:3 Bom L R 431; 8 Bom L R 777; 26 Bom 76. Doubt: 30 Cal 218. Diss· 7 C W N 180.

(4) Power of arbitrators after making delivery of award.

410—Review.

After an award has been made and handed to the parties, the functions of the arbitrators cease. They have no power afterwards to deal with an application for review of their decision.

Dutto Singh v Dosad Bahadur Singh. 9 Cal 575.

Notes.—Fol: 16 All 231. Ref: 16 Cal 482, 21 Cal 213 F B; 8 All 340; 17 All 21 F B.

411—Award signed by arbitrators at different times—Civil Procedure Code 1859 s. 327—Award irregularly made.

In the case of a private award where the arbitrators granted a new trial and eventually disposed of the case in the absence of the defendant and after a year from the time of allowing a new trial one day verbally pronounced their judgment to one party, and on another day to the other party, and on a subsequent date wrote out the award which was signed on a particular date by one arbitrator who sent it to others elsewhere for signature on a different date—*Held* that the award ought not to be enforced under Act VIII of 1859 s. 327. **Nader Ali v. Majoo 21 W R 377.**

412—Award signed only by some of the arbitrators.

Matters in dispute between the parties were referred to seven arbitrators without the intervention of a Court. The arbitrators, or so many of them as could be got together, held sittings extending over some months, and at each sitting they came to a decision either unanimously or by a majority, on different question submitted to them. These decisions were entered on the minutes of their proceedings, and at their last sitting the arbitrators all agreed, and informed the parties that the decisions so arrived at constituted the final award, and gave directions for embodying those decisions in the shape of a formal document, which was drawn up on a subsequent day, but was signed by four only out of the seven arbitrators. The remaining arbitrators not being asked to sign it, they never did sign it. *Held* that the actual award was an oral award made by all the arbitrators on the last day of their joint sitting, and the drawing up of the formal award was purely ministerial act to give effect to the previously completed judicial act. The omission to take the signatures of the minority of the arbitrators to the document which formed the record of the award was not fatal to the award. **Dandekar v Dandekars 6 Bom 663.**

Notes.—Fol: 9 Cal 575 ; 11 Cal 166 ; 8 All 340 ; 16 All 231 ; 28 Bom 287 ; 27 All 526=2 A L J 416=(1905) W N 86. Ref: 16 Cal 482 ; 21 Cal 213 F B ; 7 Bom 316: 341 ; 9 Bom 82 ; 17 Bom 674 ; 20 Bom 208 ; 596 ; 17 All 21 F B; 6 Bom L R 15.

413—Document recommending solution of disputed points—Act XIV of 1882. s 525.

A document, although headed as an "award" and signed by the arbitrator, which merely recommends a solution of the questions referred to arbitration, will not be treated by the Court as an award on an application made under s. 525 of the Code of Civil Procedure. **Nundolol Mookerjee v Chunder Kant Mookerjee. 11 Cal 356.**

(5) Application to enforce award.

414—Time for filing award—Civil Procedure Code, 1859, s. 327.

An award of arbitration, whether private or or not, cannot be enforced unless the application for enforcement is made within six months from the date of award. **Bhyrub Jha v Hunoomun Dutt Jha. 5 W R 123.**

415—Time for filing award—Limitation Act (XV of 1877), sch II, Art 176—Civil Procedure Code, 1877, ss. 525, 526.

Where an award was made and signed by the arbitrators on the 5th of August 1881, but

Arbitration-*Contd.*

9 Private Arbitration—*Contd.*

was not delivered to the parties till the 13th of September following,—*Semble* that an application to file the award, made on the 25th of February 1882, under the provisions of s. 525 of the Code of Civil Procedure, was not barred by limitation. It is clearly the intention of the Legislature that a party to an arbitration should have six months to enforce the award, under s. 525 of the Code of Civil Procedure, from the time when he is in a position to enforce it.

Dutto Singh v Dosad Bahadur Singh. 9 Cal 575.

Notes—Fol. 16 All 231. Ref. 16 Cal 482; 21 Cal 213 F B; 8 All 340; 17 All 21 F B.

415A—S. 148—Award made after expiry of time fixed by Court—Application for extending time to file award.

The Court has not power to enlarge the time for the making of an award, when the time has passed and the award has already been made.

If the time had expired and no award has been made, S. 148 C. P. C., no doubt gives the Court power to extend the time for the making of the award, notwithstanding that it had expired at the time of the application. But that section does not enable the Court to extend the time for the doing of a particular act, when in truth and in fact the act has already been done. 13 All 300 Fol. **Shib Kishna Dawn & Co v Satish Chunder Dutt 38 Cal 522.**

(6) Filing award in Court.

416—Effect of not filing—Civil Procedure Code 1859, s. 327.

An arbitration award should be filed in Court. Effect of not filing as defined in s. 327, Act VIII of 1859. **Soophul Singh v Methoo Singh 1 W R 163.**

417—Date fixed for filing award a Court holiday—Award filed on following day-Civil Procedure Code. 1882 s. 521.

Where an award was directed to be filed on the 9th August 1898, but was actually filed on the 10th August, and it appeared that the 9th August was a Court holiday and that the Court was closed on that date, *held*, that the award was filed within time. **Muhammad Yusaf v Karim Bukhsh. 78 P R 1899.**

Arbitration-*Contd.*

9 Private Arbitration—*Contd.*

418—Civil Procedure Code (Act X of 1877). Sections 522, 525, 526—Award made out of Court—Application to file the award in Court—Duty of Court on filing award to give judgment according to award—Decree—Execution—Jurisdiction.

An appointment of arbitrators to effect a partition of certain property was made out of Court, and on an award being given, two of the parties to the arbitration, A, P. and J P., applied under S. 525 Act X of 1877, to have the award filed in Court. The Court merely passed an order "that the award be filed," and a decree to this effect was drawn up. On application by A. P. and J. P. for execution of this decree, by attachment and sale of property, the Lower Court ordered the attachment to take place.

Held, that the Lower Court acted without jurisdiction in causing the attachment of the property; that it was clearly the duty of the Court in which the award was filed, after the time for presenting an application to set it aside had expired, to give judgment according to the award, upon which a decree should have followed: that this not having been done, the so called decree was no decree within the meaning of Section 522, Act X of 1877, and was therefore incapable of execution **Dharm Das v Ajudiah Pershad. P R 112 of 1879**

419—The Second Schedule r. 20 (1882 S. 525,) —Arbitration—Award—Application to have the award filed—Record of rights extract to be annexed to the application—Bombay Land Record-of-Rights Act (IV of 1903), S. 10.

It is not necessary to annex a record-of-right-extract, required by S. 10 of the Bombay Land Record of rights Act, 1903 to an application in the case of proceedings under S. 525 of the Code. **Haridas Dayal v Subraya Nagappah. 9 Bom L R 885.**

420—Sch II r. 20 (1882—S. 525) scope of.

S. 525 enables parties, who have agreed to refer their differences to arbitration and have ob-

Arbitration-*Contd.*

9 Private Arbitration—*Contd.*

tained an award, to have that award filed in Court. **Sheo Dat v Sheo Shankar Singh. 27 All 53=1904 W N 9 on appeal 1904 W N 160**

421—The Second Schedule r. 1 (1882—Ss. 506 522)—Suit—Award out of Court—Filing award.

Ss. 506 to 522 apply to arbitrations pending a suit. **Protab Chunder v Toolsey Dass. 29 Cal 793.**

422—S.1, Art 1—Sch II, Art 11—Order directing an award to be filed—C. P. C, S. 526—Order having the force of decree—Appeal.

The present appeal was brought against a judgment and decree directing that an award made on a reference to arbitration by the parties without the intervention of a Court of justice be filed under S 526 of the C. P. C. The decree was for a recovery of a sum of money. The appeal memorandum was stamped with a stamp of Rs. 2, as for an appeal falling within Art II of Sch II of the Act. *Held*, that an order directing an award to be filed is an order having the force of a decree and is in effect a decree (b) and that, consequently the appeal memorandum ought to bear an *ad valorem* fee calculated on the amount decreed to be recoverable as provided by Art 1 Sch 1 of the Court fees Act. 29 Cal 167, Fol 5 All 333, Decision of Oldfield, J in 5 All 333 approved and 23 Cal 723, Dist:) **Hari Mohan Singh v Kali Prasad Chaliha. 33 Cal 11**

Notes:—Fol: 9 Bom L R 259 ; W N (1907) 177 ; 33 Cal 757=3 C L J 450=10 C W N 609 ; 1 P R 1908=55 P W R 1907=184 P L R 1908.

423.—Examination of arbitrator on the question whether a proceeding of his was an award—Admissibility in evidence—S 526 C P C—Appeal – Maintainability:—

It may be that an arbitrator cannot be examined to show what he intended by his award but where the question is not what the arbitrator intended by his award but whether a certain paragraph in his proceedings was intended to be an award at all, there is nothing to prevent his examination. An appeal lies from an order filing an award under S 526. **Tulasi Das v Subanna Chetty, 19 M L J 394.**

C. C. 111

Arbitration-*Contd.*

9 Private Arbitration—*Contd.*

424.—Effect of not filing—Validity of award.

An award of arbitration may be valid without being enforced by the Courts, as for instance, where possession under the award is shown. **Mohesh Chunder Moiter v Buloram Moiter 6 W R 94.**

425.—S 525 C P C——Private award—Not made rule of Court—How far binding.

Where it is established that the parties have agreed to a reference and the arbitrators have made an award, so long as the validity of that award is not questioned it is binding upon the parties to it. It is not necessary that the award should be made a rule of Court under s 522 of the Code of Civil Procedure **Bhikhari Das v Gobind Ram 12 W N 238.**

Indul v Matabadal 6 All 28=3 W N 237.
Parmeshri v Lachmin 4 W N 148.

426.—Sec 525 applies only to cases where the fact of reference to arbitration is not denied. So where that fact is denied the Court has no jurisdiction under S 526 to make enquiry into that question and file the award. The remedy in such a case of the party seeking to get the award filed is by a suit on the disputed award. **Hirjibhai v Jamsetji 1890 P J 250.**

427.—Effect of not filing—Validity of award.

An award made by private submission may be valid and binding, though no proceedings under s 327, Act VIII of 1859, have been taken to enforce it. **Surubjeet Narain Singh v Gouree Pershad Narain Singh 7 W R 260.**

428.—Private award—Plea in bar

Where a reference to arbitration is made and the arbitrator has given his award the parties to the reference cannot sue on the original cause of action. The fact that the award was not made within a reasonable time was *held*, not to be fatal to its validity under the peculiar circumstances of the case. **Hassan Ali v Hoshdar Ali 113 P R 1890.**

429.—Effect of not filing—Civil Procedure Code 1859, s 327—Validity of award.

Arbitration awards not brought into Court under s 327 Act VIII of 1859, are not on that ac-

Arbitration-*Contd.*

9 Private Arbitration—*Contd.*

count necessarily invalid. Ramyad Sahoo v **Doolar Sahoo** 9 W R 441

Nursingh Gariwan v Puttoo Ostagur 20 W R 420.

430,—Objection by creditor to filing award.

The plaintiff applied to file an award and for a decree in terms thereof, to which the defendant consented. K, a creditor of the defendant, thereupon applied to be made a party to the suit and objected to the filing of the award and to the decree, alleging that award was fraudulent and fictitious, and had been made in order to save the defendant's property from his creditors. The Subordinate Judge made K a party to the suit, and refused the plaintiff's application On application to the High Court,—*Held* that the Judge was bound to file the award, defendant having raised no objection to it and no illegality appearing on the face of it **Dungarsi Dipchand v Ujamsi Velsi** 22 Bom 727.

Notes:—Ref 11 Bom L R 822.

430A.—S 506—No application in writing—Ratification by conduct—Reference.

Parties to a suit agreed to refer their case to arbitration, and in the presence of the *Mukhtar* of the plaintiff and a Revenue Agent on behalf of the defendant, the order referring the case to arbitration was passed by the Court. There was, however no application in writing signed by the parties consenting to arbitration. Subsequently the parties appeared in person before the arbitrator and even evidence was taken in their presence. On an objection that there was no valid reference to arbitration according to law.

Held, that the parties to the suit could ratify the reference to arbitration, although the requirements of S 506 of the C P C 1882, had not been strictly followed by the Court in the first instance. (30 All 32; A W N (1907) 273:4 A L J 691: 27 Cal 61; 23 Bom 629; 8 O C 263,Ref) **Gokaran Nath v Gur Prasad** 9 Ind Cas 412.

430B—Ss. 525, 526 — Punjab Courts Act (XVIII of 1884), S. 70 (1) (a) (b)—Revision—Civil cases—Appeal—Arbitration—Award — Decree in accordance with award in case referred to arbitration without the intervention of Court.

Arbitration-*Contd.*

9 Private Arbitration—*Contd.*

Held, that a decree passed in accordance with an award filed in Court under S. 525 of the C.P. C., 1882, in a case referred to arbitration without the intervention of Court, is neither open to appeal nor to revision on the points on which no appeal lies. (25 P R 1902 (P C); 89 P R 1902, Sp. C. 120 P L R 1902, Ref: 1 P R 1908, Fol:)

Ramsaran Das v Muhammad Nawaz Khan. 14 P L R 1911.

430C—S. 99—Schedule II — Arbitration — Whether second schedule part of the Code-Death of one of the parties to the agreement-Abatement.

Schedule II of the Code is as much an enactment as any other part of the Code, and where parties apply to refer the matter to arbitration in appellate Court, that Court must, under paragraph 3, Schedule II, refer the matters in dispute between the parties to arbitration, and if the Judge omits to do so, his judgment is defective, and S. 99 does not cure the defect. The authority of an arbitrator is not revoked by the death of one of the parties to the original application, and as the right to sue survived, the case should have been referred to arbitration after substitution of the heirs. **Datta v Khedu, 8 A L J 678.**

431—Obligation to file-Suit to enforce award not filed—Civil Procedure Code, 1859, s. 327.—

A suit lies to enforce an award made without the intervention of a Court of Justice. The procedure provided in s 327 of the Civil Procedure Code is not imperative upon a plaintiff who seeks to enforce an award so made. **Palaniappa Chetti v. Rayappa Chetti, 4 M H C R 119. Kota Seetamma v Kollipuria Soobbiah, 8 M H C R 81.**

Notes:—Fol: 20 W R 420. 20 Mad 490. Ref: 8 M H C R 81, 21 Cal 215; 18 Mad 423 F B.

431 *A*—Merger—Pro note accepted in full satisfaction of claim—Suit on pro-note dismissed for insufficient stamp —Determination of all rights—Subsequent conduct of defendant, effect of—Arbitration—"Dispute arising under indent" —Claim not recoverable at law.

A pro-note was accepted by plaintiff in full settlement of his claims against defendant under an indent which contained an arbitration clause. Plaintiff sued defendant on the pro-note, but the

Arbitration-*Contd.*

9 Private Arbitration—*Contd.*

suit was dismissed on the ground that the note was insufficiently stamped. Plaintiff thereupon made an *ex-parte* reference to arbitration, purporting to act under the indent. The arbitrators delivered their award and plaintiff then sued defendant to have the award filed It was contended for plaintiff that, subsequent to the execution of the pro-note, defendant so altered it as to convert it into an instrument of higher value than it bore.

Held, that, as soon as plaintiff accepted the pro-note, all obligations and rights under the contract were determined. The subsequent conduct of defendant might possibly have furnished ground for a suit in tort, but it could not revive the rights and obligations under the indent which had been extinguished prior to the commission of the tort.

Obiter dictum.—The question whether a dealer should pay a claim which is not recoverable at law is not a "dispute arising under an indent", and could not, therefore, be referred to arbitration under the clause of indent.

Ewart Ryrie and Co. v Tarachand Dhanraj, 9 Ind Cas 896.

432—On an application under Sec 525, Civil Procedure Code, to file an award, no other objections can be taken except those specified in Secs. 520 and 521. If any of them be held good, the Court ought to refuse to file an award. But no other inquiry can be made by the Court on such an application. If one of the parties objects to the fact of the submission as of the award, and the Court thinks the objection not unfounded but substantial, the Court must refuse to file the award. **Samal Nathu v. Jaishankar Dalsukram, P J (1884), 295=9 Bom 254.**

Notes:—Ap: 21 Cal 213 F B, Fol: 17 Bom 674; 20 Bom 596. Ref: 18 Mad 423 F B; 10 Bom 381; 17 All 21 F B; 6 Bom L R 15; 28 Bom 287; 25 Cal 757 F B. Ex: 29 Bom 621 F B=7 Bom L R 644.

433—The Second Schedule r.14 (1882 Ss.520, 521, 525)—Arbitration—Award—Application to file in Court—Objection by one of the parties—Duty of Court.—

Where, to an application to file a private award made under S. 525, Civ. Pro. Code, the defendant raises objections referred to in Ss.520 & 521 of the Code, the Court is bound to allow the defendant, opportunity to produce evidence to substantiate his objections.

The Chief Court observed that the Civil Courts have no power to sit as Courts of appeal to consider the correctness of awards on the merits, in respect of matters of fact and even of law.—

Nizam-ud-din v. Gulam Ahmad, 53 P L R 1909.

434—Act X of 1877, Sections 523, 524—Agreement to refer which includes matters beyond the jurisdiction of the Civil Court — Power to file such agreement. -

Held, that the agreement to refer to arbitration mentioned in Section 523 of the Civil Procedure Code, must refer to matters in regard to which a Civil Court has jurisdictio to pass a final decree, and if it deals with other matters beyond the jurisdiction of a Civil Court, it is not one that can properly be ordered to be filed under the provisions of the section: the agreement must either be one capable of being filed as a whole or it must be rejected as a whole, there being no provision in Section 523 or 524 which would enable a Court to strike out that portion of the agreement which was in excess of the Court's jurisdiction in order to give itself jurisdiction, unless the parties agreed to do so with the view of proceeding with the reference.

Partab Singh v. Devi Singh, P R 5 of 1883.

435—The Second Schedule r. 14 (1882 Ss. 520, 521, 522, 525, 526)—Arbitration out of Court—objection to validity of submission—Appeal.

If an objection to the validity of the submission is made and the Court disallows it, no distinction can be drawn between such a case and one where an objection is taken, which is specifically mentioned in S. 520 or 521. The intention of the Code seems to be that, in the one case as much as in the other, if an objection to the validity of the submission is made and the court disallows it, no appeal shall lie, except on the ground mentioned in S. 522. The principle of finality appears to be equally applicable. 10 C W N 609, Fol: U B R (1904-1905), Civil Procedure, 40. 29 I A 51 (P C), 10 C W N 601. Ref: **Nga Hmaung v. Nga Kyaw Ya, U B R (1906) C P 52.**

Arbitration-*Contd.*

9 Private Arbitration—*Contd.*

436—Objections to filing award—Civil Procedure Code, 1877, ss. 520, 524, 525 — Rejection of application to file award—Consent of parties to jurisdiction.—

A dispute between the plaintiffs and defendant having heen referred to arbitration and an award made, the plaintiffs applied under s. 525 of the Civil Procedure Code that the award should be filed in the Munsif's Court. It having been objected that the arbitrators had been guilty of impartiality and other misconduct, an issue was framed with the consent of both parties "whether the award could be filed and enforced", and the Munsif, after hearing evidence, dismissed the application. On appeal the Subordinate Judge decided that the award was valid. On second appeal,-H*eld*,that, although where an application to file an award under s 525 is made and an objection is made upon any of the grounds mentioned in s. 520 or 521, the proper course for the Court is to dismiss the application, and leave the applicant to bring a regular suit to enforce the award; yet both parties having consented to the matter being tried upon the application as if in a regular suit, it could not, on second appeal, be objected that the lower Courts had acted without jurisdiction. **Huro Nath Roy v. Nistarini Chowdhrain, 13 C L R 14.**

437—Arbitration and award—Civil Procedure Code, Sections 13 and 525—Order refusing to file award—Powers of private arbitrator-Construction of terms of reference —

In a suit by two sons of a deceased Muhammadan to recover their shares in their father's estate from their brother, the defendant pleaded that he was entitled to the said estate under an award in favour made on a submission to which the plaintiffs were parties, but it appeared that the Civil Court had refused an application under Section 525, Civil Procedure Code, to file the same.

Held, that this order was not a decision as to the validity of the award within the meaning of Section 13.

.Where a dispute relating to land and the right of succession thereto was referred by the members of a Muhammadan family to a private arbitrator, selected by reason of his knowledge of the circumstances of the family, without any stipulation that he was to be controlled in his decision by any custom or Muhammadan Law, and the arbitrator decided on the broad view of giving effect to what he conceived to be the intention of the deceased father of the parties;

Held, that this could not be relied on as misconduct, and that such decision was within the right of the arbitrator. **Muhammad Nawaz Khan v Alam Khan. 70 P R 1891**

438—Ss. 526, 520, 521—The mere allegation of objections under Ss. 520 and 521 in the defendant's written statement is not sufficient of itself to preclude the filing of an award under s. 526. **Mahadev v Lakshman. 1886 P J 103.**

439—Showing cause—Sufficient cause

The term "to show cause," in ss 525 and 526 of the Code of Civil Procedure (Act X of 1877) does not mean merely to allege cause, nor even to make out that there is room for argument, but both to allege cause and to prove it to the satisfaction of the Court **Dandekar v Dandekars 6 Bom 663.**

Notes—Fol: 9 Cal 575; 11 Cal 166; 8 All 340; 16 All 231: 28 Bom 287; 27 All 526=2 A L J 416=(1905)W N 86. Ref: 16 Cal 482;21 Cal 213 F B; 7 Bom 316; 341,9 Bom 82; 17 Bom 674; 20 Bom 208. 596; 17 All 21 F B, 6 Bom L R 15.

440—Agreement to refer to arbitration—Filing award in Court—Partnership—Civ. Pro. Code 1882 ss. 525 & 526.

The three parties to a deed of partnership agreed that in case of any dispute or difference, the matter should be referred to the arbitration of persons chosen by each party to such dispute, and that in case any such party should refuse or fail to nominate an arbitrator, then the arbitrator named by the other party should nominate another arbitrator, and two should nominate a third person as umpire. Certain differences having arisen among the three parties, two of them called upon the executors of the third to nominate an arbitrator under the terms of the deed, but they refused to do so. The first mentioned patrners then nominated an arbitrator, who in his turn nominated another, and these

Arbitration-*Contd.*

9 Private Arbitration--*Contd.*

having appointed an umpire, made an award. An application under s. 525 of the Code of Civil Procedure was opposed by the executors of the third partner, on grounds coming within s 520 or s. 521 of the Code. *Held* that the word "parties" in s.525 should not be confined to persons who are actually before the arbitrators; that if persons by an agreement have undertaken between themselves that in the event of certain things happening, a particular procedure shall be followed,which,under one set of circumstances, may be adopted *in invitum*, they should, for the purposes of s 525, be regarded as parties to that arbitration; and that in the present case they were *prima facie* bound by the arbitration so as to bring them within the terms of s. 525 as parties thereto, who should be called upon to show cause why the award should not be filed L R I C P 671 and 19 C B N S. 342 referred to. *Held*, also, that ss. 525 and 526, read together, mean that the party coming forward to oppose the filing of the award must show cause, that is, must establish by argument, or proof, or both, reasonable grounds to warrant the Court in arriving at the conclusion that the award is open to any of the objections mentioned in s. 520 or s. 521, and it is not sufficient when it is sought to make the award a rule of the Court, for the defendant party to come and merely say upon a verified petition that this or that ground referred to in ss. 520 and 521 existed against the filing. 7 Cal 490. 9 Cal 557 dissented from. 9 Cal 575: 6 Bom 663 and 3 I A 209, 26 W R 10 referred to.

Jones v Ledgard. 8 All 340.

Notes—Ref: 16 Cal 482; 21 Cal 213 F B; 17 All 21 F B; 28 Bom 287.

441—S. 327—(Act VIII of 1859).

The plaintiff sought to enforce and file a private award under the provisions of this section. The defendent objected that he was no party to it. The Court after enquiry overruled the objection, and directed that the award should be filed, but made no decree enforcing the award. *Held* that the order was not open to appeal as it did not operate as a decree. **Husaini Bibi v Mosim Khan. 1 All 156.**

Notes—Dist: 3 All 427. Ref. 17 All 21 F B.

442—Sufficient cause —Civil Procedure Code, 1882, ss. 525, 526.

Arbitration-*Contd.*

9 Private Arbitration--*Contd.*

Under ss. 525 and 526 of the Code of Civil Procedure the Court has full power to enter into the question of the sufficiency of the cause shown against the filing in Court of an award. 6 Bom 663 followed. 9 Calc 557 dissented from.

Dutto Singh v Dosad Bahadur Singh. 9 Calc 575.

Notes—Fol: 16 All 231. Ref:16 Cal 482;21 Cal 213 F B; 8 All 340, 17 All 21 F B.

443—Sufficient cause—Civil Procedure Code (1877) Ss. 525, 526—On an application to file an award, where the Court finds that there is a reasonable dispute between the parties on any of the grounds mentioned in S. 520 or 521, the application should be dismissed. Under S. 525 of the Code, sufficient cause may be showu by sufficient or verified petition. 7 Cal 490 and 8 B L R 315 referred to **Ichamoyee Chowdhranee v Prosunno Nath Chowdhry- 9 Cal 557.**

Notes—Dist: 9 Cal 575; 25 Cal 757 F B; 8 All 340; Dist. 21 Cal 213 F B. Ref: 16 Cal 482. Fol: 25 Cal 757 F B.

444—Sufficient cause—Objection to filing award—Setting aside award—Civil Procedure Code, 1859 s. 327.

In an application under s. 327 of Act VIII of 1859.to have an award filed in the Court so as to be enforced as a decree, it was objected on behalf of the defendant amongst other things, that the award, which determined the succession to a Talukhdari registered under Act I of 1869 having been based on a certain will produced, which in terms referred to another will of the same tastator not produced, there was miscarriage on the part of the arbitrators in making their award, the whole of the will, in the absence of the last-mentioned document, not having been before them. It appeared that the defendant in the proceedings before the arbitrators, notwithstanding the knowledge that this document was withheld, submitted nevertheless to take his chances of the arbitration; suggesting in fact favourable presumptions to himself in construing the will produced, or that the whole will not having been produced, it should be declared not to be operative, and that consequently the dispute should be determined according to the British Law of Succession as laid down by Act I of 1869,or accord-

Arbitration-*Contd.*

9 Private Arbitration--*Contd.*

ing to custom, or according to the Mahomedan Law of succession. *Held* that the award could not be set aside on the ground of the objection taken. According to the true construction thereof, the earlier sections are not incorporated into s. 327 of Act VIII of 1859 as they are into s. 326. The words " sufficient cause" in s. 327 should be taken to comprehend any substantial objection which appears on the face of the award, or is founded on the misconduct of the arbitrators, or on any miscarriage in the course of the proceedings, or upon any other ground which would be considered fatal to an award on an application to the Courts in England. **Chowdhri Murtaza Hossein v Bechunnissa. L R 3 I A 209=26 W R 10.**

444A—Mortgage—Decree under award upon—Choice left to proceed either against mortgaged property or against other properties and person--Execution--Right to proceed first against person--Transfer of Property Act--Non-applicability to Sind--Award—Objections to filing of--Not taken when filing--Non-maintainability before execution Court-Validity of decree—Execution Court—Validity of decree—Executing Court not entitled to question.

Where a mortgage-decree passed upon an award left it to the choice of the plaintiff to proceed first either against the person or against the mortgaged-properties.

Held, that the judgment-debtor had no right to claim that the mortgagee should realize his security first.

The mortgagee is at liberty to proceed in execution under the same decree either against the secured or unsecured property.

The Transfer of Property Act, 1882, has no application to Sind.

Where a decree has been passed upon an award, a Court of execution can neither consider objections which might perhaps have been raised to the filing of an award nor question its validity. (26 All 25; 34 Bom 540; 22 Cal 813; 26 Cal 166; 2 Cal 213; 4 All 497; 2 Sel. Dec. Sind. Sadr. Ct. 514. Ref. 2 S L R 244, Doubted. 12 Bom L R 1024; 22 Bom 475, Fol:) **Gulam Murtiza-khan, son of Serai Mahamed Nawazkhan v Changoomal Bhojraj. 5 S L R 71.**

Arbitration-*Contd.*

9 Private Arbitration--*Contd.*

445.—Arbitration—Filing private award—Effect of objection—Civil Procedure Code 1882, Sections 520, 521, 525 and 526.

Held, by the Full Bench (Petheram, C.J, and Prinsep Pigot, Macpherson, and Ghose, JJ)—Where an application is made for filing a private award and objections falling within Section 521 of the Civil Procedure Code are raised in a verified written statement as regards its validity, the Court is not bound to hold its hand and reject the application, but must inquire into the validity of the objections raised, and thereupon determine whether the award should be filed or not. Per Prinsep, Pigot, and Macpherson, JJ:—Where the objection is raised as to the fact of the alleged reference, and therefore not on a ground mentioned in Section 521, the Court has no jurisdiction to deal with it, but should reject the application and refer the parties to a regular suit. **Surjan Raot v Bhikari Raot 21 Cal 213.**

Notes—Diss; 25 Cal 757 F B. Fol: 25 Cal 557 F B ; 20 Bom 596. Ref: 18 Mad 423 F B ; 16 All 234 ; 17 All 21 F B; 28 Bom 287 ; 2 C L J 80. Appr. 33 Cal 757 F B =10 C W N 609=3 C L J 450.

446.—Award relating to property partly outside the jurisdiction to file award and pass decree :—

A Court has jurisdiction to file an award and pass a decree in terms of the award, though the matter to which the award related was the partition of property, including immoveable property, part of which was situated outside the jurisdiction of the High Court, because the right to have the award filed had originated within the jurisdiction. 2 Cal 445 ref to. **Seshayya Chettiar v Chengayya Chettiar. 24 Mad 31.**

447.—S. 80 (1882 s. 424) Public Officer—Administrator General—Cause of action—Statement of service of notice in plaint—Administrator—General's Acts (II of 1847 and V of 1902).

All estates in the hands of the Administrator-General are held by him as Administrator-General *i e* as a public officer, and in any suit insti-

Arbitration-*Contd.*

9 Private Arbitration—*Contd.*

tuted agaist him in respect of any act purporting to be done by him in his official capacity he is entitled to notice under S 424, C P C. The phrase " cause of action " in Section 424, C P C should not be too narrowly construed, the object of the section being merely to inform the defendants of the grounds of complaint. 24 Mad 279; 26 All 187 at 191 foll. The portion of S 424, C P C relating to the plaint containing a statement that such *notice* has been left or delivered in the manner prescribed by the section is separable from the earlier portion which deals with the delivery of the notice two months before suit. It is only when notice is not given that the suit is liable to be dismissed. The suit however, may be proceeded with if notice has been given in the manner prescribed, and subsequently the plaint is amended in order to state that fact.

Bholaram Chowdhury v Administrator General. **8 C W N 913.**

Notes.—Ref: 28 All 600

448.—Sec 526 C P C—" If no ground....be shown."

It is competent to the father of a joint Hindu family in his capacity of managing member of the family to refer to arbitration the partition of the joint family property and the award made on such a reference, if in other respect valid, will be binding on the sons. In sec. 526 of the Code of Civil Procedure the word " shown " is not equivalent to " alleged " but it is necessary that one of the grounds mentioned in s.520, or 521 should be proved to the satisfaction of the Court before the Court is justified in refusing to file the award. (9 Cal 575 and 6 Bom 663 followed. 10 Cal 71 and 9 Cal 557 dissented from)

Jagan Nath v Mannu Lal. **16 All 231=14 W N 60.**

Notes:—Ref: 9 M L J 34; 17 All 21 F B; 18 All 414; 422 F B; 27 Bom 287; 1 C L J 388.

449.—The Second Schedule r 20 (1882 S 525)—Provisional award—Not final—District Judge not to entertain application—Jurisdiction.

An award which is provisional, that is to say, which does not completely once for all determine the dispute between the parties, cannot be filed under Sec 525 and it cannot be made rule of the Court. The appointment of a Receiver during proceedings started upon such an award is illegal.

Hodgkinson v Mac Millan. **6 A L J 467=2 Ind Cas 304.**

450.—Arbitration—Award—Refusal by the Subordinate Judge to file the award —Appeal—Revision, High Court.

The High Court followed the practice which permits applications under Sec 622 of the Civil Procedure Code, in cases where the Subordinate Judge refused to file an award which has been presented to the Court for being filed under Sec 525 of the Code **Abdeali Gulamhusen v Yusuf Ali Alibhai.** **8 Bom L R 570.**

451.—Award on private references to arbitration—Application to file—Setting aside of award—Jurisdiction :-

Where a dispute is referred to arbitration without the intervention of Court, and, after the award is made, an application is made under Sec 525 by one of the parties to file the award in Court, the Judge, if he finds grounds mentioned in S 520 or 521, C P C, can only refuse to file the award, and has no jurisdiction, to set it aside. 18 I A 73 followed; and 20 Mad 89 distinguished.

Sundara Mudali v Ponnusawmi Mudali. **13 M L J 275.**

See decision on appeal. **27 Mad 225.**

452.—Civil Procedure Code (1882), Ss 525 and 526—Objection to application to file an award in Court that one party had not agreed to refer any matter to arbitration—Jurisdiction of Court to determine whether the parties had or had not referred the matter in question to arbitration.

An objection to an application made under S 525 of the Code of Civil Procedure that the parties had not agreed to refer to arbitration any matter, or had agreed to refer some only of the matters determined by the award, or that the document alleged to be an award was not an award of the arbitrators, is an objection which must be considered and determined under Section 526 upon evidence by the Court to which the application is made. (3 I A 209. 9 Bom 254, 17 Bom 674, 8 B L R, 315 : 15 W R F B 9, 1 All 156, 21 Cal

Arbitration-*Contd.*

9 Private Arbitration--*Contd.*

213, and 18 Cal 414. L R, 18 I A 73, referred to.
Amrit Ram v Dasrat Ram. 17 All 21

Notes:—Not Fol : 20 Bom 596. Fol. 25 Cal 757 F B. 20 Mad 89 ; 29 Bom 621 F B. Ex : 33 Cal 757 F B. Ref: 18 Mad 423 F B; 28 Bom 287; 10 C W N 601=2 C L J 153; 28 All 621= (1906) W N 136, Diss. 25 Cal 757 F B.

453.—The Second Schedule r. 21 (1882 S. 526) award—Application for filing the award—Objections against filing the award——Court—Jurisdiction.

Where an application is made for the filing of an award, the Court has jurisdiction, under S. 526 of the Civil Procedure Code, to entertain and dispose of the application on its merits, although substantial grounds of objection are urged against filing the award. **Dhanjibhai v Nathabhai. 6 Bom L R 15=28 Bom 287.**

Notes.—Ref: 8 Bom L R 777. Ex. 29 Bom 621 F B.

454.—The Second Schedule r 20 (1882 S. 525)—Reference to arbitration disputed—Jurisdiction of Court to determine whether the parties had or had not referred the matter in question to arbitration. *Held* that upon an application made to it under S. 525 of the Civil Procedure, the Court has jurisdiction and is bound to enquire into the question whether the parties had or had not referred the matter in question to arbitration. (17 All 21, 25 Cal 757, 29 Bom 621 ref to.) **Ganesh Singh v Kashi Singh. 1906 W N 136=28 All 621.**

455—The Second Schedule r 17 (1882 S 523)—Reference to private arbitration by parties pending a suit—Arbitration—Award-Application to file the award—Such application is foreign to the suit—Practice. Chapter XXXVII of the Civil Procedure Code governs reference to arbitration. It contemplates two classes of references, one by the parties to a suit who obtain an order from the Court for a reference to arbitration, the other when persons agree in writing that the difference between them shall be referred to arbitration. Parties to a suit as well as persons not engaged in litigation may agree to refer matters in dispute between them to private arbitration. But the mere fact that litigants may agree to a private arbitration, does not make that arbitration an arbitration in the suit unless there is an order of reference as contemplated by S 506.

The parties to a suit during the pendency thereof referred the matters in dispute to a private arbitration. The arbitrator having given his award the plaintiff applied to have the award filed and for a decree in terms of the award. The defendant objected to the award on several grounds. The Subordinate Judge asked the plaintiff to pursue the remedy given to him by law to enforce the award and dismissed the suit.

Held, that as there was no order of reference, the reference was governed by Ss. 523-526 of the Civil Procedure Code; and under those sections, it was necessary for an application to be made as provided by S. 525.

Held, further, that it was not open to the Court to treat the application as made in the suit; the application was completely foreign to the suit. The Court had, therefore, no power on that application to dismiss the suit. (4 Bom 1; 27 All 53 Ref: 28 Bom, 287; 29 Bom 621 Ref:)
Shivlingrao v Rango 8 Bom L R 777

456—The Second Schedule r. 15 (1882—Validity of Secs. 521, 522, 525, 526)—Arbitrators joint. one not attending all—Misconduct—Award objection to. when waived—Appeal against decree on award, if lies. Where there are joint arbitrators, there is no clause providing for an award made by less than all being valid, each of them must act personally in performance of the duties of his office, as if he were sole arbitrator, and as the office is joint, if one refuse or omit to act, the others can make no valid award.

Where, however, there were three arbitrators, and one of them could not attend some of the sittings of the arbitrators, but at these sittings, no business of disputed character was gone into, and the other two arbitrators did not decide any matter but simply looked into the accounts and the parties were there, and all the disputed matters referred to them were decided by the three arbitrators at sittings when all the three were present, the award was the award of all the three arbitrators and the objection of misconduct cannot be upheld.

Arbitration-*Contd.*

9 Private Arbitration—*Contd.*

Where the arbitration proceedings lasted for some 18 months and one of the parties to the reference to arbitration attended most, if not all, the meetings and having a clear knowledge of the circumstances on which he might have founded an objection to the arbitrator's proceedings to make their award, did submit to the arbitration going and allowed the arbitrators to deal with the case as it stood before them, taking his chance of the decision being more or less favourable to himself, it is too late for him after the award has been made, and on the application to file the award, to insist on that objection to the filing of the award.

Quære—Whether an appeal lies against the order of the Court directing a private arbitration award to be filed and a decree to be passed in accordance therewith. 26 W R 10=3 I A 209 Ref to. **Nadiar Chand Shaha Bonik v Gobind Chander Shaha Bonik** **2 C L J 61**

Notes:—10 C W N 601=2 C L J 153=33 Cal 757 F B

456 A—The Second Schedule r. 20 (1882—S. 525)—Arbitration—Award—Filing of award—Dispute as to the factum of arbitration and award Jurisdiction of the Court to deal with the objection-Separate suit.

When an application is made under S. 525, Civil Procedure Code, to file an award as an award made in the matter which has been referred to arbitration, the question, if raised whether the matter has been referred to arbitration and an award has been made thereon, is one which the Court to which the aforesaid application has been made, can and ought to decide **Manilal v Vanmalidas.** **7 Bom L R 644=29 Bom 621**

Notes—Ref 8 Bom L R 777=28 All 621=(1906) W N 136.

457—Application to file award—Civil Procedure Code (1882) ss. 521, 522, 525, and 526—Objections as to factum or validity of submission and award.—

Where on an application to file an award under ss. 525 and 526, Civil Procedure Code (Act XIV of 1882), objections, which in the opinion of the Court are not merely frivolous or colourable, are raised to the factum or validity of the submission and award, the Court has no jurisdiction to deal with them, and must refer the parties to a regular suit. 9 Bom 254 and 21 Cal 213 followed, 17 All 21 not followed. **Tejpur Dewchand v Mahomed Jamal.** **20 Bom 596**

Notes—Ref 6 Bom L R 15: 25 Cal 757 F B. Dist 28 Bom 287. Expl 29 Bom 621 F B.

458—Award, jurisdiction of Court to file—Depends on value of entire matter submitted—Omission to give notice to parties or acceptance of a fee by the arbitrators cannot invalidate the award.

The proper Court for presentation of an application for filing an award is to be determined by its pecuniary jurisdiction with respect to the entire matter to which the arbitration related and not to the amount allowed under the award.

An award does not become invalid by the mere omission to give notice of the arbitrators' meeting to a party, who had previously informed the arbitrators of his cancellation of his *muchilika* for, and his withdrawal from, submission to arbitration, nor is an award rendered illegal by reason of the acceptance by the arbitrators of the offer of a fee for their services such acceptance not involving any misconduct on their part.

Subraya Prabhu v. Manjunath Bhakta, **29 Mad 44.**

459—Civil Procedure Code 1882 Sections 520 521, 522, 523, 525, 622—Power of Court to inquire into objections denying validity of a reference to arbitration—Revision—Practice.

Held by the Full Bench that, it is not competent to a Court upon an application under Section 525 of the Civil Procedure Code, to file an award, to inquire into and decide objections other than those specified in Sections 520 and 521 of the Code.

It is not the invariable, though it is the usual, practice for a High Court to refuse to interfere under Section 622 of the Code, when the party professing to be injured has another remedy open to him. 134 P R 1888 and 49 P R 1893 overruled. **Narain Das v Manohar Lal.** **21 P R 1898 F B.**

Notes—Overr 84 P R 1901=112 P L R 1901;

Arbitration-*Contd.*

9 Private Arbitration—*Contd.*

Ref 51 P R 1899, 13 P R 1903=57 P L R 1903.

460—Sch. II r.20 (1885 S 525) Award-Filing of award—Assumption of factum of reference and award—Dispute as to validity of award on account of matter alleged to have existed prior to reference—Objection falling outside the scope of Ss. 520 and 521—Jurisdiction of the Court to deal with such objection. A claim based on a promissory-note was referred to arbitration without the intervention of a Court of justice and an award made thereon. The plaintiff applied to the Court of the Subordinate Judge to file the award. In showing cause under S 526 of the Civil Procedure Code, the defendant maintained that there was no consideration for the promissory-note and that the award was sham and fraudulent. The Subordinate Judge in view of these objections declined to file the award. The plaintiff then applied to the High Court under S. 622 of the Civil Procedure Code

Held, (1) that the question whether there was no consideration for the promissory-note having been decided by the arbitrator in the plaintiff's favour, the matter could not again be investigated or considered by the Subordinate Judge; and that would not entitle him to say that the award should not be filed

(2) that if the objection that the award was sham and fraudulent meant that there was corruption or misconduct of the arbitrator, then it would fall under S 521 (a) of the Civil Procedure Code and would have to be investigated by the Subordinate Judge on the application before him

Antaji v Narayan. **7 Bom L R 793.**

461.—Order to file—Amendment of decree—Jurisdiction—Civil Procedure Code, ss. 206, 522, 525 and 526.

On an application made under s. 525 of the Code of Civil Procedure that an award be filed in Court, the District Judge made an order that the award be filed and a formal order was drawn up to that effect. The applicant made an application for execution of the formal order (which she called the decree of the District Judge). Her application was rejected on the ground that there was no decree capable of execution. She then applied to the Court of the Judicial Commissioner under s. 206 of the Code of Civil Procedure to amend the so-called decree of the District Judge, so as to bring it into conformity with the judgment. *Held*, that the Court had no power to grant the application under s. 206 of the Code of Civil Procedure, the order of the District Judge having been made under s. 206 of the Code of Civil Procedure, the order of the District Judge having been made under s. 526 of the Code, and the formal order giving effect to it being in conformity with the same. *Held*, that having directed the award to be filed, the District Judge should, as the next step, have pronounced judgment in accordance with the award, upon which a decree could follow under the provisions of s 526 read with s. 522 of the Code of Civil Procedure *Held*, further, that on the application of any of the parties to the suit, the District Judge could proceed to give effect to the award in the manner contemplated by s. 522 of the Code. **Gulab Kuar v Thakur Sheo Ratan Singh.** **4 O C 82.**

—Partly inoperative -See Powers of arbitrator. **23 All 383=28 I A 111.**

462—C P C O 21 r. 2, The Second Schedule (1882 Ss. 258, 521, 525 and 526).—Execution of decree—Arbitration out of Court—Decree according to award—Adjustment not certified—Power of execution Court to enquire into the factum of adjustment.

The provisions of s 258, Act XIV of 1882, were never intended to apply to a case where the parties agreed between themselves that their debts were to be privately adjusted before any decree came into existence.

Where disputes between a creditor and a debtor were settled by arbitration without the intervention of a Court and the decree was obtained in the terms of the award under s. 526, Act XIV of 1882, notwithstanding that the debtor's objection that, in pursuance of the award, he had already assigned debts to the creditor in part satisfaction of the aggregate amount awarded to the latter by the arbitrator, and upon the decree-holder subsequently applying for execution of his decree in full, the judgment-debtor repeated the same objection, held, that the assignment was not an adjustment of a decree in whole or in part within the meaning of a

Arbitration-*Contd.*

9 Private Arbitration *Contd.*

decree in whole or in part within the meaning of s. 258, and the execution Court was bound to consider that debts, if any, had been assigned, before directing execution as claimed by the creditor.

Per Banerji, J. (contra.)—The alleged assignment of debt, if true, became an adjustment of the decree, as soon as the decree was made, and not having been certified in the manner provided by s. 258, could not be recognised by the Court executing the decree. **Gauri Singh v Gajadhar Das. 6 A L J 403=2 Ind Cas 608.**

463—C P. C. Ss. 520, 521, 522 and 525 — Arbitration-Private award—Award ante-dated—Misconduct of arbitrator.

Where an application is made to a Court under S. 525, Civil Procedure Code, to file a private award, the Court filing the award has jurisdiction to inquire into the genuineness of the award; and where an objection is raised to the filing on the ground that the award was made after a notice of revocation of the submission had been served on the arbitrators and was perversely ante-dated by them the court has power to go into the matter and decide it finally. If such an objection is considered and disallowed and the decree passed in accordance with the award, no subsequent suit will lie in which the same matter can be re-agitated. 1 Mad 319 and 17 All 21 followed **Chintamallayy. v Thadi Gangireddi, 7 C W N 61**

464—The second Schedule r. 21 (1882 S. 526) —Appeal dismissed for default—Memorandum of objection—Costs.

Affidavit of objections, filed under the old Civil Procedure Code, cannot be argued, if the appeal is dismissed for default.

Courts are not bound to allow costs when the memorandum of objections is dismissed owing to the appeal having been withdrawn or dismissed for default. **Muthu Payal v Nagalingam. 6 Ind Cas 309=8 M L T 53.**

465.—The Second Schedule; r. 14 S. 90 (1882 Sections 520 to 526 and 540)——Arbitration——Award—Revision—Distinction between Ss. 526 and 523, C. P. C., as regards appeal

An award was made by a private arbitration

Arbitration-*Contd.*

9 Private Arbitration--*Contd.*

appointed out of Court, in favour of N and S against S, M, and D, and in favour of D against S, M Then N, S and D applied under S. 525 C. P. C. to have the award filed in Court. S & M raised certain objections which were disallowed by the District Judge who ordered "the award to be filed and decree passed in accordance with the terms thereof."

S & M appealed. At the hearing of the appeal two preliminary questions were raised:—

1 Whether an appeal lies against an order under S. 526, C. P. C., directing an award to be filed.

2. If not, whether such an order is open to revision on the grounds urged in the appeal.

Held by the Full Bench unanimously that an appeal does not lie from an order under S. 526, C P C, directing an award to be filed, nor from the decree passed in terms of the award as there is only one decree in the case viz the filing of the award and the consequences of decree being passed in terms of the award flow from that order and no fresh order is required for those consequences to result but it is not so in proceedings under S. 523, C. P. C.,

Held, also, that no revision lies in such cases on the grounds on which no appeal is allowed.

Held, by the Devision Bench, that in the appeal no ground for interference on revision is shown. 84 P R 1901 overruled by 25 P R 1902 (P C), 25 P R (1888) (P C), 89 P R 1902 (P C); 10 C W N 601 and 11 C L J 153, followed. 33 Cal 757; 27 All 526; 29 Mad 303 Diss.

Shankar Mal v Nathu Mal, 58 P W R 1907 (F B)=1 P R 1908,

466.—Civil Procedure Code (Act XIV of 1882), Ss. 525 and 526—Arbitration award—Denial of reference to arbitration—Jurisdiinoct of Court to determine the factum of reference—Appeal.

Held by a majority of the Full Bench (Macpherson J., dissenting) that when an application has been made under s. 525 of the Code of Civil Procedure and notice has been given to the parties to the alleged arbitration, the jurisdiction of the Court to order the award to be filed and to

Arbitration-*Contd.*

9 Private Arbitration--*Contd.*

allow proceedings to be taken under it, is not taken away by a mere denial of the reference to arbitration on an objection to the validity of that reference. 17 All 21, followed. **Mahomed Wahiduddin v. Hakiman. 25 Cal 757 = 2 C W N 529.**

Notes:—Fol: 23 Mad 101. Ref: 27 Mad 255. F B: 29 Cal 278, 6 C W N 205; 28 Bom 287; 14 M L J 356; 31 Cal 516: 28 All 621=(1906) W N 136; 2 C L J 80; 2 C L J 431, 441; 33 Cal 757 F B=10 C W N 601, 609=3 C L J 450. 7 C L J 486; 9 C L J 563=13 C W N 654, 36 Cal 713; 29 Bom 621 F B.

467.—The Second Schedule r. 20 (1882 S.525) —Application to file an award—Denial of reference—Jurisdiction of Court.

Where under S. 525, Civil Procedure Code, an application is made to the Court to file an award made in a matter referred to arbitration without intervention of Court, an objection is taken by the defendant to the filing of the same on the ground that there was no reference, the Court has jurisdiction to determine as to the genuineness and validity of the award. (20 Mad 89 Fol.)

Kikkara Appadu v Dattu Kamayya. 16 M L J 474.

468.—Application to amend an award—Civil Procedure Code. 1859, s. 327.

Upon a motion to amend an award filed under s. 327 of the Civil Procedure Code, on the ground of obvious errors contained in it, it was held that the Court had no power, under s. 327 to amend an award or remit it for the reconsideration of the arbitrators, but had only the power to file and enforce the award or reject it.

Allarakhia Shivji v Jehangir Hormasji. 10 B H C R 391.

Notes:—Ap: 3 Mad 68. Fol: 27 All 526= 2 A L J 416=(1905) W N 86.

469.—Award in criminal matter—Civil Procedure Code, 1859, s. 327.

When complaint has been preferred to a Criminal Court, and the Magistrate has directed that the subject-matter of the complaint be referred to arbitration, if the parties consent and

Arbitration-*Contd.*

9 Private Arbitration--*Contd.*

proceed to such reference, the award may be enforced under the provisions of s. 327, Act VIII of 1859. **Sheo Nund Rai v Mahanund Ram. 1 Agra 45.**

470.—Award ade upon reference in criminal proceeding—Validity.

Held that an award made upon reference by the parties in a criminal proceeding is as valid as one made upon reference by the parties in a civil proceeding. **Badshah Begam v Nathu Khan. 6 W N 158.**

471.—Decree according to award—Amendment of plaint—Civ Pro. Code 1877, s. 525.

By the amendment of the plaint, a case under this section was taken out of the scope of Chapter XXXVII of the Act. *Held* that, this being so, the decree of the Court of first instance was appealable.

Held also, where a private award determined a matter not referred to arbitration, that a claim under this section that such award should be filed in Court was properly dismissed. **Jwala Singh v Naraindas. 3 All 541.**

Notes:—Fol: 27 All 526=(1905) W N 86= 2 A L J 416.

472.—The Second Schedule r. 20 (1882 Ss.525, 520, 526). Application to file an award, order granting or refusing an, is a decree—Award on matters not referred, not to be ordered to be filed.

Where on an application made, under S.525 of the Code, to a Court for filing an award therein the Court finds that the arbitrator has decided rights to certain properties regarding which no reference was made to him, the Court is bound to refuse to allow the award to be filed and an order on such an application whether refusing or granting the prayer is a 'Decree' within its definition in the Code (a) and is appealable as such. (27 Mad 255 fol. 29 I A 61 foll.)

Tiruvengadathiengar v Vaidinatha Ayyar 29 Mad 303.

473.—Award in excess of terms of submission —Civil Procedure Code, 1877, ss. 525, 526-Agreement as to management of devasam.

Arbitration-*Contd.*

9 Private Arbitration—*Contd.*

An award made under s. 525, which is partly within, and partly exceeds, the terms of the submission to arbitration, cannot be enforced by summary procedure under s. 526 as to such portion as does not exceed those terms. To refer to arbitration questions arising on the construction of the awards and questions left undecided by it is a matter beyond the scope of an agreement to submit to a scheme for the further management of a devasam as regards conduct of suits, granting of demises, custody of property, collection of rents, appointment and removal of servants, and defrayment of current expenditure. **Mana Vikrama, Maharaja of Calicut. v Mallichery Kristnan Nambudri. 3 Mad 68.**

Notes:—Con: 22 Mad 299; 7 M L J 10. Fol: 27 All 526=2 A L J 416=(1905) W N 86. Over: 27 Mad 255 F B; 14 M L J 356. Ref; 2 C L J 80; 7 Bom 316; 341 F B.

474.—The second schedule r. 14 (1882 Act XIV Code of Civil Procedure)—Ss. 520, 521, 526)–Private arbitration—Award-Objection–Court should either file or reject it.

If a ground of objection such as is mentioned in section 520 of the Code of Civil Procedure is shown against the award passed upon a 'private arbitration' the only course open to Court under section 526 of the Code is to reject the application and to file the award. The Court has no power to amend a private award or remit it for reconsideration, but only possesses the power to file and enforce it or reject it.

In this case the arbitrator placed restrictions upon the full enjoyment of some portions of the property which he alloted to two of the parties: *held* that the arbitrator had determined matters which were outside the submission which he was not justified in doing, and the application for the filing of the award was not rejected. (10 Bom H C R 391=3 All 541=3 Mad 68=6 Bom 663 follo)

Mustafa Khan v Phulja Bibi. 2 A L J 416=1905 A W N 86=27 All 526.

Notes.—Diss: 30 All 151=(1908) W N 54. Not Fol: 5 A L J 160.

475.—Reference and award—Construction—Validity of award—Abstract filed with award—Setting aside award.

Arbitration-*Contd.*

9 Private Arbitration—*Contd.*

One B., a contractor, sued the Municipal Committee of Lahore for Rs 43,201 for work done by him on a certain public building, and in his plaint admitted that he had been paid a sum of Rs. 56,810.

The matter in dispute had previously been referred to private arbitration, the parties agreeing that "arbitration be resorted to for a settlement "of the dispute so far as it relates to measure-"ments of work done and to the rates to be paid "for the same, where such rates have not been "agreed upon between the Committee and the con-"tractor." The two arbitrators appointed subsequently delivered their award, which was to the effect that "after having duly weighed and con-"sidered, &c., &c, they award and adjudge that "the Municipal Committee *do pay* to B., the con-"tractor, the sum of Rs 58,876 *as the total value "of the work done.*" With this award the arbitrators gave in a statement, headed "Abstract of Cost" of the building in question. This abstract appeared to be the foundation of the award, and represented the results of the arbitrators' inquiries.

The District Judge held that the said award was invalid because (a) it directed a specified sum to be paid by defendant to plaintiff, and (b) the arbitrators had omitted to allow for certain portions of the work.

The District Judge thereupon proceeded himself to adjudicate in the matter, and gave plaintiff a decree for Rs. 13,779 with costs in proportion and interest on the amount decreed. Both parties appealed to the Chief Court, and on behalf of plaintiff it was contended that the award was also invalid because his arbitrator had absented himself from the proceedings and made the work over to his son. It was further urged that if the award was to be maintained it must be interpreted strictly, and that under its literal terms plaintiff was entitled to receive the full sum therein awarded to him, viz, Rs. 58,876.

Held, (i) that according to the terms of the agreement to refer, the scope of the arbitration was limited to an inquiry as to (a) the quantities of the work done by the plaintiff, and (b) the rates where none were provided for by the original contract; and that though in certain parti-

Arbitration-*Contd.*

9 Private Arbitration—*Contd*

culars the arbitrators had exceeded their authority, it was possible to separate from their finding and award that which was in excess of their authority;

(ii) that it had not been proved that plaintiff's arbitrator had absented himself from the proceedings or that his son had acted in the matter otherwise than in a purely ministerial capacity;

(iii) that the abstract given with the award was the basis of the award, and must be read with it;

(iv) that the mistake made by the arbitrators in awarding a specified sum *to be paid* by the defendant did not vitiate the award;

(v) that the meaning of the award was clear that after due inquiry the arbitrators were of opinion that sum of Rs. 58,876 represented the total value of the work done by the plaintiff for defendant, and that the meaning of the award being clear, the literal wording thereof was not to be interpreted with too great strictness;

(vi) that in order to make the award invalid on account of the alleged omissions to make allowance for certain work done by the plaintiff it would be necessary to find that the arbitrators had wilfully or negligently ommitted to make the requisite measurements, &c, and include them in their award, and that there was no evidence of any such wilful or negligent omission.

Where the parties to a dispute have deliberately referred it to arbitration and bound themselves to abide by the decision of the arbitrators the award of the arbitrators should not be set aside lightly or for a merely formal defect. **Municipal Committee of Lahore v Buta. 65 P R 1899.**

476—Award, dealing with—Matters referred piece by piece—Civil Procedure Code, 1859,s 327.

Where an arbitration bond provides that the matters in dispute referred to the arbitrators may be taken up and dealt with *seriatim*, and the award delivered bit by bit (khundkhund), it is not necessary, under s 327 of Act VIII of 1859, that all the matters referred should have been decided before the first portion of the award, dealing with some only of the subjects in dispute, can be filed. **Shoshimukhi Dabia v Nobin Chunder Roy. 4 C L R 92.**

477—Private award, enforcement of—Procedure—Civil Procedure Code, 1859,s 327.

When a private award between parties is filed in a Court, the prescribed course is for the Court to give judgment upon it and pass a decree; not to order execution before such decree has been passed. **Saheb Ram Jha v Kasheenath Jha 21 W R 295**

Notes:—Ref: 2 All 471.

478.—Validity of—Private reference—Some of the plaintiff's parties—Stamp, want of, objection in second appeal.

An award on a private reference, made by some of the plaintiffs and the defendants, is binding on the rights of the parties to it. The award is not invalid on the ground that all the plaintiffs were not parties to it.

An objection as to want of stamp cannot be taken for the first time in second appeal.

Jadu Nath Chowdhury V Kailas Chunder Bhattacharjee. 10 C L J 41=2 Ind Cas 414=37 Cal 63=14 C W N 75.

479.—Civil Procedure Code S. 525—Secondary evidence of award.

Section 525 of the Code of Civil Procedure says the award shall be filed. There is no provision enabling a Court to file a copy of the award or to take secondary evidence of the contents of the award when that award has been lost. A suit for a copy of such award being filed under s. 525 cannot therefore be maintained. **Gopi Reddi v Mahanandi Reddi. 12 Mad 331.**

480—Award not deciding chief subject of dispute—Order setting aside filing of award.

Amongst other matters, the arbitrators were asked to make a division of certain fields, to which the parties were equally entitled. The arbitrators decided the other matters, but, as regards the fields, said that it was inconvenient to do so in consequence of the rains, and ordered the parties "to receive the profits half and half and to pay the as-

Arbitration-*Contd.*

9 Private Arbitration—*Contd.*

sessment half and half." *Held* that the award left undetermined one of the principal subjects of dispute; and as the Court had no power to remit the award to the arbitrators, the applicant was entitled to a judgment setting aside the order for filing the award. **Dandekar v Dandekars 6 Bom 663.**

Notes.—*Fol:* 9 Cal 575; 11 Cal 166; 8 All 340; 16 All 231; 28 Bom 287; 27 All 526 = 2 A L J 416 = (1905) W N 86. *Ref:* 16 Cal 482; 21 Cal 213 F B, 7 Bom 316 341; 9 Bom 82; 17 Bom 674; 20 Bom 208; 596; 17 All 21 F B; 6 Bom L R 15

481.—Civil Procedure Code s. 525—Alternative suit on a private award—Withdrawing of the claim on the award.

Plaintiff lent money on promissory notes to defendants Nos. 1 and 2. They with third defendant were partners & the money was advanced for their work Disputes having arisen, the disputed matters were referred to arbitrators who made an award. Plaintiff applied to the Court under section 525 of the Civil Procedure Code. Defendant No. 1 objected & the Judge referred the plaintiff to a regular suit. Plaintiff then instituted a suit praying in the alternative either for a decree on the award or in the promissory notes. At the hearing the Judge was of opinion that the award could not be held a valid decision for enforcement: & hence plaintiff withdrew his claim on the award to get a decree against the three defendants on the promissory notes. From this decision the third defendant alone appealed on the ground that the withdrawal of the prayer for a decree on the award altered the nature of the suit, & the plaintiff must either fail or succeed on the award. The District Judge held this view, & gave the plaintiff a decree in terms of the award, no evidence being produced as to the misconduct of the arbitrators.

Held, the Procedure of the District Judge was perfectly regular & his decision was correct.

Narasayya v Ramabadra 15 Mad 474

482.—Private award—Plea in bar—Case in which a private award was successfully pleaded in answer to a suit in which the plaintiffs sought to recover property forming part of the subject matter of the award in defendants' favor.

Arbitration-*Contd.*

9 Private Arbitration—*Concld.*

56 P R 1886, distinguished from the present case, on the ground that though the award pleaded in both cases dealt with a matter beyond the jurisdiction of the Civil Court, the award in the present case dealt separately with such matter, the decision with regard to such matter being therefore separable from the other portions of the award covering the matters in dispute in the present case. **Alam Khan v Muhammad Rawaz Khan. 32 P R 1888.**

483.—Award—Civil Procedure Code, Sec. 525—Application for filing the award registered as a suit—Objections taken by the defendant—Court precluded from filing award.

An application for filing an award being registered as a suit, the defendant raised objections and the following issues were framed:—

(1) Whether a certain arbitrator was nominated or accepted as one of the defendants ?

(2) Whether there was any and what illegality apparent on the face of the award ?

(3) Whether the proceedings conducted by the arbitrator were illegal ?

Held, that the objections taken by the defendant, which were the subject of the above issues, precluded the Court from filing the award.

Venkatesh Khando v Chanapgavda. P. J. 1892, 362, 17 Bom 674

Notes.—Ref: 20 Bom 596; 17 All 21 F B; 6 Bom L R 15. Dist: 28 Bom 287. Ex: 29 Bom 621 F B.

10 GENERAL CASES.

(1) Power of Court to grant instalments

484.—S. 15-B—Court—Instalments in payment, power to grant—Decree in terms of award—Award in arbitration out of Court.

Where a decree is once passed in terms of an award arrived at on reference without the intervention of the Court, the Court has no power to grant instalments under S. 15-B of the Dekkhan Agriculturists' Relief Act, 1879.

Ref: 8 Bom 20; 21 Bom 63; 29 I A 58 Com on.

Govindrao Nurhar Pingle v Ambalal Mohanlal. 13 Bom L R 352.

Arbitration-*Contd.*

10 General Cases-*Contd.*

(2) Application of 2nd Schedule r. 1 to arbitrators pending suit.

485.—The Second Schedule r. 1 (1882—Ss. 506, 522)—Suit—Award out of Court—Filing award.

Ss. 506 to 522 apply to arbitrations pending a suit. **Protab Chunder v Toolsey Dass. 29 Cal 793.**

(3) Appeal from decree based on a private arbitration award.

486—Ss. 522, 525, 526, Civ Pro. Code, 1882—Arbitration award, private—Decree—Appeal.

When a Court has orderd a private arbitration award to be filed under s. 526, Civ. Pro. Code, and has drawn up a decree in accordance with the award, no appeal lies against such decree except in so far as the decree may be in excess of, not in accordance with the award. *Quære.*—Whether this rule is not limited to cases of misconduct and has any application when the cause shown against the filing of the award has denied the submission to arbitration or the genuineness of the award. (18 Mad 423, Ref:). S 526 should be read with s 522, the provisions of which are, by implication made applicable to cases under the former section ; the Court must proceed to give the judgment according to the award and upon the judgment so given a decree shall follow, from which decree, no appeal lies, except in so far as the decree is in excess of, or not in accordance with, the award. The decision of the Full Bench in 25 Cal. 757, in so far as affirmed the decision in 25 Cal 141, has been overruled by the Privy Council in the case of 29 I. A. 51. *Semble.*—An order of refusal by a Court of first instance to file an award under s. 526, Civ. Pro. Code, is a decree, against which an appeal lies. (27 Mad 255. 2 C L J 80 Fol 26 All 205 Dist.). The bar as to appeal provided by s. 522, Civ. Pro. Code is applicable only when a decree has been made in accordance with the award by the Court of first instance and not when a similar decree has been made by a Court of appeal in reversal of the order of the first Court setting aside the award.

Chintamoni Aditya v Haladhar Maiti 2 C L J 153=10 C W N 601.

Notes—Appr. 33 Cal 899, 33 Cal 757=10 C. W. N. 609=3 C. L. J 450 ; Ref: U. B R. 1906, 4th Qr., Civ. Procode, 52, 1 P R. 1908=58 P. W. R. 1907, F. B., U. B. R. 1905, C. P. C. 40.

See also cases under:-**Appeal arbitration.**

487—Sch. 11 r. 19 (1882 Secs 522, 525, 526,) Decree—Appeal—Private award.

When an application has been made under section 525, Civil Procedure Code, for the filing of an award made on submission to arbitration without the intervention of a Court of justice, and the Court, after deciding the objections raised against the award, ordered the same to be filed under section 526, Civil Procedure Code, and drew up a decree in these terms "It is ordered that the arbitration award in this case be filed in Court : Dissentente. "

Held, by the majority of the Full Bench (Maclean C. J. and Sale J *dissentiente*): That the decree is substantially one as contemplated by sec. 526 read with section 522, Civil Procedure Code, and is to be interpreted as incorporating the terms of the award, and no appeal lies against such decree except in so far as the decree may be in excess of or not in accordance with the award.

Held by the majority of the Full Bench - (Sale J. *dissentiente*) that when a private arbitration award has been ordered to be filed in Court under section 526, Civil Procedure Code, the party in whose favour it is, must proceed to obtain a judgment and consequent decree under section 522, Civil Procedure Code, and if that decree is according to the award, then there is no appeal from it.

Per Maclean C. J, and Ghose J.-An order under section 526, Civil Procedure Code, merely directing an award to be filed in Court is not tantamount to a decree in accordance with the award within the meaning of section 522, Civil Procedure Code, and is therefore, appealable.

Per Sale J. (agreeing with Maclean C J.)—An appeal does lie from an order passed under section 526 Civil Procedure Code, directing the filing of a private arbitration award in Court.

Per Sale J.—The words " such award shall then take effect as an award made under the provisions of this chapter " in section 526 Civil Procedure Code, refer to the *effect* which follows from section 522, Civil Procedure Code, namely, that it is to be enforced in manner provided in the Code

Arbitration—*Contd.*

10 General Cases—*Contd.*

for the execution of decree. They do not import into section 522, Civil Procedure Code, the bar of appeal prescribed by section 522, Civil Procedure Code. No decree expressly incorporating the terms of the award is required to be drawn up pursuant to the order made under section 526 Civil Procedure Code, to file the award, nor is the clause ristricting the right of appeal in the case of a decree made under section 522 Civil Procedure Code, applicable to such an order.

Per Curiam:-An order passed under section 526 of the Code of Civil Procedure, refusing to file an award, is a decree against which an appeal lies.

Quare: When the Lower Appellate Court has reversed by way of appeal a non-appealable decree of the Court of first instance, whether the High Court should interfere by way of appeal or revision.

Janokey Nath Guha Roy v Braja Lal Guha Roy 3 C L J 450=10 C W N 609=33 Cal 757.

Notes—Diss: 58 P W R 1907=1 P R 1908: Fol: 126 P R 1907=88 P W R 1907=50 P L R 1908, 7 C L J 486; Cons 11 C W N 220; Ref: 1 S L R 86, 149; 100 P R 1907=17 P L R 1908; 4 L B R 130; Diss: 4 L B R 249=14 Bur, L R 129.

(4) Appeal from order refusing to file private award.

488—S. 525, Civ. Pro. Code, 1882—Award—Submission without the intervention of Court—Order refusing to file—No appeal.—

No appeal lies from an order refusing to file, under s. 525 of the Code, an award passed upon a submission made without the intervention of the Court. (6 All 186, 26 All 205=A W N 1903, 234, Fol: 29 Cal 167, Expl: 18 Cal 414, Ref:)

Basant Lal v. Kunji Lal, 2 A L J 450=A W N 1905, 165=28 All 21.

Notes:—Fol: 4 L B R 130; Ref: 9 O C 205, 1 S L R 149, 7 A L J 425; Dist: 126 P R 1907=88 P W R 1907=50 P L R 1908.

489—Civ. Pro Code, 1882, s. 526 — Private award—Order refusing to file such award—Appealability.—

An order under s. 526 of the Code, refusing to file an award of arbitrators made out of Court, is appealable as a decree. (26 All 205 Diss: 27 Mad 255; 29 Mad 303; 25 Cal 757; 33 Cal 757; 84 P R 1901, F B=112 P L R 1901 Fol: 25 P R 1902, P C. Ref:) **Sheo Sahai Mahton v Kirtarath Bhagat. 7 C L J 486.**

490—Civ. Pro. Code, 1882, ss. 522 and 526—Private arbitration — Award made a rule of Court—Appeal.—

When an award made in a private arbitration has been made a rule of Court and a decree passed thereon, no appeal will lie except so far as the decree is in excess of or not in accordance with the award. In this respect there is no difference between a decree based upon a private award and a decree based upon an award made through the intervention of the Court. (27 All 526, Dist:) **Bahadur Singh v. Negi Puran Singh, A W N 1908, 54=5 A L J 160=30 All 151.**

(5) Misconduct of arbitrator.

491—Want of power of private arbitrator to procure attendance of witnesses—General rule—Exception:—

The general rule is, when parties choose to abide by the settlement of matters in dispute made by a private arbitrator, they in effect agree to accept all the limitations of the position of such a Judge, among which is the want of power to compel the attendance of witnesses. The following is an exception to that general principle. Where the issue in the case was as to the validity of the award on account of the conduct of the arbitrator in not examining all the witnesses wanted, according to his undertaking to examine them, *held* that the award was not valid under the circumstances. **Ma Sat Kyu v Maung Tum Gyi, U B R 1897-1901, Vol. II 4.**

Notes:—Ref: U B R 1897-1901, Vol. II, 10.

(6) Power of Court to affirm only portions of award.

492—Private award, partly good and partly bad—Validity.—

In the case of a private award, it is open to the Court to affirm such of the portions of the award as are good and reject those that are bad, and it is not necessary that it should affirm the award in its entirety or reject it altogether which

Arbitration-*Contd.*

10 General Cases—*Contd.*

would be the case with an award under the Civ. Pro. Code. Miran Bakhsh v. Rahim Bakhsh, 18 P R 1892.

Notes—Ref: 84 P R 1907.

(7) Arbitrator not deciding a particular question—Arbitrator giving rules—Witnesses—Arbitrators not signing at the same time—No provision for appointment of umpire-Death of one party.

492A—Agreement to refer—Addition of name—Conduct of parties—Arbitrator not deciding a particular question—'Certum est reddi'—Arbitrator giving rules for calculating but not stating result—Ministerial act—Reception of written statement—Witness, tendering of—Arbitrators not signing at the same time—No provision for appointment of umpire—Death of one party—Private arbitration—Nunc pro tunc.

Where the agreement between the parties was that the matter in difference between them should be referred to the arbitration of one person only, and one of the parties inserted in the instrument the name of a second gentleman, the other party, if, without any objection he submitted to the arbitration of both the gentlemen, cannot repudiate the position he deliberately took before the arbitrators (*a*).

In order to invalidate an award for not deciding a particular question, it must be established that the point was specifically stated and brought to the notice of the arbitrators.

If the arbitrator has given rules for calculating the amount of money to be paid, without stating the result of such calculation, the award is sufficiently certain, on the principle that that is sufficiently certain which can be made certain.

Arbitrators have power to do singly acts of a ministerial nature. A mere reception of a written statement by one of the arbitrators is not a judicial act.

In order to make out a case entitling a party to impeach the award, the witness must be distinctly tendered to the arbitrators.

Where, on a reference to arbitration, the case was regularly heard by all arbitrators sitting together, and an award was drawn up and signed by them, the fact that the arbitrators did not sign the award and the same time did not invalidate the award (*b*).

A submission to arbitration is not bad, simply because no provision has been made therein for the appointment of an umpire in the event of difference of opinion between the arbitrators.

The principle of *nunc pro tunc* is applicable to proceedings before arbitrators. There is no difference in principle between the cases where the reference to arbitration was filed in Court and where the whole of the proceedings before the arbitrators was upon a private submission.

If the intention of the parties to arbitration was that not merely themselves but their representatives in interest should be bound by the decision of the arbitrators, the reference does not stand revoked merely by the death of one of the parties. If the hearing was not completed, the representatives of the deceased party should be brought on the record and be made parties to the submission. 10 M I A 413 (426) R (*b*) 4 El. & Bl. 44; 12 W R 397 *not* F 8 B L R 128 F. Manindra v Mahananda. 15 C L J 360.

Arbitration.

See:—Onus of proof.

Arbitration award.

See (1) Appeal arbitration
(2) Dekkhan Agriculturists Relief Act.

Arbitration award on one point only.

See:—Arbitration.

Arbitration by Court.

See:—Appeal arbitration.

Arbitration order giving leave to sue under S. 18 of Act XX of 1863.

See (1) Religious Endowments Act.
(2) Act XX of 1863.

Arbitration—Private arbitration.

See:—Relinquishment of or omission to sue for portion of claim.

Arbitration, Reference and award

See—Arbitration.

Arbitration Rules, construction of.

See (1) Bengal chamber of Commerce.
(2) Arbitration Act.

Arbitration under Special Acts and Regulations.

See:—Arbitration.

Arbitration under the Civil Procedure Code.

See:—Arbitration.

Arbitration without intervention of Court.

See:—Arbitration—Private arbitration.

Arbitration—Award of arbitrators when requires registration—Registration Act, 1908, ss 17, 49. **71 P R 1906=111 P L R 1907.**

Arbitration—Father's power as managing member to refer a partition question to—Award—Whether sons bound—Hindu Law—Partition. **6 Ind Cas 123.**

Arbitration—Mamomedan Law — Inheritance. **A W N 1883, 115.**

Arbitration—Execution of decree. **A W N 1894, 38.**

Arbitration—Vendor and purchaser. **A W N 1890, 78.**

Arbitration—Succession Act, 1865, ss. 261, 234. **12 P R 1894.**

Arbitration — Decree in accordance with award—Reference to arbitration by guardian *ad litem* of minor without Court's sanction, validity of—Civ. Pro. Code, 1908, O. XXXIII, r. 4; O. XXXII, r. 7, sch. II, r. 1; O. XLI, r. 23. **4 P R 1907=20 P W R 1907.**

Arbitration—Costs—Taxation of costs. **61 P R 1896.**

Arbitration—Reference to — Invalidity of award—Second reference without consent—Validity of second award—Foreign Court—Judgment **2 M L T 269=30 Mad 292.**

Arbitration—*Concld.*

Arbitration—Reference by Court to—Munsarim's power to fix date for hearing—Effect of sch. 2, cl. 8, Civil Pro. Code, 1908—Revision.— **13 O C 341=8 Ind Cas 876.**

Arbitration—Mahomedan Law—Dower. **A W N 1885, 19.**

Arbitration—Dispute about succession to trusteeship cannot be referred to—Award—Application to file award—Jurisdiction of Court—What matters can be referred to — Mahomedan Law—Wakf. **6 Ind Cas 219=7 A L J 761.**

Arbitration—Termination of pleader's authority—Legal practitioners—Pleader — Authority to bind client. **A W N 1888, 199.**

See also
(1) Pleader & Client.
(2) Legal practitioners.
(3) Attorney & client.
(4) Principal and agent.

Arbitration Act (Act IX of 1899)

1—Applicability of, to pending suits, Per Maclean, C. J.

The Arbitration Act does not apply to pending suits. **Tincowry Dey v Fakirchand Dey 30 Cal 218=7 C W N 180**

2—S. 2 - Cause of action arising where performance is to be completed——Completion of sale of unascertained goods.

The defendant in this case entered into a contract with the plaintiff's agent at M for supply of goods which were then unascertained and agreed either to deliver the goods to the plaintiff's agent at M to be forwarded to K at the defendant's risk, or to forward the goods himself direct to K. The agreement also provided that in both the cases goods had to be tested and accepted or rejected by the plaintiff's at K.

Held, that (1) As the contract was for sale of unascertained goods, the property in the goods could not pass to the purchasers till they were ascertained and appropriated by the agent at M (S. 83, Contract Act).

(2) Delivery to the plaintiff's representatives at M would amount to delivery to them *qua* agents

Arbitration Act-*Contd.*

of the sellers for goods being forwarded at the risk of the sellers to the purchasers at K, and not delivery under the contract.

(3) Therefore, the performance of the contract could be only completed at K, and the Courts at K, have jurisdiction to entertain a suit based on the contract, and also to entertain an application to file the award based on the submission contained in the contract 3 S L R 156, Appr: 4 Cal 801 ; 27 Mad 355 ; 32 Cal 816, Ref.

Louis Dreyfus & Co v Girdharidas Rughnathdas, 4 S L R 20=7 Ind Cas 593

3—Ss. 2,8—Jurisdiction of Karachi Courts to appoint arbitrator.

The Karachi Courts have jurisdiction to appoint an arbitrator under this Act, where differences have arisen between the parties to a contract for purchase of goods, entered into on terms known as the K P or "Karachi Pass Terms." (3 S L R 56, Ref:) **Sanday, Patrick & Co v Mayamal Bishendas. 4 S L R 10=7 Ind Cas 588.**

4—Ss. 2 and 19—Order under s. 19 not decree under s. 2, C. P. C., 1882—Revision—Powers of Chief Court under s. 70 (1) (b) Punjab Courts Act 1884—"Could be instituted in a Presidency Town," in s. 2, Arbitration Act, construction of.

An order passed on an application under s. 19, Act IX of 1899, for stay of proceedings or for refusing to stay proceedings, is not a decree within the terms of s. 2, C. P. C. 1882. So the Chief Court has no power to have the order revised, under s.70 (1) (b), Punjab Courts Act 1884. (76 P R 1908, 70 P R 1904, Ref ; 18 Cal 501, not Fol). The words "could be brought" in s 2, Act, IX of 1899 show that the Act is not limited to suits which cannot be instituted elsewhere than in a Presidency town, but applies to suits, which cannot be instituted, at the plaintiff's option, in a Presidency Town or elsewhere.

Clements and Co v Rattan Singh. 144 P R 1908.

5—Ss. 4 and 12—Submission to arbitration, form of.

Under this Act no special form of submission is required ; only there must be an agreement to refer and that agreement should be reduced in writing. **Seth Utoomal Vasoomal v Seth Haridas Asanand 4 S L R 26=7 Ind Cas 595.**

Arbitration Act-*Contd.*

6—S. 4—What constitutes written submission—Award made ex-parte, if valid.

To constitute a submission within the meaning of S 4 of the Indian Arbitration Act, if not necessary that there must be an agreement on a single piece of paper signed by both parties. It is sufficient if the bought and sold notes containing a term to refer to arbitration, are signed by both parties or their authorised agents But a mere stipulation inserted by one party and not formally agreed to by the other, does not constitute such a submission.

Although the Court will not decree specific performance of an agreement to arbitrate, yet it will enforce an award when validly made. *Held*, on the facts of this case, that the award, though made *ex-parte*, was valid. (60 L J (Q B) 610, Exp ; 25 Q B D 545 Ref;) **Ram Narain Ganga Bissin v Liladhur Lowjee. 10 C W N 814=33 Cal 1237.**

7—Arbitration Act (IX of 1899), S. 4—Oral submission—Necessity of submission in writing—Award on oral submission—Validity—Civil Procedure Code (Act XIV of 1882), S. 375—Adjustment of suit—Award on oral submission not an adjustment.

The parties to an administration suit consented (at the hearing), to its being referred to the Commissioner to take the usual accounts and to determine their respective shares. Accounts and objections were filed before the Assistant Commissioner, and the parties appeared before him, when it was orally agreed to save the costs of a lengthly enquiry, that the Assistant Commissioner should deal summarily with all matters in dispute and draft terms by which the parties were to be finally bound, and the Assistant Commissioner personally explained to defendants 1 and 6 that they would be bound by his decision even if he decided to give them one rupee. To this they agreed. The Assistant Commissioner in due course arrived at a decision but defendants 1 and 6 considered that it awarded them an insufficient amount and declined to be bound by

Arbitration Act-*Contd.*

it. Upon application being made by plaintiff that an adjustment of the suit might be recorded under S 375 of the Suit Civil Procedure Code, on basis of the Assistant Commissioner's decision.

Held that there has been no adjustment of the suit. There had been no written submission to arbitration as provided by S. 4 of the Indian Arbitration Act and consequently, there had been no legal and valid reference to arbitration and the Assistant Commissioner's award (for it really was an award and nothing else) had no legal foundation and could have no legal consequences. As there had been no reference to arbitration and no award, there had been no adjustment. (20 Bom 304 ; 20 Bom 76 Dist.)

Rukhanbai v Adamji Shaik Rajbhai
10 Bom L R 366=33 Bom 69=
1 Ind Cas 622

8—Ss. 4 and 19—Application to file written statement, if step in proceedings under S. 19.

Taking out a summons, for further time, to deliver a written statement, is taking a step in the proceedings, within the meaning of S. 19 of the Arbitration Act. (L R 1896 Ap Cas 1 (1895) fol.

S. 19 of the Arbitration Act examined and explained. (1 Q B 850 Ref:) **Sarat Kumar Roy v The Corporation of Calcutta.**
11 C W N 306=34 Cal 443

9—Ss. 4 (b), 19—Submission—Signature unnecessary—Specific performance—Suit to compel signature to reference—Whether lies—Proper remedy—Stay of proceedings under s. 19—C P. C. 1908, sch 11—Not applicable to Karachi.

In Karachi where the arbitration Act is in force, the second schedule of C. P C. 1908 does not apply. (3 S L R 163, Ref). A submission must be in writing (s 4-b, Act IX of 1899), but need not be signed. If there is a valid submission, the proper remedy is to apply under s.19 of the Arbitration Act for stay of proceedings No suit lies under the Specific Relief Act s 21, as amended by the Arbitration Act to compel a party to sign the reference. **Narsidas Nanji v Dose Khan.**
4 S L R 149.

Arbitration Act-*Contd.*

10-11—Ss. 5, 10–Leave to revoke submission to arbitration—Motion to be in Court—Practice –Stating a case by arbitrators to Court for opinion—Questions as to admissibility of evidence should be decided in their very inception.

The proper procedure to be followed in moving for leave to revoke a submission to arbitration under S. 5 of the Indian Arbitration Act 1899, should be by motion in Court.

Where there are more agreements than one between the parties to refer their differences to arbitration, and the evidence recorded by the arbitrators in one of them is by consent to be treated as evidence in all the submissions, but there is no order consolidating the reference, and there is no consent any where that the different references should be treated as one, it is not competent to any party to seek to revoke the submission to arbitration, in all the different cases, by one application alone.

In England, the Court can compel an arbitrator to state a case. The Courts in India have no such power. The Indian Arbitration Act (S 10) leaves it to the discretion of the arbitrators to state a special case or not as they choose; and the Court has no power to enforce its rulings or directions upon the arbitrators if they do not choose to follow the ruling or obey the directions.

When a party to a submission to arbitration feels aggrieved by the arbitrators deciding improperly or erroneously to admit evidence which they should have rejected, his proper course is to apply to the Court for leave to revoke the submission. On such application the Court will accord or refuse such leave according to the circumstances of each particular case that comes before it. The power of the Court is discretionary and ought to be cautiously and sparingly exercised, but such power *should* be exercised by the Court in favour of the applicant if it appears to the Court that the main object of all submissions to arbitration which is to obtain "speedy end of the strife" is not likely to be subjected to "multiplied expenses" and "interminable delays by the conduct of the arbitrators. Leave to revoke should be accorded to the applicant in all cases where he can establish that there will be failure of justice if the reference is allowed to proceed."

The arbitrators ought to form a clear and definite opinion as to what questions are referred to their arbitrament and decide what is within the

Arbitration Act -*Contd.*

scope of the reference and what is outside it. If this once definitely settled, there would be no difficulty in their deciding the question of admissibility of any evidence that may be tendered by one or other of the parties. (2 Q B D 915; (1894); 23 Q B D 2 (1889); I Q B D 102 Ref. **Atlas Insurance Co. & Ahmedbhoy Hubibbhoy. 10 Bom L R 351**

12—Ss. 5 and 8—Death of a party to the submission—Effect of:

In this case the plaintiff applied for appointment of an arbitrator under S 8 of the Act, to settle differences arising out of an indent. The indent was signed by a representative of the defendant's firm and contained a clause providing for submission of future difference to an arbitrator to be appointed by the parties The defendants contended that one of their partners died since the signing of the indent and that consequently the submission clause was rendered ineffective.

Held, that S.5 of Act IX of 1899 has laid down the general rule that a reference was irrevocable unless with the permission of the Court and that the Act contains no provision to justify treating the death of a party as an exception to this rule 1 Q B D 748, 757, 758 L R 6 Cal 212; 12 Q B D 310; 20 Q B D 177, 180; 25 Q B D 545; 12 M I A 112, 130, 131, Ref: **Sanday Patrick & Co Ramratton. 4 S L R 14=7 Ind Cas 590**

13—Ss 8, 9—Failure to follow procedure under S 8—Jurisdiction of Court to appoint arbitrator —Statute conferring jurisdiction—Interpretation.

Before the Court can appoint a single arbitrator, it must be satisfied that the provisions of s. 8 have been complied with, and it cannot accept as equivalent to such compliance, a procedure appropriate to a wholly different set of circumstances and to the attainment of a result wholly different from that to which the application before it is directed. Where the provisions of S. 8 have not been followed, the Court has no jurisdiction to appoint an arbitrator.

Statutory provisions which confer jurisdiction must be strictly construed. **Sandy Patrick & Co. v Shivaldas Lokaram. 3 S L R 221**

14—S. 5—Clause providing for arbitrator's

Arbitration Act -*Contd.*

appointment within six days—Appointment before six days—"Days" meaning of—Fractions of days.

Where a clause, providing for a reference to arbitration of future differences under a contract stated that, if either party shall fail to nominate an arbitrator within six days after being required to do so, the other party shall be at liberty to appoint both arbitrators and where the reference was signed at the earliest on the sixth day—five clear days and broken portions of two other days.

Held, that the time limited by the condition precedent had not elapsed, and that the plaintiffs had no power to make the appointment "within six days after an act" means so many clear days after it. A day, is generally speaking, a period from midnight to midnight and the law admits not of fractions in time but in case of necessity.

Louis Dreyfus & Co v Seth Meharchand Fatechand. 3 S L R 237= 6 Ind Cas 886.

15—C.P.C.S.104.Sch.II r.11—Indian Arbitration Act (IX of 1899), s 10—Arbitrators—Reference to arbitration—Difference in opinion of arbitrators on a question of—Statement of a special case for the opinion of the Court—Appeal from the Court's order

The parties to a suit agreed to refer their disputes relating to the properties in suit to the arbitration of two persons and a consent Judge's order was obtained. They further agreed to refer to the same arbitrators their disputes with regard to properties which were not the subject-matter of the suit. The agreements provided that, in case of disagreement between the arbitrators which prevented them from making an award, the matter in difference was to be referred to an umpire who should make the award. The two arbitrators differed on a question of law arising in the arbitration. There was no reference to an umpire. But the arbitrators each expressed his opinion on the question and referred it for opinion to the High Court in the from of a special case under the C P C 1908, Sch 11. r.11 and the Indian Arbitration Act, s. 10. It was decided by the Chamber Judge. An appeal was preferred against his decision.

Arbitration Act-*Contd.*

Held that no appeal lay, since the special case was in no sense an award. There was no award which could be adopted by the Court by the mere expression of its opinion; but there was simply a statement of a question of law for the opinion of the Court The case was not therefore, one which fell under r. 11 of the second schedule of the C. P.C. 1908: but it fell under S 10 of the Indian Arbitration Act in so far as related to the second agreement. **Purshotumdas Ramgopal v Ramgopal Harilal.**
8 Ind. Cas. 171=12 Bom L R 852.

16—C P C (1908) Sch 11 S 16—Refusal of arbitrator to sign award—Legality of award—Decree passed on such award—Appeal.

Held that no appeal lies from the decree of a Court passed in accordance with an award, in a case where five arbitrators were nominated and two of the arbitrators appointed by one party refused to sign it, but no misconduct was alleged against the umpire and the other two arbitrators who did sign it. **Kamta Prasad v. Jodha Singh, 7 A L J 890=7 Ind Cas 99.**

17—Arbitration Act (Act IX of 1899) ss. 11. 15—Award should be written and signed Omission by arbitrators to make a written award-effect of.

Under section 11 of Act IX of 1899 an award, by the arbitrators should be written and signed. The arbitrators are bound at the request of any party to file the award or a copy thereof in Court and such an award, unless it is set aside or remitted for reconsideration becomes enforceable as if it were a decree of Court. The writing and signing of an award is not a formality that may be dispensed with by the parties. It stands on the same footing as a decree of Court.

The plaintiffs and defendants made a reference of their disputes to arbitration. The arbitrators decided that plaintiff should receive Rs. 30,000 from defendants in monthly instalments of Rs 1,000 and should execute a release of all his interest in the subject of dispute. The necessary deeds were executed to give effect to this arrangement. The decision was declared by the arbitrators in plaintiff's presence. There was however no award in writing as the parties thought it was sufficient to actually carry out the award. The plaintiff sued to set aside the award. The defendants pleaded *inter alia* that, as there was a binding award, plaintiff's suit was not maintainable.

Held, that as there was no written award, plaintiff's claim was not barred. **Cotha Krishnaswami Chetty v. Thatha Seetharam Chetty. 7 M L T 355.= 5 Ind Cas 374.**

18—S 11 (2) & 15—Lower Burma Courts Act S 14—Civ Pro Code S 2—Award—Whether an order of Court necessary for filing it—Order dismissing application to set aside award-Whether decree.

Under the Arbitration Act no order of the Court is necessary for the filing of an award and an order dismissing an application to set aside the award is neither a suit nor an appeal and there is nothing in the Arbitration Act to show that it is to be treated as a suit.

The order therefore is not a decree within the meaning of the Civ Pro Code and appealable as such.

The provisions of the Arbitration Act clearly indicate that an award upon a submission which contain no provision to the contrary is final unless the Court in which it has been filed remits it or sets it aside. (33 Cal 757 Dist). **Khatoun Bee v Abdool Rahman. 14 Bur L R 129= 4 L B R 249.**

19—Arbitration Act S 13—Civil Procedure Code S 520—Arbitration—Remitting award—Power of Court.

On an application to file an award made by arbitrators on a private reference. the Court has power under s. 13 of the Arbitration Act to remit the award for reconsideration for reasons not falling within s 520, C P C. Where arbitrators tacitly assumed that one party was in possession of certain documents and directed that the other party should pay a sum on receipt of the deeds: *Held*, on application to file the award that it should be remitted to the arbitrators for reconsideration. **Protap Chunder Dey v Toolsey Das, 29 Cal 793.**

20—Arbitration Act (IX of 1899) s 14—Bengal Chamber of Commerce, arbitration by the —Rules of the—Indian Stamp Act (II of 1899)

Arbitration Act-*Contd.*

Ss 5,6 and 35 Sch I Arts 5 and 43—Submission required to be proved and stamped—Award made out of time—Enlargement of time after expiry of original time—Concealment of names and appointment of arbitrators—Notification of time and place of hearing—Evidence refusal to hear, when misconduct—Award against a firm—Jurisdiction of Court to set aside award if may be ousted.

Contract notes which contain a provision for the submission of disputes to arbitration ought each to bear eight annas stamp under Art 5 Sch 1 of the Indian Stamp Act 1899 as an agreement not otherwise provided for in the schedule

Although the Indian Arbitration Act 1899 has made the procedure for the enforcement of an award simpler than the old practice of instituting suit for the purpose, it is still necessary to prove that the arbitrators acted under a valid submission before an award can be made a decree of Court under the Act

The Rules for the guidance of the arbitration tribunal of the Bengal Chamber of Commerce were construed to contemplate the parties being notified of the names and the fact of the appointment of the arbitrators.

Where the arbitrators appointed by the Bengal Chamber of Commerce under its rules did not appoint a time and place for the hearing of the reference.

Held, that the arbitrators failed in their duty in not doing so.

Where the arbitrators should or should not hear evidence and the parties by counsel or otherwise must depend on the particular circumstances of every case the arbitrators exercising in a judicial manner their discretion in the matter.

The refusal to hear evidence in a case where the arbitrators cannot decide a matter in dispute without hearing evidence would amount to a misconduct on the part of the arbitrators. It is improper for the arbitrators not to hear evidence to ascertain as to who are the persons liable on a contract entered into in the name of a firm.

An award made against a firm without ascertaining as to who are the persons who constitute it, is on the face of it bad and no Court can make a decree in such circumstances upon the award against a firm.

Arbitration Act-*Contd.*

It is not competent for the parties by an agreement to oust the jurisdiction of the Court vested in it by S 14 of the Indian Arbitration Act 1899 to set aside an award if misconduct on the part of the arbitrators were shown or if it were shown that the award was improperly procured, when the parties desire that the award should be enforced under the provisions of the Act. 7 Bom and Cal 427. **Hurdwary Mull v Ahmed Musaji Selaji. 13 C W N 63=I Ind Cas 371**

21.—S 14—Arbitration—Agreement to refer impeached—Suit prior to award—Injunction granted when—Award—Effect——Award improperly obtained when—Proceedings to file award—Not suits but litigious proceedings—S 10, C P C, 1908—Rule inapplicable.—

Where the very agreement to refer matters to arbitration is impeached, an injunction may issue to stay the arbitration proceedings. But in a case where a suit covering the disputes submitted to arbitration has been commenced, prior to the award, in a Court of competent jurisdiction, an injunction will not as a rule issue (1 S L R 255; 129, Ref) In both cases the arbitrators proceed at their own risk. Their award may be nugatory and they may not recover their costs, as the award may prove valueless and not be taken up. Where an injunction had issued to restrain them from proceeding, their award, if they ignored the injunction, would be considered to be improperly procured, but where no injunction would issue to restrain them, the award cannot be said to be improperly procured on account of a pending suit. Proceedings to file an award, though not technically a suit (1 S L R 86, 29 I A 58, Ref,) and therefore not within s 10 C P C, are yet litigious proceedings, and are governed by the same principles of general law as are laid down for suits in s 10 C P C, 1908. (11 I A 41 Ref.). The pendency of a suit in a Court, which had neither jurisdiction to try the plaintiff's claim before the arbitrators nor power to grant the relief claimed before them, is no bar to the filing of an award for an amount far in excess of the pecuniary jurisdiction of such Court. (25 Mad 548, Dist.)

Macdonald & Co v G D Emden 4 S L R 187.

22.—S 15—C P C (Act V of 1908), O XXI

Arbitration Act-*Contd.*

22—Award—Enforceable as it were a decree—Stay of award pending decision of a suit between the same parties.

An award passed under the Indian Arbitration Act, 1899, can be enforced as if it were a decree of the Courts (S 15); but the stay of its execution cannot be ordered under O XXI r 29 of the C P C 1908. **T K Gajjar v Lallubhai Dharamchand 12 Bom L R 860=8 Ind Cas 179.**

23.—Cl 18 Sch II—Application for stay of suit—Whether can be under—In places where Arbitration Act applies. Where the Indian Arbitration Act is in force, an application for stay of suit filed in a Court must be made in accordance with the provisions of S 19 of that Act and the rules made thereunder, and not under cl 18 Sch. II C P C (1908). **Vishindas v Simpson 3 Sind L R 162=4 Ind Cas 1150.**

24-25—S. 19-Application to file written statement if step in proceedings under S 19.

Taking out a summons, for further time to deliver a written statement, is taking a step in the proceedings, within the meaning of s 19 of the Arbitration Act. (L R 1896 A P Cas 1 (1895) fol.)

S 19 of the Arbitration Act examined and explained. (1 Q B 850 Ref.) **Sarat Kumar Roy v The Corporation of Calcutta 11 C W N 306=34 Cal 443.**

26.—S 19—Arbitration—Stay of proceedings—Application for stay.

S 19, Arbitration Act, applies only where there has been a submission to Arbitration before the commencement of legal proceedings. (35 Cal 199 Fol). **Peruri Suryanaryan and Co v Gullapudi Chinna Narsingham 11 Bom L R 1060=34 Bom 372=4 Ind Cas 188.**

27.—S 19—Reference to arbitration—Right to have recourse to ordinary tribunals-Proceeding with the reference after suit filed—Award before disposal of suit—Effect.

To proceed with a reference, when notice had been received that a suit has been filed, is improper. The right of reference to arbitration does not exclude the right of recourse to the ordinary tribunals, and is, indeed, subject to it. Where one party has referred any matters in dispute to the decision of a law Court by filing a suit, the other party may apply for a stay of proceedings under S 19 of the Act, but failing such application or in the event of such application being made and refused, there is no alternative but to submit to the jurisdiction of the Court.

An award obtained by one of the parties during the pendency of a suit can have no operation inconsistent with the decree which would follow the judgment. **Messers Louis Dreyfus and Co v Seth Shivakram Harkarandas 1 S L R 255.**

28.—Jurisdiction of the High Court to stay proceedings on the Court of the Small Causes—Arbitration, reference to.

The legal proceedings referred to in s 19 of the Indian Arbitration Act does not necessarily mean legal proceedings in the High Court alone. Section 19 of the Indian Arbitration Act gives jurisdiction to the High Court to stay proceedings in any Court in the Presidency Town subordinate to its jurisdiction It does not indicate that the legal proceedings contemplated must in Presidency Town be proceedings in the High Court and not in any other Court Subordinate to it in that town.

Proceedings taken by a party to a suit to stay legal proceedings under the provisions of s 19 of the Indian Arbitration Act are not steps "in the proceedings." (11 Bom 467; 24 Cal 778 Ref:) **Ralli Brothers v Noor Mahomed 8 Bom L R 955=31 Bom 236.**

29.—S 19—Applicability of the section.

S 19 of the Arbitration Act applies only to cases where there has been a submission to arbitration before the commencement of the legal proceedings; the section has no application where the parties agreed to the arbitrtion after the institution of the suit. **Ramjidas Poddar v Howse 35 Cal 199.**

Notes:—Fol: 11 Bom L R 1060

Arbitration Act-*Concld.*

30.—Ss. 4, 20—Contract Act S 28 exception-Arbitration clause in contract.—

A clause "to refer disputes arising out of a contract to the arbitration" of a body like the Chamber of Commerce is a submission to arbitration within the meaning of S 4 of the Arbitration Act and is valid, being covered by exception to S 28 of the Contract Act. **Ganges Manufacturing Co v Indra Chand** 33 Cal 1169.

Arbitrator.

See Cases under:—
(1) Arbitration.
(2) Award.
(3) C P C (1908) Sch II.

Arbitrator Charge of Corruption Against, by Party to suit.

See:—Defamation.

Arbitrator receiving evidence from one side in absence of other side.

See:—Arbitration.

Arbitrators.

1.—Arbitrators, when functus officio-Signing award after being filed in Court—Dissenting arbitrator.

As soon as the award is filed in Court, the powers of the arbitrators come to an end. They are afterwards functus officio, and it is not open to a dissentient arbitrator to come in afterwards and sign the award, nor has the Court any power to allow him to sign it. **Ramesh Chandra Dhar v Karunamoyi Dutt.** 33 Cal 498.

Architect.

—Certificate of, in building contract.
See:—Contract—Breach of contract.

Ardass.

See:—Religious Institutions and Religious Endowments.

Arguments on appeal

See (1) Letters Patent High Court Cl 15.
(2) Review—Questions which may be raised on Review.

Arhat.

See (1) Small Cause Court Act, 1887, 2 nd Schedule, Article 39.
(2) Punjab Tenancy Act (1887) s 77.

Ariyat, law as to.

See Mahomedan Law-Shafis. (Gift).

Armenian Christian.

See Succession Act.

Armenians.

See English Law.

Arms Act (XI of 1878)

(1) S. 1, cl. (b), and S. 5—Attachment and sale of arms in execution of a decree by Nazir of the Court—Public servant, sale of arms by —

A Sale of arms by a Nazir in execution of a decree is a sale by a public servant in discharge of his duty and therefore excluded by Section I, Cl. (b) from the operation of Act XI of 1878. The Court however should give notice of the sale under Sec 5. **Wala Hirji Marwadi v. Hir Patel.** P J (1895) 115 = 9 Bom 518.

Army

See Small Cause Court, Mofussil.

Army—Suit for debt against an officer in the—See Limitation—General.

A W N 1897, 203.

Army Act 1881.

See (1) Small Cause Court, Presidency.
(2) Jurisdiction (Small Cause Court).

1.—Army Act (44 & 45 Vic., C 58). Ss 136, 151—Army (Annual) Act (58 Vic, C. 7, S. 4)—Civil Procedure Code (XIV of 1882) Ss. 2, 266—Public Officer—Attachment of moiety of pay of officer of Indian Staff Corps :—

The effect of S 136 of the Army (Annual) Act, 1895, is to empower Civil Courts to attach one moiety of the salary of an officer in the Indian Staff Corps under S 266 (i) of the Code of Civil Procedure. 26 Cal 102 foll. **Watson v Lloyd. 25 Mad 402.**

Army Act. 1881 (44 and 45 Vic, C 58) Sec 136—Pay of military officers—Attachability. **8 A L J 487.**

Army Discipline Act 1879.

Army Discipline Act. 1879 (42 & 43 Vic, c 33.)

See:-Soldier.

1-Section 144—Decree against person subject to military law—Stoppage of pay, Order for.

Where a decree was made against the defendant, who was an officer in the Indian Army, the Court, under s. 144 of the Army Discipline Act, 42 and 43 Vic, c. 33, directed that the amount of the decree should be stopped and paid out of the pay of the defendant not exceeding one half thereof. **Ramsay v Anderson. 7 C L R 336.**

Army Discipline Act 1879—Ss 144, 151.

See (1) Service of summons.
(2) Small Cause Court, Mofussil—Jurisdiction—Army Act.

Army Discipline Act 1881 (44 & 45 Vic. c 58).

—**S. 145**—Soldiers in Indian Forces.-S 145 of the Army Act. 1881, is not applicable to soldiers of Her Majesty's Indian forces. **Nathud Bi v Jafar Husain. 8 Mad 365.**

See Small Cause Court, Mofussil-Jrisdiction-Army Act.

——**Ss. 148, 151.**

See Small Cause Court, Presidency Towns—Jurisdiction-Army Act.

Army Discipline Act-*Concld.*

—**S. 151.**

See Attachment—Subject of Attachment—Pension, Salary, or Annuity.

See Small Cause Court, Presidency Towns—Jurisdiction—Army Act.

Army Discipline Act 1888. (51 Vic c. 4) S. 7.

See Small Cause Court, Presidency Towns—Jurisdiction—Army Act.

Arrangement.

—Distinguished from agreement.—

An arrangement is not necessarily an agreement. It is a preparatory measure or negotiation. **Chabildas v Dayal Mavji. 6 Bom L R 557.**

Arrangement, deeds of.

See 1 Insolvency.
2 Insolvent Act.

Arrangements between widow and reversioners.

See Hindu Law reversioners.

Arrays of Parties in Appeal.

See Parties.

Arrears.

See (1) Mesne profits.
(2) Rent Suits.
(3) Laddlord and Tenant.
(4) Maintenance.
(5) C P C (1908) S. 60
(6) Hindu Law Maintenance.
(7) Interest.
(8) Bengal Act (Rent Act.)
(9) Punjab Tenancy Act (1887) S 16
(10) Jurisdiction (Small Cause Courts)
(11) Small Cause Courts Act, Art 8.

Arrears of Assessment, Suit to recover.

See (1) Inamdar.
(2) Jurisdiction of Civil Court-Rent and revenue suit.

Arrears of Maintenance.

1.——Hindu Law——Maintenance—Arrears—Prior suit for partition—Zemindari-Junior members. The right of the junior members of a family owing an impartible Zamindari to claim arrears of maintenance from the Zamindar is not forfeited by a suit for partition of the zamindari which failed on the ground of its impartibility. Quære: Whether, if the defendant had been misled by the previous suit for partition into the belief that the claim for maintenance was abandoned and had not in consequence set aside any portion of his annual income to meet such claim he would have a good defence to a subsequent suit for arrears of maintenance. **Raja Yarla Jadda Mallikarjuna Prasad v Raja Yerlagadda Durga Prasad. 5 C W N 74=24 Mad 147=27 I A 151 (P C.)**

Notes.—See also 34 I A 64=20 M L J 394=27 Mad 153,

2.—Impartible Zemindari—Maintenance of junior members—Rule—Arrears-Decree, form of.

Junior members of an impartible zemindary in Southern India, both according to the practice prevailing in Southern India and the precedents of Courts, have a legal right to maintenance out of the Zemindary property. Ordinarily, the only son of a junior member ought not to be allowed maintenance at the same rate as the father, especially where, as in the present case, the existing head of the family had junior sons of his own who will have to be maintained out of the estate. Their Lordships allowed arrears due during plaintiff's minority at a rate less than the rate of maintenance allowed after plaintiff attained majority. *Held* also that, a compromise made in a suit brought by plaintiff's father for partition did not operate as a release of all claims on behalf of himself and his family for maintenance.

Venkatachella Reddiar v Venkatachella Reddiar 20 M L J 394.

Arrears of maintenance due under a bond of agreement, suit for.

See (1) Small Cause Courts, mofussil—jurisdiction-Maintenance.
(2) Small Cause Court-Presidency towns jurisdiction-Maintenance.
(3) Hindu Law-Maintenance.
(4) Mahomedan Law-Maintenance,
(5) Limitation Act Art 128.
(6) Malabar Law—Maintenance.

Arrears of maintenance, right to sue for.

See Mahomedan Law-Maintenance.

Arrears of Rent.

See (1) Sale for arrears of rent.
(2) Landlord & tenant.

Arrears of Revenue.

See Sale for arrears of revenue.

Arrears of subscription to a newspaper.

See Limitation Act Art 42,

Arrears of Rent.

See (1) Landlord and tenant.
(2) Rent.

1—S 60 (=S 266, C P C 1882)—Arrears of rent—Suit by auction purchaser —

Arrears of rent due under a sub-lease, which, under the contract, were made payble to the lessor's zemindar, constitute a debt, due to the lessor, which is liable to attachment and sale under s 266 of the Code of Civil Procedure. **Lachmi Narain v Kalyan Das 5 A L J 265=A W N (1908) 129.**

Arrest.

(1) Civil arrest 1-25.

1 Arrest pending enquiry into insolvency (1)
2 Arrest of a Lunatic in execution of a decree (2)
3 Arrest of debtor in execution of money decree (3)
4 Suit for damages for arrest in execution of decree (4-5)
5 Privilege from arrest 6—12

Arrest-*Cont'd.*

6 Power of High Court to release party arrested in execution of decree of Pre-Small Cause Court 15 - 16
7 Arrest of a Sunday (17)
8 Arrest on pilot brig(18)
9 Dis-charge from arrest (19)
10 Other cases 20—25

See (1) Attachment—Attachment of person.
(2) warrant of arrest.
(3) C P C Code.

Arrest of Native Subject

See Cases under Bengal Regulation III of 1818.

Arrest-Validity or otherswise of-

See 1 escape form custody.
2 Execution of decree.

Arrest-Civil arrest.

See C P C S 135 (1) (2) 1885 P. J. 211.

Arrest-Civil arrest.

See C P C S 135 cl (2)

(1)Arrest pending enquiry into insolvency

1,—Application of judgment-debtor to be declared insolvent-Subsequent proceeding in execution against him –Civil Procedure Code (Act XIV of 1882) ss 245B, 336, 337 A, 344 and 349.

G obtained a money-decree against M and in execution applied for his arrest and imprisonment. Before the warrant of arrest was issued, but after M had appeared in Court in obedience to a notice under s 245B of the Civil Procedure Code. another judgment-creditor applied for execution of another decree against him. Thereupon M applied under s 344 of the Civil Procedure Code (Act XIV of 1882), to be declared an insolvent, and in his application mentioned G as one of his creditors (s 345). The Subordinate Judge referred to the High Court the question whether, pending the inquiry into M's insolvency, he could be arrested in execution of G's decree against him. *Held* that there was no provision in the Code to prevent the Court from issuing a warrant of arrest against him. Where, however such a judgment-debtor is brought before the Court under a warrant of arrest or comes before it upon notice under s 245 B, the Court has a discretionary power not to put the warrant in force under s 349 or not to issue it under s 336 (where the requisite notification has been published by the Local Government) if the applicant furnishes security for his appearance when called upon. In such cases the Court can also act under s 337 A of the Civil Procedure Code. **Ganpat Bhagvat v Mahadev Hari 22 Bom 731.**

Arrest-*Contd.*

1A.—S 58 (1882 s 341)—Insolvency Act (11 and 12 Vic c 42), S 13-Judgment-debtor-Interim protection order—Re-arrest under the same decree.

A judgment-debtor, who has been arrested and imprisoned in execution of a decree and has obtained an interim protection order under s 13 of the Insolvency Act, is liable to be re-taken, in execution of the same decree under the provisions of the Civil Procedure Code. **Shamji v Poonja 4 Bom L R 483=26 Bom 562.**

(2) Arrest of a lunatic in execution of a decree.

2.—Ss 245 A and 245 B, 337 A, 443 and 463-A Darkhast against the judgment debtor presonally could not be proceeded with if he is declared a lunatic under Act XXXV of 1858. Under s 443 and 463 of the Civil Procedure Code the Court should appoint a guardian for the suit for the lunatic.

Under the Civil Procedure Code a Court is not bound to order the arrest of a lunatic in execution of a decree passed against him. The power to order an arrest in such case is discretionary.

Bhanabhai Rambhai v Chhotubhai Khandubhai P J (1897) 347=22 Bom 961.

(3) Arrest of debtor in execution of money decree.

3—Civil Procedure Code, 1882, ss. 245 B, 337 A, 339—Subsistence allowance.—

A decree by consent was made on 6th May 1896, ordering the defendant within one year to pay to the plaintiff Rs. 4,842 with interest and costs. On 14th May 1898 a notice was issued to the judgment-debtor to show cause why this decree should not be executed by his arrest and imprisonment· he pleaded poverty and "other sufficient cause",and the matter was set down for inquiry under s. 337A. When it came on, the

Arrest-*Contd.*

Court, after hearing the evidence of the judgment-debtor, held that no cause had been shown why he should not be arrested, and that it was bound to order his arrest at once under that section, and subsistence allowance was ordered under s. 339. **Gubboy v. Ramdoyal Chowbay. 2 C W N 588.**

(4) Suit for damages for arrest in execution of decree.

4—Malice—Reasonable and probable cause, Want of.—

A suit to recover damages on account of injuries caused by an arrest in accordance with a decree of a competent Court can only be maintained under special circumstances, — *viz.*, the plaintiff must show (i) that the original action, out of which the alleged injury arose, was decided in his favour; (ii) that the arrest was procured without reasonable and probable cause; (iii) that the injury sustained was something other than an injury which has been or might have been compensated for by an award of the costs of the suit,—*e.g.*, that he has suffered "some collateral wrong". Where a plaintiff must show an absence of reasonable and probable cause, malice is not alone sufficient to entitle him to a verdict.

Raj Chunder Roy v. Shama Soondari Debi. 4 Cal 583.

Notes:—Ref: 19 Bom 717; 6 Bom L R 704.

5—Malice, proof of.—

To maintain such a suit, legal not actual malice is sufficient. **Goutiere v. Charriol, 1 N W, Part 2, 32: Ed 1873, 91.**

(5) Privilege from arrest.

6—Privilege of party morando.—

Where a native of Patna came from Calcutta to Madras on 24th October on account of a suit pending, in which he was plaintiff, and, the case having been adjourned on 27th October for seven weeks, remained in Madras on account of the suit, and was arrested on 10th November.—*Held* that he was privileged under s. 642 of the Code of Civil Procedure. **Siva Bux Savuntharam, 4 Mad 317.**

Notes:—Not Fol: 6 A L J 912.

7—Party in contempt of Court.—

Arrest-*Concld.*

A party against whom a writ of attachment for contempt has been issued is not entitled to his right of privilege from arrest while proceeding to Court or leaving Court on the hearing of his suit. **John v Carter, 4 B L R, O C, 90.**

8—Party to suit—Summary Procedure—Arrest under writ of Small Cause Court—Act X of 1877, Section 642.—

The general rule of a party being exempted from arrest under civil process is applicable to a defendant to a suit under the summary procedure sections of the Civil Procedure Code, who has not obtained leave to appear and defend, and who, therefore, cannot be heard at the trial. Questions as to the privilege of exemption from arrest in the case of persons arrested under writs issued from the Small Cause Courts in Calcutta, must be governed by the English Law, and not by S. 642 of the Civil Procedure Code. It is not a deviation sufficient to forfeit the privilege if the shortest road home is deviated from and a less crowded and more convenient road adopted.

Surendro Nath Roy Chowdhry, 5 Cal 106.

9—Civil Procedure Code, 1877, s. 642—Arrest in execution of process of Revenue Court.—

S. 642 of the Civil Procedure Code only protects an accused person while he is attending a Criminal Court from arrest "under that Code". *Held*, therefore, where a person, who had been convicted by a Magistrate and had been fined, was arrested in execution of the process of a Revenue Court while waiting in Court until the money to pay such fine was brought, that such person was not protected from such arrest by the provisions of that section, and that, having escaped from custody under such arrest, such person had properly been convicted under s. 651 for escaping from "lawful custody". **Empress of India v. Harakh Nath Singh, 4 All 27.**

10—Civil Procedure Code, s. 642—Insolvent Act (11 & 12 Vict. c. 21), s. 51—Exemption from arrest on civil process redeundo.—

The Commissioner in Insolvency committed an insolvent to jail by an order under s. 51 of the Insolvent Act, and he was released by order of the Full Bench, who held that a Commissioner in Insolvency has no power under that section to commit an insolvent to jail, but must leave the excepted judgment-creditors (if any) to their

Arrest-*Contd.*

ordinary remedies for the time mentioned in the order. The insolvent, having been discharged from jail under the rule laid down by the Full Bench as above, was immediately arrested on a warrant obtained by a judgment-creditor. *Held*, *per* Shephard, J, that the insolvent was not privileged from arrest as being on his way back from Court. **Samarapuri v Parry & Co., 13 Mad 150.**

11—Defendant as witness for plaintiff.—

A defendant in a suit summoned by, and examined as a witness for, the plaintiff, is entitled to protection from arrest on civil process during the time reasonably occupied in going to, attending at, and returning from, the place of trial.

Appasamy Pattar v. Govinen Nambiar. 4 M H C R 145.

12—Summary execution—Small Cause Court, Mofussil—Act XI of 1865, s. 19.—

In authorizing (s. 19, Act XI of 1865) immediate execution of a Small Cause Court decree, by the issue of a warrant, either against the person or against the moveable property of a judgment-debtor, the Legislature never intended that the debtor should be protected from arrest until he had had a reasonable time for returning home. Where a judgment-debtor has paid the amount of a Small Cause Court decree, he is not entitled to a refund, merely because he was arrested before he reached home under an execution issued against his person by the Court, and paid the amount to obtain his discharge. **De Penning v. Debendronath Moitro 9 W R 549.**

(6) Power of High Court to release party arrested in execution of Presidency Small Cause Court.

13—Civil Procedure Code, 1877, s. 642.—

Where a defendant in a suit in the High Court was arrested in execution of a decree of the Calcutta Court of Small Causes, while attending before an arbitrator appointed by the High Court to take a reference in the suit, it was held that he was privileged from such arrest while so attending, and that the High Court had power to direct his release from custody. Small Cause Courts in the Presidency towns are subject to the order and control of the High Courts. 1 Cal 78, Fol. **Juggessur Roy. 5 C L R 170.**

Arrest-*Contd.*

14—Witness—Bona fides.

Where a witness was arrested in execution of a decree, and the circumstances under which the arrest had taken place showed the absence of a *bona fide* belief on his part that his attendance at Court was required for the purpose of giving evidence in the case in which he had been subpœnaed, the Court refused to allow his claim to privilege from arrest. **Wooma Churn Dhole v. Teil, 14 B L R, Ap 13.**

See Omrito Lall Dey, 1 Cal 78.

Notes:—Dist: 1 Cal 78; 5 Cal 106.

15—Witness.

Held that on the facts shown in the affidavit the prisoner was privileged as a witness at the time of his arrest. **Omrito Lall Dey I Cal 78**

Notes.—Fol: 5 C L R 170.

16—Civil Procedure Code s 349—Court, Power of, to release judgment-debtor after he is "imprisoned"—"Arrest" and "imprisonment."

Arrest as used in s 349 of the Civil Procedure Code (Act XIV of 1882) does not include "imprisonment." Therefore the power conferred on the Court under that section to release a judgment-debtor arrested in execution of a decree on a security being given by him ceases after he has been imprisoned or put into jail. 11 Cald 451, dissented from. 8 Mad 503 followed.

Mahomed Husein v. Radhi. 12 Bom 46.

(7) Arrest on a Sunday.

17—Lord's Day Act.

Arrest under civil process of a mofussil Court on Sunday is legal in this country. **Anonymous 4 M H C R Ap 62**

See Abraham v Queen 1 B L R A Cr 17

See Graseman v Gardner 3 W R Rec Ref 2

See Param Shook Doss v Rasheed Ood Dowlah. 7 M H C R 285.

(8) Arrest of pilot brig

18—Privilege from arrest—Statute 21 & 22 Vic c. 126.

A Government brig employed in supplying pilots to vessels at the Sandheads was arrested under proceeding *in rem*. *Held* that the brig by

Arrest-*Contd.*

21 & 22 Vic c 126 had become the property of the Crown and as such was entitled to the same exemption from arrest as all other Queen's ships, and that the proceeding *in rem* was therefore illegal. **Brown v. The Pilot Brig "Kedgeree" 1 Hyde 253**

(9) Discharge from arrest

19—Undertaking by prisoner not to sue.

The prisoner was required before his discharge to give an undertaking that he would bring no action for damages for illegal arrest or false imprisonment against the Judges of the Small Cause Court the bailiff, the Jailor or the judgment-creditor. **Omrito Lall Dey 1 Cal 78**

Notes.—5 C L R 170

Arrest—Application for arrest of judgment-debtor-Illness whether ground for refusing application-Discretion of Court to issue notice to show cause against the application. **14 O C 36**

(10) Other Cases

20—Before Judgment.

On the application of plaintiff an order was passed for a warrant to issue under Section 75 Act VIII of 1859 to bring up defendant to show cause why he should not give bail for his appearance —unless defendant gave security for his appearance with satisfaction of any decree that might be passed against him. Defendant's pleader appeared and gave the required bail. Defendant not having appeared, the bail was forfeited. Defendant in appeal urged that the order of arrest and subsequent proceedings thereon were bad, in that he should have been arrested and required to show cause before security was demanded.

Held, that defendant in choosing to appear and offer bail through his pleader was prevented from taking this objection. He could not insist upon an irregularity in the course of the proceedings, when he himself acted upon and took advantage of that irregularity, and took part in it as if the proceedings were regular.

Elphinstone v Raheem Bux P R 77 of 1868.

21—Act V of 1869—Suits against privileged persons.

Arrest-*Contd.*

Although under Part III Act V of 1869 certain persons are protected from arrest for debt, and their pay, allowances, accoutrements, & c, cannot be attached, yet a suit may be brought and a decree is obtainable against such persons.

Mian Mir P R 43 of 1871

22—Second arrest for same decree.

The Civil Procedure Code (Act VIII of 1859) does not prevent a judgment debtor from being imprisoned a second time on account of the same decree where he has been released on the application to the judgment-creditor **Musammat Subhani v. Sadho Ram P R 37 of 1873**

23—Ground for discharge—Agreement made under threat of arrest.

The mere fact of a debtor under arrest being in receipt of a salary is not sufficient cause for refusing his discharge. An agreement to pay under threat of arrest, *held*, by the Chief Court to be properly cancelled by the Lower Court.

Baness v Turton P R 83 of 1875.

24—S 135 cl (2)—Returning from Court—Privilege of exemption from arrest—How far applicable—Arrest in execution of a decree-Appeal.

The respondent obtained an *ex-parte* decree against the appellants at Benares. The appellants made an application to have the decree set aside. They, being residents of Bombay, came from that place to Benares to look after their case. They put up at Dak Bungalow and attended the Court on the 27th of March 1909. Their application to set aside the decree was dismissed They came back to the Dak Bungalow and thence proceeded to the Railway station. They took tickets for Allahabad and were seated in the train when they were arrested in execution of the decree. *Held*, under the circumstances they could not be said to be returning from a tribunal within the meaning of S 135 C P C 1908 and consequently they were not entitled to exemption from arrest.

Held further that an order directing the arrest and imprisonment of a judgment debtor in execution of a decree is appealable. (4 Mad 317 not approved 14 B L R 13 Ref.) **Ardeshar Framji Bhumgara v Kalyan Das 6 A L J 912**

Arrest-*Concld.*

25—Arrest—Illegal—Interposition of judicial act between charge and imprisonment:—

When any illegal arrest takes place in the course of criminal proceedings instituted by a complainant, he is not liable for the mistakes of the Court or of any of its officers. His responsibility, so far as the illegal arrest is concerned, ceases as soon as he puts the law in motion. When the opinion and judgment of a judicial officer comes between the charge and imprisonment of the person charged, the complainant cannot be held liable for false imprisonment. 10 C. P. 534 foll.; 6 B & C 88: 28 Cal 540; 12 Q B 871 ref. to 3 Ad, E exp. dist. The service of summons is the act of the Court and the familiar procedure of identification is altogether outside the law, and is in no way legally necessary. **Monmotho Nath Dutt v The Chairman of the Cossipore Chitpore Municipality.** 9 C W N 736

See also cases under—

(1) False imprisonment.
(2) Malicious prosecution.

Arrest and commitment of judgment-debtor to jail.

See (1) Arrest-Civil arrest.
(2) Attachment-Attachment of person.
Arrest and Imprisonment.

See Civil Procedure Code. (1908) O. 21 r. 39 (5).

Arrest of decree.

See cases under:—
(1) C P C S 114.
(2) Arrest civil.
(3) Attachment—Attachment of person.

Arrest of defendant before judgment.

See (1) Attachment
(2) Arrest

Arrest of pleader while acting in his professional capacity.

See Arrest—Civil arrest.

Arrest-succession.

See Hindu Law—Inheritance.

C. C. 115

Arrest when perfected.

See (1) C P C S 8.
(2) Arrest.

Articled Clerk.

See Solicitor.

1—Attorney—Practice—Articled clerk, who can take assistant in a firm, if competent—Independent practitioner.

An attorney, who is working as an assistant in a firm of solicitors, is not competent to take to himself a clerk under articles of agreement.

Sarojendra Kumar Dutt. **13 C W N 402= I Ind Cas 286.**

Articles.

—of Association—See Company.
—of Clerkship—See soliciter.
—for settlement—See settlement-trust.
—of partnership—See partnership.

Articles of association.

See (1) Company-Articles of Association and liability of share-holders.
(2) Company-Meeting and voting.
(3) Stamp Act 1879.
(4) Sch. I art 8.

Articles of Association and Liability of share-holders.

See Company.

Artificers.

See Act XIII of 1859.

Artizan.

See (1) Madras Towns Improvement Act (III of 1871).
(2) Bombay formation and Registration.
(3) Rejectment, suit for.

Ascetics.

—Succession to property of.

See Hindu Law-Inheritance—Religious person.

Ascetics

See also cases under:—

Hindu Law—Ascetic.

1—Hindu Law—Bairagi or ascetic-Letters of administration, application for by his preceptor's preceptor—Succession—Custom, ancient and definite Dyabhaga Ch. XI s 6 para 35--Vyavastha Darpana, Ch, V, s. 1 para 144—Indian Evidence Act (1 of 1872), s. 42.

On the death of a Bairagi or an ascetic his preceptor's preceptor applied for letters of administration claiming that according to the custom prevailing in the sect of which he and the deceased disciple were respectively, members, he, as the preceptor of the dead man's preceptor was entitled to his property.

Held—The custom set up was proved.

The Collector of Dacca v Jagat Chandra. 5 C W N 873=28 Cal 608.

Notes—Ref: 3 A L J 717=(1906) W N 289 =29 All 109.

2.—Succession—Religious institution—Head of Chelas, right of, to succeed-Mahant-Alteration of succession-Ascetic.—The right of succession to the property left by the deceased head of a religious institution depends upon custom and practice which must be proved by evidence in each case. A Chela is primarily entitled to succeed a Mahant of the Sanyasi sect who has to follow a life of celebacy, but where there are more Chelas than one, custom and practice intervene. An ascetic is a mere life tenant and cannot alter the succession to the trust by an act of his own in connection with the status under which he originally acquired the trust. One J who was the Mahant of a religious institution initiated A who had been his Chela and nominated and installed him as his successor. A after succeeding to the Mahantship executed an ekrarnama in favour of the Mahant of Mirzapur giving him the right of naming or appointing his own successor. *Held* that, the mode of appointment by a Mahant of a successor from out of his chelas was well known and the manner of A's own appointment to the guddi indicated that such was the custom and practice of the Barhampore-Paita Asthal; that A had no power to ignore this custom and practice and give away the right of appointment to the Mahanth of Mirzapur. That consequently the ekarnama

Ascetics-*Concld.*

was *ultra vires* as an exercise of A's right of electing his own successor. **Mahanth Ramji Dass v Lachhu Dass. 7 C W N 145.**

Notes—Ref: 5 C L J 360: 8 C L J 499.

Assam.

Assam.—Law as to pykes in—**See** Right of occupancy—Acquisition of right—Persons by whom right may be acquired. **15 Cal 100.**

Assam Forest Regulation VII of 1891.

Assam Forest Regulation (VII of 1891) —S. 40. Rules 1 & 2—Breach—Onus:—The onus rests on the prosecution to prove that the forest produce had been removed along some route other than those authorized by the rules. **Moti Thakoor v Deputy Conservator of Forests. (1906) 33 Cal 895.**

Assam Land & Revenue Regulation (1 of 1886).

1— ss. 2, Prov. (b). 12, and ss. 39, 151, settlement-holder, his rights under a settlement——Nisf-kherajdar, his rights to a settlement.

The effect of ss 39 and 151 of the Assam Land and Revenue Regulaion, 1886, is that a settlement made by a Settlement Officer, unless interfered with by the Chief Commissioner, is final; but the settlement-holder does not thereby acquire any right to the land so settled as against any person claiming rights to it. The effect of an order by the Government of India before the passing of the Assam Regulation in regard to the right of a nisf kherajdar to hold lands found upon survey to be in excess of his nisf-kheraj estate, and to obtain a settlement thereof, considered. In 1881, S, a nisf-kherajdar, obtained a settlement for a year of certain lands which were found upon survey to be in excess of his nisf kheraj estate Subsequently a pottah was granted to S for a portion of the excess lands, while the other portion was settled by the revenue authorities under a kobala pottah with M, who entered into possession under his settlement In a suit by S, the nisf-kherajdar, for a declaration of his right to a settlement of the portion settled with M and for possession,—*Held* that, having regard to the provisions of s. 2, prov.(b), s. 14

Assam Land & Revenue Regulation 1 of 1886-*Contd.*

of the Regulation, and the order of the Government of India, the nisf-kherajdar was entitled to a declaration of his right to a settlement, but in view of s. 154 he was not entitled to decree for possession. **Madhub Nath Surma v Myarani Medhi.** **17 Cal 819**

Notes.—*Ref*: 24 Cal 239.

2.—Assam Land and Revenue Regulation (Act I of 1886), s. 59—Suit for rent - Suit for arrears before the Act came into force.

The plaintiff sued to recover arrears of rent accrued due before Act I of 1886 came into force. The suit was instituted on the 7th July 1886. It was found that the plaintiff's name was previously registered, but no notification under s. 48 directing that the registers then existing should be deemed to be registers prepared under s. 59, and that the plaintiff's name had not been registered under the last-mentioned section:—*Held* that s. 59 applies to rent becoming due subsequently to the Regulation coming in force, and that, therefore, the suit was maintainable. **Brojo Nath Chowdhry v Birmoni Singh Monipuri.** **15 Cal 227.**

3.—Ss. 65, 68, 70 (sub-ss. 2 and 3), and 71—Act XI of 1859, s. 37—"Estate"—"Property"—Shikmi haziram rights.

A purchaser of a part of a permanently-settled estate is entitled to the benefit of s. 71 of the Assam Land and Revenue Regulation, inasmuch as in s. 71 the words used are "property sold under s. 70," and the property to which reference is made in s. 70 includes both an estate as well as a share in respect of which revenue has been separately apportioned. The object of s. 37, Act XI of 1859, is the same as that of s. 71, Regulation I of 1886 Those sections cannot be said to have different meanings, for, if it were to be held that the incumbrance which could be set aside under s. 71 of the Regulation I of 1886, must be an incumbrance actively created by the previous holder, it would amount to this, that any acquiescence or laches, either wilful or arising from pure negligence on the part of the holder, by which the talukh or estate becomes incapable in the hands of the purchaser of yielding the Government revenue, would be outside the scope of this section. **Mahomed Nasim v Kasi Nath Ghose.** **26 Cal 194=3 C W N 108.**

Assam Land & Revenue Regulation 1 of 1886-*Contd.*

Notes.—Fol: 3 C L J 387.

Assam Land & Revenue Regulation (I of 1886)--ss. 96 and 154.

See Partition—Jurisdiction of Civil Court in suit respecting partition.

4.—Jurisdiction Civil Court Assam Land Revenue Regulation (I of 1886) Ss. 96-98, 119, 154 Sub S (I) cl (c)—Imperfect partition.

Per Ghose and Brett JJ Rampini J dissenting:—The expression "imperfect partition" as defined in the Assam Land and Revenue Regulation is only referable to a division of the entire estate and not to a specified portion thereof. There is nothing to prevent a suit in the Civil Court for the partition of a specific piece of land appertaining to an estate when the interest of the plaintiff is confined to a share in that piece and he has no joint interest in the other lands of the estate. Such a case is not covered by the Regulation and the plaintiff is entitled to maintain such a suit for partition in the Civil Court. 23 Cal 514 Ex.

Per Rampini J Contra-To divide a portion of a revenue paying estate would be to form still other portions of the estate, all jointly liable with the portions now sought to be divided for the revenue and would thus amount to an imperfect partition. The object of the Regulation would seem to compel sharers in all cases to apply for perfect partition and to allow the Civil Court to partition only in the case mentioned in section 154 sub sec 1 cl (e). **Gouri Krishna Syam v Indramani Debi** **1 C L J 421= 32 Cal 1036.**

5.—Assam Land and Revenue Regulation (I of 1886) s. 154—Right to obtain a settlement—Jurisdiction of a Civil Court.

The question as to the right of a party to obtain a settlement from the Revenue authorities is not excluded from the jurisdiction of the Civil Court by the provisions of s. 154 of the Regulation. **Patan Maria v Bhabiram Dutt Barua.** **24 Cal 239=1 C W N 94.**

6.—Regulation I of 1886 (Assam Land Revenue).—s. 6, Rule 80 (i) of the Government Rules—Settlement of land, first applicant if entitled to—Jurisdiction of Civil Court.

Rule 80, cl. (i) of the rules framed under Regulation I of 1886 lays down a principle for the

Assam Land & Revenue Regulation-*Concld.*

guidance of Settlement Officers, and does not confer a right on the first applicant to a settlement. It directs that, in cases where settlement is not made with the first applicant, the reasons therefor should be stated in writing. It does not follow from this that if the reasons are not recorded, the first applicant is entitled to a settlement.

Under S. 6 (a) of the Regulation, no right to settlement arises merely by reason of the fact that the Plaintiff was the first applicant (17 Cal 819 (1890) & 24 Cal 239 (1896) Dist. **Ananda Kisore Sen v Secretary of State for India in Council. 14 C W N 990=7 Ind Cas 90.**

7—Assam Land and Revenue Regulation (I of 1886) Secs. 70, 71—Annulment of incumbrances -Effect of sale-Part of estate.

The purchaser of a share of an estate at a sale held under section 70 of the Assam Land and Revenue Regulation is entitled to hold the property free of all incumbrances. The word 'property' in section 71 includes not only an entire estate but also a share in an entire estate.

The purchaser, moreover, is entitled so to hold as soon as his purchase is completed. It is not necessary for him to take any steps to have the property freed from incumbrances.

An incumbrance existing not only upon the part of the estate sold, but also over other parts, is, after the sale, annulled so far as it extends over the part of the estate which has been sold.

Jawad Ali v Jnanada Sundari Dutt. 3 C L J 387.

Assam, Law—See Hindu Law—Custom

Assam Local Rates Regulation.

1—Assam Local Rates Regulation Ss. 3-317—Rates payable by tenant, amount of contract by tenant to pay in excess of maximum—Realisation in excess, whether gives landlord any right.

The maximum rate at present imposed under S. 3 of the Assam Local Rates Regulation is one anna in the Rupee. And although a contract between the landlord and tenant for the latter to pay the full amount of local rate may be justified, one to pay anything in excess of that maximum is not legal.

Assam Local Rates Regulation -*Concld.*

A landlord cannot get a decree for rates at more than one anna in the Rupee, even if for a long time he had been realising more than that. **Upendra Nath Sen v Kameswar Kolita. 5 Ind Cas 80.**

Assam Regulation.

1—Assam Regulation III of 1891 (the Sylhet Jhum Regulation)—Considerations of law involved in the process of reasoning—Jhum cultivation, nature of—Government's claim to confiscate proprietary rights—Burden of proof—Proprietary title—Long possession and enjoyment.

When lands have long been in the enjoyment of the zemindar and it is asserted by Government that they are entitled to confiscate the proprietary rights upon payment of compensation under Reg. III of 1891, the *onus* is upon the Government to show that the facts of the case are such as to bring it within the operation of the Regulation.

To bring a case within the Regulation it is not sufficient to show that at the time of Permanent Settlement, the income from *Jhum* cultivation was taken into account as asset for purposes of assessment ; it must also be shown that the income taken into account was derived from *Jhum* cultivation carried on beyond the limits of the settled estate.

The question whether *Jhum* lands lay within or without the limits of the settled estate is not necessarily a question of fact, specially if at every point in the process of the reasoning considerations of law have to be regarded.

Long possession of land in assertion of a particular title may be relied upon as proof of that title. **Mahomed Ali Haidar Khan v The Secretary of State for India in Council 8 C L J 436.**

Assault.

—Suit for damages for.

See (1) Evidence—Civil cases.
(2) Special appeal—Small Cause Court suits—Damages.
(3) Tort.

1—Cause of action.

An assault made by parties proceeding together and acting in conjunction as to time, place, and

Assault-*Concld.*

assault, is a single act, and the cause of action is common to all parties. **Ramessur Bhuttacharjee v Shibnarain Chuckerbutty. 14 W R 419**

2-Suit for compensation—Damage for assault —Criminal prosecution.

A person who is assaulted can pursue his civil in addition to his criminal remedy; but if punishment in person has been resorted to, that must always be an important element in mitigation in subsequently estimating the amount of penalty to be inflicted in pocket. **Misr Ramji v Jiwan Ram; and Kidar Nath v Misr Ramji. A W N 1881, 131.**

Assented Taxes.

See:—Cess.

Assessment.

(1) Suit for arrears of assessment. (1)
(2) Levy of assessment by Government (2-4)
(3) Liability for assessment levied after date of mortgage (5)
(4) Other cases (6)

Assessment.

See (1) Jurisdiction of Civil Court—Rent and revenue suits.
(2) Bombay Land Revenue Act.
(3) Landlord and tenant.
(4) Rent.
(5) Revenue.

Assessment—Crown's prerogative to levy : See **14 M L J 37=27 Mad 386** ; F B.

(1) Suit for arrears of assessment.

1—Suit for arrears of assessment does not give.

An inamdar suing for arrears of assessment is not entitled to a charge on the lands of, but only to a money decree against the occupants ; hence no personal decree can be passed against an occupant in respect of assessment for the years previous to his coming on the holding. **Vinayak v Lakshman. 5 Bom L R 700=26 Bom 271.**

(2) Levy of assessment by Government.

2—Grant of land by Collector—Favourable assessment-Long occupation by grantee—Sudden enhancement of assessment by Government—— Illegality.

Assessment-*Contd.*

Where lands are granted by the Collector, whether—With or without authority at a favourable rate of assessment, and the grantee enjoyed them on such conditions for nearly a hundred years, and then full assessment was levied by Government.

Held, that the imposition of the full assessment was illegal and could not be levied.

The Secretary of State for India in Council v Komandur Narasimhachariar. 8 M L T 378.

3—Assessment, levy of—By Government.

Where the grantee on the assurance of the assessment being kept at a fixed amount undertakes to keep an embankment in repair and expends his money thereon, it is not open to the Government to levy further assessment on his lands. **Secretary of State v Dattatraya. 3 Bom L R 923=26 Bom 271.**

4—Where lands are continued to an Inamdar and his lineal male descendants, free from assessment, the Government are not debarred from levying assessment when the lands pass to a third person. **Mahadev v Secretary of State 1 Bom L R 528.**

(3) Liability for assessment levied after date of mortgage.

5—The mortgagor is liable for the enhanced assessment levied by Government after the date of the mortgage. **Burle Jaganna v Yelugula Latchanna. 8 M L T 420=7 Ind Cas 871.**

(4) Other Cases.

6—Assessment—Land Revenue Act s. 7—Appeal from apportionment of assessment—Limitation, starting point of—The period of ninety days provided in s. 7 of Act 1 of 1876 for appeals from Collector's apportionment of separate assessment is to be reckoned only from the date when the Collector declared the apportionment of the assessment, after the apportionment proposed by him to the Board of Revenue had been sanctioned, and not from the date when he submitted his proposal to the Board of Revenue. Act 1 of 1876 is exhaustive and complete in itself, and supersedes S. 18 of Regulation II of 1803, under which the appeal was against the proposal of the Collector and time ran from the date of the proposal. **Secretary of State for India in Council v Fisher. 26 Mad 389.**

Assessment-*Concld*

Assessment—Prohibitory—See Mad Act II of 1864.

See Mad Act I of 1876 s. 7.

Assessment—Liability of District Forest Officer to be assessed by Municipal Council—See Mad Act IV of 1884 schA **25 Mad 747.**

Assessment—Sale of Zamindari land for arrears of revenue and purchase thereof by Government—Irrigation from existing source, right to, by way of easement—Government's right to assess ryots in occupation—Easements Act 1882 s. 13 **26 Mad 51.**

Assessment, exemption from

Assessment in Execution and suit for mesne Profits.

See Mesne-Profits.

1—Dewasthan lands—

Where the plaintiff and his predecessors in the management of a temple had for sixty years been in possession of lands used for the purposes of the temple without paying any assessment.—

Held, that the presumption was that the land was dewasthan land, a recognized tenure of the country, and exempt from assessment.

Collector of Ahmedabad v Mohangarji. 1875 P J 8.

2.—Jurisdiction— Udhad bandhi-jama—Visalpur—

The jurisdiction of the Civil Courts in cases governed by Bombay Regulation XVII of 1827, to deal with questions of assessment, is confined to cases where the contention is that there is a right on the part of the occupant in limitation of the right of Government in consequence of a specific limit to assessment having been established and preserved.

Visalpur is an *Udhad-bandhi-jama* village, settled for, hereditarily and in the gross at a fixed immutable rent independent of the quantity of land under cultivation and payable to Government, and falls within the protection of Bombay Regulation XVII of 1827, s. 8. It is also land situated in a district ceded by the Peshwa before 1803, held partially exempt from payment of land revenue under a tenure recognized by the custom of the country for 30 years and upwards, and therefore falls within the claims for exemption mentioned in s. 21 of Bombay Act VII of 1863; and is liable to assessment to the extent of Rs. 28-4 only, inasmuch as it falls within the concluding proviso in s 25 of Bombay Act I of 1865. **The Government of Bombay v Sundarji. 1879 P J 333.**

Assessment, exemption from-*Concld*

3—Talukdari land—Adverse possession—Sale for arrears—Bom. Reg. XVII of 1827 Ss. 23—27 29—

Where a title to lands originally forming part of a Talukdari estate has been acquired as against a Talukdar by adverse possession, and the assessment thereon has been paid by the Talukdar, a sale of the lands made by order of the Collector on behalf and in aid of the Talukdar, as against the person in adverse possession, cannot be sustained under Bombay Regulation XVII of 1827, so as to enable a purchaser thereat to eject the person in possession. **Gambhirsangji v Kashiram. 1877 P J 69.**

4—Adverse possession—Talukdari lands—Local funds—Bom. Reg. XVII of 1827 Ss. 5 30—

The fact that the Government instead of taking the assessment from the Talukdars in a lump as formerly, take it from them as rent fixed on each field in the taluk separately, does not alter the relations between the Talukdar and the person who has acquired title by adverse possession, and does not render the latter liable for any part of the land revenue so assessed on the taluk.

Talukdari Settlement Officer v Ranchor. 1877 P J 75.

Assessment Land Revenue Act.

See: Madras Land Revenue Assessment Act.

Assessment, payment of

See Cases under—

Contract Act s. 69.

1—Assessment of Revenue on a Mahal-Arrears of maintenance-Withholding of maintenance—Maintenace.

In a suit for arrears of maintenance it is incumbent on the plaintiff to prove that there has

Assessment, payment of-*Contd.*

been such a withholding of maintenance as would amount to a denial of the plaintiff's right to receive it. 3 Bom 44 and 207; 17 Mad 362; 18 Mad 403; 17 Bom 45; 21 All 183 refd to.

Bansidhar Panda v Mt- Daimati Pandiani. 16 C P L R 30

2—Payment of assessment by mortgagee—The amount so paid can be added to mortgage money—

Apart from special stipulation a mortgagee is under no liability to pay assessment as between himself and his mortgagor; and if he does pay it for the purpose of preserving his security, then he is ordinarily entitled to add that amount to his mortgage money, and to require that he should be paid it before he can be redeemed

When the mortgagee agrees to pay a certain sum as assessment and the assessment is subsequently increased, he is entitled to add the amount of the excess payments so made to his mortgage security. **Nilawa v Krishnappa 8 Bom L R 350.**

3.—Inam land—Acquisition for a Municipality—No exemption from payment of ordinary assessment—Acquisition by Government under Land Acquisition Act—Effect—Grant of exemption—To be in express words.

An Inam land was acquired by the Government for a Municipality. By successive sales, the plaintiff became the owner of the land. He claimed that the Government was entitled only to quit rent as from inamdar, and not ground-rent.

Held, that, when the land became vested in the Government, it became ordinary Government land liable to assessment in the hands of any person who might afterwards become the occupier.

If the plaintiff claims to hold the land free from the payment of such assessment as the Government may fix, he must show some grant exempting him from the payment of ordinary assessment.

Where a Government Order permitted Municipal Council to transfer lands vested in them by sale, mortgage or otherwise, but contained no condition that the assignee would be liable to pay such assessment as might be fixed by the Revenue authorities,

Assessment, payment of-*Concld.*

Held, that it cannot be contended that the order granted an exemption for payment of land revenue to all persons who might purchase lands from the Municipality.

No exemption can be claimed without a grant or exemption in express words.

Chellapalli Hanumanulu Pantulu v The Secretary of State for India in Council. 11 M L T 207.

Assessment of price of crops belonging to an evicted tenant.

See Landlord and tenant-Ejectment.

Assessment of reformed land after diluviation.

See Bombay Acts Land Revenue Code.

Assessors.

—In Land Acquisition cases.

See (1) Land Acquisition Act 1870 S 19.
(2) Land Acquisition Act 1870 Ss. 22,35.

--Disqualification of.

See Land Acquisition Act 1870 S 19.

Assessors—Value of opinion of—**See—** **8 C L J at 63.**

Assessors—See Act X of 1870.

Assets.

See 1 Administrator-General.
2 Administrator—General's Act, 1867, s. 33.
3 Administrator—General's Act, 1874. s. 35.
4 Cases under Company—Winding up-Costs and claims on assests.
5 Cases under Company—Winding up-Duties and Powere of Liquidators.
6 Cases under Representative of deceased person.
7 Cases under sale in execution of decree—Distribution of sale-proceeds.

1.—S. 52 (1882 S 252)—Duty of heir and legal representive in the application of assets—,

Assets-*Contd.*

Rateable distribution—Distinction between heir under Hindu Law and executor.

The heir and legal representative of the deceased coming into possession of the deceased's assets is not bound to pay each and every creditor *rateably*. S. 252 C P C only provides that the representative can be proceeded against personally to the extent to which he has failed to apply the assets duly. An heir paying debts but not paying the creditors rateably has not failed to apply assets duly within the meaning of S 252 C P C. Every payment on account of a debt is a perfectly lawful payment irrespective of its effect upon other creditors and will be a due application of the assets within the meaning of S. 252. There is no analogy between the position of an executor governed by the special provisions of the Indian Succession Act and that of the legal representive under the Hindu Law in respect of the distribution of assets. Where payments have been made by the representative to the full value of the property that has come into his hands, creditors cannot proceed against such property on the mere ground that the representative is still in possession of property originally belonging to the deceased. 12 W R C R 177 followed. Where certain jewels were pledged by the deceased and the representative redeemed them with his own money, he is entitled as against the creditors to a lien with respect to the amount paid by him for redemption. The representative is not a mere volunteer in so redeeming with his own funds. Where a debt is due by thedeceased to the representative, the latter is entitled to pay himself out of assets as he cannot sue himself.

Verasokkaraja v Papiah 13 M L J 258= 26 Mad 792.

Notes:—Fol : 30 Bom 270 · 6 Bom L R 1135.

2—C P C S 73, O 38, rr8,11, 12 (1882 Ss.295, 486, 489, 490)—Attachment before judgment, effect of —Realisation in execution—Priority—s. 490, effect of—Rateable distribution.

The object and effect of an attachment before judgment is simply to safeguard the property attached so as to enable the plaintiff to realise the amount of his decree if he should get one. Though he has a security, he has no charge on the property, which remains that of the defendant, available for other decree-holders.

Assets-*Concld.*

In short a plaintiff decree-holder, who has attached before judgment, has not, by reason of such attachment or process, incidental thereto any right to be treated preferentially to other judgment-creditors. There must be realization in execution to give rights of property. 12 Bom 400 Ref. **Sewdut Roy v Sree Canto Maity. 10 C W N 634=33 Cal 639.**

Assets—Legal representative —Proof of possession of assets of deceased judgment-debtor—Extent of assets—*Onus* of proof. **Trust. 10 M L T 272=(1911) 2 M W N 271.**

Assignability of tenancy.

See Landlord & Tenant.

Assignee.

See cases under:—

(1) Estoppel
(2) Resjudicata

Assignee of decree.

See Appeal-Execution of decree.

Assignee of interest in suit.

See Appeal-Execution of decree.

Assignment.

See Cases under:—

(1) Debtor and Creditor.
(2) Equitable Assignment.
(3) Insolvency—Assignment by debtor.

See Cases under:—

(1) C. P. C. S. 232=O. 21 r. 16.
(2) Mortgage.
(3) False imprisonment.
(4) Malicious prosecution.
(5) Assignment of chose in action.

Assignment after decree.

See Attachment—Alienation during attachment.

Assignment by official assignee.

See Official assignee.

Assignment by operation of law of a share in a decree.

See-C. P. C O. 21, r. 16.

Assignment by payee of all his property including the note whether amounts to negotiation in the absence of endorsement.

See Negotiable Instruments Act.

Assignment of actionable claim.

See Assignment of chose in action.

Assignment of administration Bond.

See Guardians & Wards Act S. 35.

Assignment of all his property by debtor to trustees for payment of creditors.

See Insolvency—Voluntary conveyances and other assignments by debtor.

Assignment of bond.

See Assignment of chose in action

Assignment of chose in Action.

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Assignment—Act IV of 1900 (Punjab descent of jagirs), s. 8, cl. 3—Sub-assignment—Liability to be attached in execution—Pun. Act IV of 1900, s. 8, cl. 3. **117 P R 1907.**

——Of executory contract, legality and validity of—Transfer of Property Act, 1882, s. 3. **10 C W N 755=33 Cal 702.**

——Distinction between attachment and assignment of decree—Execution of decree—Miscellaneous. **6 A L J 564=2 Ind Cas 626.**

——Execution of decree—Miscellaneous. **A W N 1881, 101=A W N 1883, 262.**

——Contract to assign pattas—Legality of contract of insurance—Contract—Miscellaneous. **3 M L T 393.**

——Decree—Decree, construction of. **A W N 1883, 198.**

——of Decree for costs—See Costs—Miscellaneous. **24 All 288=(1902) A W N 47.**

——of invalid mortgage—Rights of assignee as against mortgagor and subsequent mortgagee for consideration—Scope of s. 53 Transfer of Property Act—Mortgage-General. **A W N (1908) 116=5 A L J 305.**

——Endorsement on pro-note—Intention to effect a transfer—Negotiable Instruments-Promissory note-General. **1 M L T 329=16 M L J 554=30 Mad 75.**

——of business of firm—Liability of assignee for debt not shown in books of firm. Novation. **(1881) A W N 52.**

——Determination of validity of, after notice to parties—Effect—Res-judicata—General. **7 M L T 224=6 Ind Cas 286.**

(1) Practice of Courts in India.

1—Right of assignee to sue.

In the practice of the Courts of India, it is

Assignment of chose in action-*Contd.*

lawful to assign choses in action when there is neither fraud against individuals nor special violation of the rule of public policy. The assignee of claim for rents can sue under Act X of 1859.

Hurrinath Muzoomdar v Moran & Co. W R 1864 Act X 127.

1A—Assignment of pro-note-Assignment back to assignor—Necessity for endorsement--Assignment of note by a firm-Signature of one member of firm—Whether such signature is on behalf of firm—Admission of oral evidence.

The defendant's firm endorsed several negotiable promissory notes in their favour to one M, who again endorsed them to a Bank Certain other pro-notes made by the said firm in favour of M, as payable to him or to his order, were, also, endorsed by M to the same Bank. All the notes happened to be dishonoured and M paid the Bank and obtained a return of the notes but without any re-indorsement by the Bank. Subsequently, on receipt of value paid by the present plaintiff, M assigned his right to the notes over to the plaintiff by means of an assignment deed and this suit brought by the plaintiff for recovery of the amount due in respect of some of the notes, so assigned to him, was dismissed by the lower appellate Court on the ground that, the notes not having been endorsed over to the plaintiff, he could not sue on them. *Held*, revising the decree of the lower appellate Court, promissory notes whether negotiable instruments or not, are nevertheless choses in action and choses in action have been held assignable, in this country, and the rules of general law, that applied to them prior to the Negotiable Instruments Act with respect to their, transfer as choses in action or chattels, do not cease to be applicable to them by the passing of that Act, unless its provisions expressly or impliedly affect those rules. The absence in the Indian Act of certain provisions, saving the rules of common law, similar to those found in the English Bills of Exchange Act. 1882 does not warrant the view that the former Act abolished rules, previously established, even though they are in no way inconsistent with any of its provisions. There is, therefore no reason to prohibit assignment of negotiable instruments, otherwise than by endorsement, as illegal.

Held, also, overruling a contention raised on behalf of the defendants that a re-indorsement by

Assignment of chose in action-*Contd.*

the Bank to M, the plaintiff's assignor was in point of law necessary to re-vest the title in the notes in him, that, when a prior indorser takes up a note on payment to his immediate indorsee and discharges his liability under the contract arising by the indorsement, there is no provision, either in the Negotiable Instruments Act or elsewhere, prescribing the mode in which such taking up of the note is to be established and possession of the note by the person so taking up is *prima facie* evidence that he is the true and lawful owner thereof and he has acquired the full title thereto.

On a further objection taken, that the notes having been given and the indorsements made by only one member of the firm, viz, the first defendant, in his own name, the other members of the firm are not liable, it was held, that the question, whether the first defendant signed only for himself or on behalf of the firm is one of fact to be decided with reference to the evidence in the case and the reception of parol evidence in such a matter is subject to much the same rules as govern written contract generally. (11) Mad. 390; 17 Mad 161 declared overruled by 24 Mad. 654; 11 Pick 320. Refd to. 10 M P C 93 Refd to. **Muthar Sahib Maraikayar v P M K Kadir Sahib Maraikayar 15 M L J 384=28 Mad 544.**

(2) Rule in equity.

2—Semble There is nothing in equity which prevents a suitor, pending a suit or any other legal proceedings, from assigning the whole or any part of the subject of litigation.

Grose v Amirtamayi Dasi 4 B L R O C. 1; 12 W R. O C 13.

See **Ramlal Mookerjee v Haran Chandra Dhur 3 B L R. O C. 130; 12 W R, O C, 9.**

(3) Right of assignee to sue

3—Suit in his own name.

Choses in action are assignable in this country and they are also assignable in England, although at law the assignee cannot sue in his own name. **Jug Mohun Lall v Buddun Koer 9 W R 243.**

Notes—Doub 6 C L R 85 Ap: 12 Cal 317 Fol: 6 C L R 85; 10 Cal 567.

3A—Endorsement by one of two joint payees to another. A promissory note was made

in favour of A, and A endorsed it to B. *Held*, that the endorsement was invalid, but B can maintain a suit in respect of the amount due under the note as assignee of the cause in action.

Muhammad Kumarhali v Ranga Rao 24 Mad 654.

Notes—Appr· 28 Mad 544=15 M L J 384. Ref 28 Mad 244. 17 M L J 393.

3*B*—**S. 22**—Of parties—Civil Procedure Code (Act XIV of 1882) Sec. 372—Assignment of the rights of a plaintiff—Substitution of assignee—Limitation Act (XV of 1877), Sec. 22.—

When the name of the plaintiff is removed from the record and that of his assignee substituted in its place, the provisions of section 22 of the Limitation Act are applicable and the suit must be dismissed if it is barred at the date when such substitution takes place. **Abdul Rahaman v. Amir Ali, 5 C L J 486=34 Cal 612=11 C W N 521**

3*C*—Promissory-note-Assignment made without endorsement—Right of assignee to sue.

A negotiable instrument is negotiable otherwise than by endorsement, and the assignee of a pro-note can sue on the pro-note, though it was not formally endorsed in his favour. 31 Mad 531: 4 M L T 341. Appl. **Lodd Govind Das v. Karnam Munusami Pillai 8 Ind Cas 881=9 M L T 169.**

(4) Right of assignee not to sue.

4—Suit by assignor—Conditional assignment—Assignor's right to sue.—

When an agreement of assignment provided that the assignor should sue for the benefit of the assignee who is to supply funds for and enjoy the fruits of litigation, the plea that the assignor having parted with his property and rights in the subject-matter of suit is not entitled to sue will not avail. It will hold good only in the case of an unconditional assignment of which notice had been given to the debtor. **Muhammad, Sadiq v. Pollard, 1886 P R 183.**

(5) Right of purchaser of decree to sue for possession.

5—Choses in action are assignable by Civil Courts in this country, which are not merely

Courts of Law, but also Courts of Equity. The purchaser of a decree-holder's rights and interests in decreed land may sue to recover possession, even if the thing purchased have no actual existence, but rests on mere possibility; if legally saleable it was equitably an assignable cause of action. **Munrunjun Singh v. Leela Nund Singh, 11 W R 5.**

6—Hindu Law — Promissory note — Small Cause Court, Madras.—

According to Hindu Law, not only is the beneficial interest in the subject-matter of the contract, but the contract itself, assignable: the assignee therefore may sue in his own name. This doctrine is applicable to suits brought in the Madras Small Cause Court.

Vembakum Somayajee Janakee Ammal v. Moonesawmy Chetty, 4 M H C R 176.
Kaderbacha Sahib v Rangasvami Nayak, 1 M H C R 150.

(6) Assignment of bond.

7—Obligor's consent.—

The obligor's consent is not necessary to the assignment of a common money-bond. **Krista Chetti v. Balarama Chetti, 1 M H. C R 139.**

8 Assignment by bond Liability of assignor.—

Three bonds, two of them being hypothecation bonds, and the third, a simple bond, were assigned to the plaintiff's predecessor—in title for Rs. 300. with an undertaking on the part of the transferor to produce evidence to prove the bonds, and to be responsible in case of any damage incurred. The transferor realized a certain amount as interest subsequent to the transfer, and the claims on the hypothecation bonds were reduced by the Court. and the claim under the simple bond was dismissed altogether, but the transferee did not prefer an appeal. *Held*, that the first Court was right in decreeing the claim of the vendee for the interest realized by the vendor under one of the bonds subsequently to its sale. and that, as he had not appealed as regards the simple bond, he was not entitled to realize that amount **Hardeo v. Kishen Lal, A W N (1881), 90.**

9—Bond—Endorsement on bond 'the balance due should be paid into the hands of my son '—

Assignment of chose in action-*Contd.*

Whether can be treated as assignment of bond—Assignee's right of suit.—

An endorsement on a bond that "the balance due should be paid into the hands of my son" operates as an assignment, so as to entitle the assignee to sue thereon. 30 Mad 75, Fol:

Saminatha Pillai v. Dorasawmy Naick, 1 Ind Cas 212.

(7) Assignment of mortgage bond.

10—Assignment—Suit on a mortgage bond—Assignment of the mortgage right by mortgagee to another pending suit—Only one attesting witness to the mortgage—Both parties ignorant of this defect at the time of assignment-Subsequent discovery of the defect — Withdrawal of the mortgage suit with liberty to bring fresh suit—Suit by assignee for refund of purchase money—Non-liability of the assignor for any defect in the claim transferred as per the terms of the assignment—Whether a valid defence.

A instituted a suit against B under a mortgage bond. He then assigned all his rights under the bond and in the suit to C. The mortgage bond was attested by only one witness. Both parties were ignorant of this defect at the time of assignment. On discovery of this defect subsequently the mortgage suit was withdrawn with liberty to bring fresh suit. C then sued A for a declaration that the assignment is void and for a refund of the sum paid by him to A in consideration of the assignment. By the deed of assignment, C covenanted with A among other things that A shall not be liable for any defect in the claim thereby transferred and assigned or responsible for any sum or sums of money that may not be recovered by him.

Held, that the assignment to C was not void and that he was not entitled for a refund of the purchase money from A inasmuch as he had chosen to contract to take the claim with all its defects and to hold the vendor not responsible for the consequences.

Sadu Kavaur v. Tadepally Basaviah, 1 M L T 416=17 M L J 167=30 Mad 284.

(8) Suit by assignee.

11—Assignment of chose in action—Suit by assignee. *Held*, where a promissory note made payable simply to the payee without the addition of the words order or bearer, and therefore not negotiable, was assigned to a third person, that the assignee could sue upon such note, a chose in action being by the law of India assignable, and that the assignee could sue in the Courts of India in his own name. **Kanhaiya Lal v. Lomingo, 1 All 732.**

Notes:—Fol: 13 Bom 42, Ref. 28 Mad 544=15 M L J 384.

12—(1882), s. 134—Right to recover subscriptions-Assignment-Right to sue-Actionable claim.

An assignment of the right to recover subscriptions hypothecates a debt and the hypothecator has an interest sufficient to give him a right to sue. The holder of a charge on a debt due to his debtor by way of security for his own loan is a transferee of an actionable claim and is entitled to recover the debt due from the transferor's debtor. 20 Mad 35, Ref: 14 C W N 165 and 33 Bom 610 Fol: (1898); 1 Q B 765 (769), Ref:

Ramasamy Pillai v Muthoo Chetty, 7 M L J 125=5 Ind Cas 834.

13—Municipal Acts—District Muncipalities Act (Madras Act IV of 1884), s. 26 Regulation VII of 1817—Mismanagement of trust—Assignment of management-not in writing-Valid Where owing to the mismanagement of one Venkamma, the management and superintendence of a choultry were made over to the Municipal Council, *held* that the Chairman of the Municipal Council could sue on a mortgage bond whose assignment was not effected in writing (12 Mad 366 Fol.).

Municipal Council of Rajahmundry v Susurla Venkateshwarulu. 3 M L T 241=31 Mad 111.

13A.—S 51—Endorsement by one of two joint payees to another. A promissory note was made in favour of A. and A endorsed to B. *Held* that the endorsement was invalid but B can maintain a suit in respect of the amount due under the note as assignee of the cause in action.

Muhammad Kumarhali v Ranga Rao 24 Mad 654.

Notes:—Appl: 28 Mad 544=15 M L J 384. Ref 28 Mad 241, 17 M L J 393.

14.—Purchaser of moiety of right to damages. Where the plaintiff purchased from a certain

Assignment of chose in action-*Contd*

person a moiety of whatever the latter might obtain as damages from the defendants for the breach of a contract,—*Held* that such a transfer did not confer on the plaintiff a right to sue the defendants for a moiety of the damages.

Bhekaree Singh v Muhossein Ally **1 Hay, 482.**

15.—Amalgamation of joint debt and personal debt.

A joint debt cannot be amalgamated by a colourable assignment with a personal debt, so as to give the assignee the right to sue in respect of both debts. **Sreehurry Paul v Nilmoney Sen.** **1 Hyde, 169.**

16.—Order directing servant to pay money on account of advance.

An order directing a servant to pay at an uncertain time certain sum of money to the payee on account of advance is not a cheque, and the payee cannot transfer the same to a third party so as to give such third party a right of action against the drawer of such order. Nor is such a document evidence of a debt, enabling the person to whom the same is transferred to contend that by the sale to him he acquired the interest in a debt due by the writer of the order to the payee.

Bulloo v De Breton **2 N W 335.**

17.—Suit to recover possession of land and for damages.—

In a solenamah between B, the assignee of the plaintiff, and the defendant and a third party it was agreed that, as B held less seer land than the other two, there should be an equal division between the shareholder within a certain time, and, in case no division took place, that B should be entitled to damages. In a suit by the plaintiff to recover possession of certain seer land and a certain sum as damages for breach of the contract

Held, if it was a suit to enforce a contract made with B, which contract did not convey any right in specific lands, the cause of action was one not legally assignable. **Jurbundhun Sing v Sheoraj Singh** **5 N W 184.**

18.—Sale of patnidari rights.

When a patnidar's rights and interests in a patni are sold during the pendency of a suit brought by him against his tenants, the purchase

Assignment of chose in action-*Contd.*

acquires the patnidar's privilege to carry on the suit. **Wilson v The Government** **12 W R 122.**

19.—Sale of right to sue for wrongful attachment.

The mere right to sue for compensation for the wrongful attachment of moveable property in execution of a decree is not transferable by sale. **Pragi Lal v Fateh Chand** **5 All 207 = 2 W N 219.**

20.—Sale of decree.

Where A has sold his decree to B the purchaser, B can sue on it. **Sunnooburnessa Khanum v Meher Chund** **W R 1864, 313.**

(9) Assignment of decree.

21.—C P C Ss 47, 49, O 21 r. 2—Execution proceedings—Res-judicata—When rule 2 applicable—Contest between assignee of decree and execution purchaser of judgment-debtor's interest—Whether regular suit is maintainable, not of practical importance—Assignee of decree—Equities and defences.

A party who allows an order for execution to be passed where he had an opportunity to contest the validity of that order, cannot subsequently re-open the whole matter in controversy. But this principle does not apply where there was no adjudication by reason of the failure of the decree-holder to prosecute the execution proceedings.

If an application under r 2 of O 21 is not made within time the party concerned cannot indirectly obtain an extension of the period on the ground that the question falls within the scope of s 47 and may be determined thereunder.

Where the contest lies between the assignee of the decree and the execution purchaser and the latter makes allegations of fraud and conspiracy between the decree holder and the judgment-debtor, O XXI, rule 2, does not apply and the matter may be investigated under s 47.

The question whether the question of fraudulent assignment is to be determined in execution proceedings or by a suit is not of any practical importance where the Court, in which the question has been raised is the Court competent to ex-

Assignment of chose in action-*Contd.*

ecute the decree as also to entertain the suit The matter is one of form, and the Court will not, by a strict adherence to the form defeat the ends of justice.

Under s 49 of the Code, the assignee of a decree stands in no better position than the assignor. (8 Cal 51: 11 C L R 113; 8 I A 123 6 All 269; 11 I A 37; 7 All 102; 11 I A 181 Fol).

Mon Mohon Karmakar v Dwarka Nath Karmakar 7 Ind Cas 55=12 C L J 312.

21A.—Decree assigned before order absolute-Appeal—Assignee not made a party to appeal till after expiry of limitation—C P C S 372—Lis pendens. Where in a mortgage suit, a decree is passed under S. 83 of the Transfer of Property Act such a decree is only a decree nisi and not a final decree, and the suit continues till an order absolute is made under S. 89 of the Act. If the decree is assigned before such order is made, the assignee is affected by the doctrines of *lis pendens*. He can be made a party under S 372 C P C., to an appeal against his assignor and he cannot raise any defence of a plea of limitation to the appeal which could not be raised by the assignors. **Chunni Lal v Abdul Alikhan 1904 A W N 9= 23 All 331.**

Notes—Ref: 9 C W N 171; 13 C W N 787: 9 C W N 883; 29 All 76: 34 Cal 612 F B; 5 C L J 486 F B. Fol; 2 C L J 288: 3 A L J 675,

21B.—C P C S 47; O 21 r 16 (1882 Ss 244 232) Act VII of 1888, S 26—Effect of—Transferee's suit for a declaration that an assignment of a decree is valid, maintainability—Order under S. 232, appealability of:—

In a suit for a declaration that an assignment to the plaintiff of a decree is maintainable. S 26 of Act VII of 1866 has not taken away that right. An order under S 232 C P C is applicable.

Bommanapatti Veerappa v Chintakunta Srinivasa Row 26 Mad 264.

Notes-Ref 14 M L J 401. Foll: 28 Mad 50,FB

22—C P C O. XXI, r 16 and Ss.99, 151—Decree—Assignment of decree—Execution of decree—Notice to judgment-debtor——Attachment issued before hearing jdgment-debtor's objections—Illegality—Irregularity—Practice.

Assignment of chose in action-*Contd.*

The assignee of a decree applied to the Court, under O. XXI, r. 16 of the Code of 1908, for notices to the transferor and the judgment-debtor, on the 18th June 1910. He applied at the same time for attachment by seizure of the goods of the judgment-debtor in his shop On the same day notices were issued by the Court and also a warrant of attachment. Before any objection had been heard on the part of the judgment-debtor, the property was attached in his shop by seizure on the 20th June 1910. The objections were heard on the 26th June, and on the 6th August 1910 the Court *held* that the assignee was entitled to execution of the decree against the judgment-debtor. The lower Courts held that the procedure adopted was a mere irregularity and the proceedings in attachment should not be set aside :

Held, that the procedure adopted was unlawful and not merely irregular, inasmuch as the objection of the judgment-debtor had not been heard before the attachment, which was a step in the execution proceedings, had been ordered. **Kassum Goolam v Dayabhai. 13 Bom L R 973.**

See cases under C P C O 21 r 16=(s 232).

(10) Right of assignee to execute.

23—Assignment of decree.

When decree is assigned to A for his benefit in the name of B, B, the ostensible decree-holder may take out execution. **Purna Chandra Roy v Abhaya Chandra Roy. 4 B L R Ap 40.**

23—C C P O. 21, r 53 (1882 S 273)—Assignment of decree—Attachment, effect of, on execution application by assignee.

Where a decree of the District Court was transferred to the appellant and he applied to the District Court for the execution of the decree and his application was rejected on the ground that it was meanwhile attached under S. 273, of the C. P. C., by the District Munsiff's Court.

Held, that the order was right and the only remedy open to the transferee was to prefer a claim petition to the attaching Court.

Chillaloor Verra Musala Reddi v Pathangi Ramaiya, 7 M L T 83.

Assignment of chose in action-*Contd.*

24—Execution, application for, by assignee of decree—holder, maintainability of—Decree for maintenance.

An assignee of a decree for maintenance can execute it against the judgment-debtor in the same manner as the orginal decree-holder.

Where the claim has been merged in an actual judgment, the right under the judgment is assignable and the nature of the chose in action is generally immaterial. The judgment may be enforced by the assignee in his own name.

Asad Ali Mokata v Haidar Ali.
12 C L J 130=14 C W N 918=6 Ind Cas 826.

25—Execution—Application in accordance with law—Assignment of decree by some of decree-holders to one of them—Refusal of those who did not assign to join assignee in execution—Failure to prove validity of assignment, effect of—Parties.

Some of the decree-holders in a suit assigned the decree in favour of one of them. The others having refused to join the assignee in execution, he applied for execution, making them defendants. *Held*, (1) that this was an application in accordance with law, (2) that the failure of the assignee-decree-holder to prove the validity of the assignment did not make his application any the less in accordance with law. 12 M L J 348 Ref:

Vasha Kuthiyakath Uduman Hajee v Ashi Kalakath Mamikutti. 5 Ind Cas 120.

26—C P C O. XXI. r, 2 (=S. 258)—Transfer of decree—Assignee's representative applying for execution—Plea of assignment being intended for the benefit of judgment-debtor—Arrangement not certified—Effect—Scope of O XXI r. 2.

Where A applied for execution of a decree which he alleged had been assigned to his father by the original decree-holders, and objection was made by B, one of the judgment-debtors, on the ground that the assignment which was in the name of A's father was made under an arrangement that A's father should be a mere *benamidar* for the judgment-debtors.

Held, Per Abdur Rahim J., that the arrangement set up amounted to an 'adjustment' referred to in O. XXI, r. 2, and cannot be recognised as it was not certified or recorded as such.

Assignment of chose in action-*Contd.*

There is no reason why the meaning of the word 'adjustment' should be limited so as to refer only to an adjustment which purports to be one and not to one which has the effect of an adjustment.

Held, also, *per Abdur Rahim* J., that if it cannot be pleaded as an adjustment, it cannot be relied on as showing want of title on the part of A.

Per Sundara Ayyar J. contra. Held that S. 258 (= O. XXI, R. 2) is no bar to proof of a contract that the assignee should obtain a transfer for the benefit of the judgment-debtor himself.

O. XXI, r.2, C.P.C, does not prevent a party from proving that the assignment of a decree was not intended for the benefit of the assignee himself. The object of the clause is to provide that everything preventing the execution of a decree should be made a record of the Court, so as to give the Court complete control over its decree and execution thereof, and it is not part of its object to restrain the transfer of decrees by the decree-holder to any one he chooses. It does not make payments or adjustments which are not recorded or certified to the Court invalid, and the Court will give effect to such adjustments in proceedings other than the execution of the decree. It merely forbids effect being given to adjustments when they are set up as a defence to the execution of the decree by one entitled to do so.

Ponnusami Nadar v Letchmanan Chettiar. 10 M L T 442.

27—Assignment of decree.

A Court is not bound to admit the assignee of a decree to execution thereof. If there is no dispute, it may admit him, or, if the dispute is one which it can decide, it may try the point in dispute, and upon the result of that trial admit the assignee to carry on the decree. **Bishtoo Churn Bhoosun v Kishen Gopal Misser. 13 W. R., 207.**

28—Assignment of ex-parte decree for rent.

When an *ex-parte* decree for rent has been sold by the decree-holder, there is no rule of law in Bengal which forbids the assignee from carrying on the suit instead of the landlord.

Binode Beharee Mookerjee v Beer Narain Roy. 5 W R Act X, 52.

29.—Assignee of decree under Act X of 1859.

Assignment of chose in action-*Contd.*

The purchaser of a decree under Act X of 1859 is entitled to ask the holder for a power-of-attorney to proceed with the execution. **Brojo Coomar Mullick v Mon Mohinee Debia. 16 W R 55.**

Notes.—*Ref:* 1 C L J 500.

30.—Assignment of Act X of 1859 decree.

There is no prohibition or rule of law forbidding the assignment of a decree under Act X of 1859, any more than any other decree. **Junmejoy Mookerjee. 14 W R 215.**

Notes.—Ref: 1 C L J 500.

(11) Right of assignee to appeal.

31.—Assignment of interest in suit.

Where the interest of a sole plaintiff had been transferred with his unqualified assent, and the transferee was substituted for the original plaintiff in the very inception of the case, the defendant's written defence being afterwards put in without demur, it was held not to be necessary for the original plaintiff to be associated with the transferee in an appeal by the latter. **Muneeroodeen Mojoomdar v Parbutty Churn Ghose. 15 W R 121.**

32.—Assignment of decree—Order refusing recognition of—Appeal.

An appeal lies against an order refusing to recognise an assignment of a decree. 25 Mad 383 Fol. **Unnamalai Ammal v Kandaswamy Madpanor. 6 Ind Cas 199=8 M L T 56.**

33.—Purchaser of rights and interests of plaintiff.

A party who purchases the rights and interests of the plaintiffs after a suit has been dismissed is not entitled to appeal against the order of dismissal without joining the original plaintiffs in the suit as appellants. **Dhunnoo Sowdagur v Sunnoo Bibee. 15 W R 106.**

See Judoopattee Chatterjee v Chunder Kant Bhattacharjee 9 W R 311.

34.—Assignment of interest pendente lite—C. P. C. 1882 s. 372.

If a plaintiff in a suit sells his right to prosecute it, the purchaser must carry on the suit in his vendor's name. But if it is desired to bring the vendor's name upon the record, the Court must be satisfied that consideration had been paid and that there had been a *bona fide* transfer. In such cases, evidence of the necessary proceedings under s. 372, Civ. Pro. Code. 1882, having been taken must be adduced, and the preliminaries essential for giving the vendee a title to carry on the suit must be complied with. **Ramji Mal v Hazari Lal. A W N 1885,242.**

Assignment of chose in action-*Contd.*

35.—Purchaser of right, title, and interest in suit.

The purchaser of the right, title, and interest of a defendant in a suit in and to the land the subject-matter of that suit, has no right as such to appeal from a decree passed against the defendant. **Gajadhar Prasad v Ganesh Tewari. 7 B L R 149=15 W R 485**

36.—Right of purchaser on death of assignee.

A sued B in the Court of first instance, and obtained a decree declaring A's right to a house. The District Court on appeal reversed this decree and rejected A's claim. The High Court reversed the decree of the District Court, and remanded the appeal. The District Court on remand made a decree confirming the original decree of the Court of first instance in A's favour. Subsequently to the last-mentioned decree of the District Court, B sold the house to C. B then preferred a special appeal to the High Court, but died before it was heard. *Held*, under Act VIII of 1859, that C could not carry on the special appeal after B's death. **Moreshwar Bapuji Phatak v Kushaba Shankroji. 2 Bom 248.**

Notes.—Ref: 30 Bom 101=7 Bom L R 659.

37.—Purchase of right of appeal—Effect of, as to liability for costs in lower Court—Speculative purchase, Policy of.

Where the rights and interests of the plaintiff in a suit which was dismissed were purchased by third parties who filed an appeal in which they described themselves as plaintiffs-appellants, together with the original plaintiffs, and the original decree was confirmed with costs,—*Held* that the purchasers took the position of plaintiffs, with all the risks and liabilities of plaintiffs from the commencement, including liability for all costs awarded against the plaintiffs generally without

Assignment of chose in action-*Contd*

limitation. *Quere*—Ought the speculative purchase of a right of appeal to be recognized by a Court of Justice ? **Troylockhonath Banerjee v Brindabun Chunder Sirkar Chowdhury. 18 W R 438.**

37A.—Mortgage—Suit on—Parties—One defendant, also assignee from another defendant—Claim under assignment—Court's duty to adjudicate on—Assignee already party—Not necessary to be again made party as such.

Where in a mortgage suit, the assignee of a mortgage claiming under an assignment made by a defendant in her favour was also himself a defendant and put forward his claim as such assignee.

Held, that the Court was bound to adjudicate upon his claim and that it was unnecessary to make him, who was already a party, again a party expressly as assignee. **Saminathaier v Adinarayanasamier. 9 M L T 410= 9 Ind Cas 643.**

38—Suit by assignor—Notice of assignment—Conditional assignment.

Plaintiff sued on the allegation that he had a claim for Rs. 10,000 against defendant, arising out of a transaction regarding blue stones; that he assigned this claim to one M.S. for Rs 6,000, it being agreed at the time of the assignment that the suit to enforce the claim against the defendant should be brought by and in the name of the plaintiff, but for the benefit of M. S, who would provide the funds required for and receive the fruits of the litigation. No notice of the assignment was given to the defendant either by the assignor or the assignee. It was urged by the defendant, among other pleas, that plaintiff having parted with his property and rights in the subject-matter of the suit, was not entitled to bring or maintain the suit.

Held, that this contention could not prevail: that though the assignee of a chose in action was entitled to sue in his own name in ths Courts of this country, and, if there had been an unconditional assignment of the claim and if notice of the assignment had been given to the defendant, the plea might have been good, it was of no force when it appeared that the suit was brought by the assignor in pursuance of the contract of assignment and for the benefit and with the consent of the assignee.

Muhammad Sadiq v Pollard. P R 186 of 1883.

Assignment of chose in action-*Contd.*

39—Defendants assigned their mortgagee rights under two deeds to plaintiff, stipulating to make good any loss which the latter might sustain by reason of the opposition or resistance of the mortgagors. Plaintiff, in a suit against mortgagors, failing to establish one of the mortgages, sued the original mortgagees to recover damages, with interest and costs, incurred by him in a suit against the mortgagors. *Held* that the measure of damages or loss to which the plaintiff was entitled is not the sum paid by him as consideration, but the value of the thing which he has been deprived of; and that the suit being in its nature a suit for unliquidated damages, plaintiff was not entitled to the interest or sum awarded as damages. **Musammat Parbutty v Misser Chimmun 1Agra Rep, A C 82.**

(12) Assignment by minor.

40—Ss. 6, 8—(1877)—S. 7—Minority—Right to sue exemption—Assignment by minor.

If a minor in respect of a cause of action accruing during his minority sells his rights and interest to a third person who is *sui juris*, the latter cannot claim the exemptions accorded to the minor under S, 7 of the Indian Limitation Act, 1877, but is subject to the ordinary rules of limitation. 9 Cal 663 and (1888) A W N 183 foll. **Dyal Singh v Basant Ram. 1901 A W N 12.**

See also cases under:—

Limitation Act S. 7.

(13) Assignment by mortgagee for lesser consideration

41—Redemption—Usufructuary—Right to redeem before satisfaction of debt by rents and profits—Assignment by mortgagee for lesser consideration—Right to assignee to recover entire amount due to his assignor—Interest, rate of—Appropriation of rent first towards principal and then for interest—Liability of mortgagor to pay enhanced assessment—Transfer of Property Act S 135.

In the absence of an express recital to that effect, a mortgagor under an usufructuary deed of mortgage is not debarred of his right to redeem till the entire debt is satisfied by enjoyment by the mortgagee of the profits of the land.

Where the mortgagee assigns his interest for

Assignment of chose in action-*Contd.*

a lessor amount than that due to him, without stating that the balance was conveyed as a gift. the assignee cannot recover from the mortgagor more than the consideration he paid for the assignment and reasonable interest thereof.

Where at the date of assignment, a very small portion of the consideration was due for principal and the balance represented the interest, the assignee was held not entitled to the high rate of interest provided for in the original mortgage-deed, *viz.*, 24 per cent. per annum, but was awarded only 6 per cent. per annum.

The rents and profits have first to be applied towards principal and then towards interest.

The mortgagor is liable for the enhanced assessment levied by Government after the date of the mortgage. **Burle Jaganna v Yelugula Latchanna 8 M L T 420 = 7 Ind Cas 871.**

(14) Effect of assignee being added as co-defendant after limitation.

42A—S 22— Pre-emption — Suit — Assignment by vendee pending of suit—Assignee added as co-defendant after limitation for suit' expired effect of.

S 22 Limitation Act, does not apply, where the added defendant derives his title from the original defendant by an assignment pending the suit. The words " when a *new* plaintiff . . . . added after the institution of the suit" in S 22 mean a person who claims in his own right. But when the interest set up by the added party is only derivative, acquired pending the suit, then he is not a new defendant or plaintiff; and the case is one merely of continuation of the original suit with leave of Court under S 372, Civ Pro Code, without any change in the date of its institution. A suit for pre-emption, therefore, is not barred by limitation, by reason of a person deriving title from the vendee-defendant after the institution of plaintiff's suit, having been joined as a co-defendant after the expiry of the stipulated period. 5 Cal 720; 23 All 331; 68 P R 1879; 7 P R 1906 Ref; 25 P R 1903; 25 Cal 409 Dist. **Fatteh Muhammad v Said Ahmad, 3 P R 1907 = 3 P L R 1908 = 1907 P W R 42.**

See also cases under:-Limitation Act S 22.

Assignment of chose in action-*Contd.*

(15) Conditional assignment.

43—Validity of, by way of mortgage—Conditional assignment—Assignee's right—Law applicable to the Punjab.

An assignment of the assignor's interest in a certain sum due from a third party, "until certain advances made by the assignee to the assignor had been paid off with interest," is a conditional assignment. And a charge or a conditional assignment is not such an assignment as gives the assignee all the rights which, under the Judicature Act, he can have. only when the assignment is absolute *i.e.*, when it absolutely vests the property in him. So. a person, to whom a non-negotiable promissory-note is assigned by the payee, as security for a debt due from the payee to the assignee, *until* the debt due to the assignee remains unpaid, cannot, as such an assignment is only conditional, sue the maker of the pro note, in his own name, for recovery of the amount due on the note. (12 P R 1894. 1 All 732, Ref:) Neither the Judicature Act nor the Transfer of Property Act is, in terms, in force in the Punjab, and the Court is at liberty to adopt such provisions of the one or the other, as appear to it to be consonant with the general principles of law and equity.

Nihal Chand v Ali Baksh. 9 P R 1907 = 41 P W R 1907 = 25 P L R 1908.

(16) Liability of assignee arising by reason of his privity of estate.

44—Of mulgeni tenure—Assignee's liability arises by transfer to him and not by obtaining possession—Transfer of Property Act, s. 109 (j).

The liability of the assignee from a lessee arises by reason of his privity of estate, and this privity is created by the transfer to him, and not by his obtaining possession. Similarly, when the assignee in turn assigns over, his privity of estate ceases, and, consequently, his liability also ceases in respect of breaches of covenant committed after he has assigned over. This principle applies both to agricultural and non-agricultural leases, although the Transfer of Property Act does not apply to an agricultural lease. (1 M H C 21; 3 C L R 285, Not Foll: 17 Mad 296, Ref:) **Saldanha v Subraya Hebbara. 17 M L J 258 = 2 M L T 163 = 20 Mad 410.**

Assignment of chose in action-*Contd.*

(17) Right of a third party to impugn assignment.

45—Assignment admitted by assignor—When can be impugned by a third party—Pleadings.

Ordinarily, an assignment cannot be impugned by a third party when the assignor admits it. But a third party is entitled to impugn it when the transfer is a colourable one and has been entered into with the object of defrauding him.

Jwala Prasad v Bharat Singh. 10 Ind Cas 226.

45A—Attachment—Security deposit—Assignment to third party—Creditor subsequently attaching the deposit — Assignee's right to recover—Trans of Pro. Act, S. 130—Applicability.

S obtained an assignment from one N, of the latter's right to a sum of money deposited by him with X as security for proper performance of some office held by N. Subsequent to such assignment, V attached the security amount in execution of a decree held by him against N and obtained payment through Court of a sum of Rs 145 out of that amount. S now sued V for the recovery of the said sum of Rs 145. *Held*, that S was entitled to recover.

V's rights were not higher than those of a purchaser at Court auction and he obtained only such rights as N possessed at the time of the attachment by V.

According to S. 130, Transfer of Property Act. S's rights under the assignment became complete against N on the date of the assignment.

Though it may be that S.130 is not applicable to a debt which was not strictly within the defination of an actionble claim in S.130, yet the principle of the section must be applied to the present case. **Yenkatachalam Iyer v K V Subramania Iyer 11 M L T 245.**

46—Rights of third party to impeach—Assignment defrauding the third party.

Ordinarily an assignment cannot be impugned by a third party when the assignor admits. But it is otherwise where the question is whether the transaction to which the assignment relates is colourable and intended to defraud that third party. **Gaurishankar v Hiralal 12 Bom L R 822=1 Ind Cas 957.**

Assignment of chose in action-*Contd.*

47—Champerty and maintenance—Agreements contrary to public policy—Assignment—Rights of third party to impeach.

There may be a valid transfer of property for the purpose of financing a suit upon the terms that the property or the proceeds realised from the litigation shall be divided between the transferor and transferee, irrespective of the fact whether or not there was any agreement for the payment of consideration "win or lose." The duty of the Court in such a case is to determine whether or not the agreement is a fair agreement to supply funds and does not purport to have been made so as to be inequitable or for improper objects, as for the purpose of gambling in litigation or of injuring others by encouraging unrighteous suits.

In ordinary cases it is a rule that, where an assignee sues on his assignment and proves it, an adverse party cannot take the objection that there was no consideration, but the rule does not apply where the transferor being a party to the litigation pleads that the assignment was fictitious and without consideration. (4 I A 23=2 Cal 233 Foll 12 Bom 686 Foll) **Baldeo Sahai v. Harbans 8 A L J 652.**

(18) Mere right to sue not transferable

48—Ss 3, 6 (*e*) and 130—"Actionable claim." what is-Breach of contract damages for-Right to recover, transfer of-"Mere right to sue," if transferable—Cause of action. The right of a person to recover damages for the breach of a contract is (*Fletcher J doubtful*), "merely a right to sue" within the meaning of s 6 of the Transfer of Property Act, and is not capable of being transferred and the assignee thereof cannot maintain an action to recover such damages. **Abu Mahamed v S C Chunder 13 C W N 384=36 Cal 345=1 Ind Cas 827**

Assignment of chose in action-*Contd.*

(19) Payment of rent by lessee in good faith to person in possession.

49—S 50-Lessor and lessee Payment of rent by lessee in good faith-Liability of the lessee to pay rent to the rightful owner.

On the 14th December 1895 S went into possession of certain property as mortgagee; and, on the same day he let the property to the defendant for twelve years. S after some years died, and his interest as mortgagee survived to his younger brother R. Thereafter R died. And since then S's widow, G, took possession of the property and managed the same, and got her name placed on the *khatta* as the owner of the property, She also recovered rent from the defendant for the years 1902 and 1903. The person who was really entitled to the property at R's death was his sister the plaintiff. She sued to recover rent for the years 1902 had 1903 from the defendant, on the ground that G had no authority to receive rent and give a discharge for the same. It was found that the defendant in making the payment to G had acted in good faith and had no notice of the plaintiff's interest in the property.

Held, that the defendant was not chargeable with the rent sued for, as S 50 of the Transfer of Property Act 1882, applied to the case.

The language of S 50 is general. It applies even to cases where there has not been an assignment by the lessor during the tenancy.

Kaveriamma Putta Hedge v Lingappa Rama 10 Bom L R 1190=33 Bom 96= 1 Ind Cas 654.

(20) Right of assignee of Life Tenant's interest to rent

50—Sub-lease by life tenant—Rent payable in a certain month—Death of life tenant before expiry of the particular month—Right of assignee of Life Tenant's interest to rent--Apportionment of rent.

Where a tenant for life subleased the lands on a yearly tenancy and the rent was payable in a certain month and the tenant for life died a few days before the expiry of the particular month, but after its commencement, in a suit by the assignee from the tenant for life.—Held—Per Subrahmamya Aiyar J:—In the absence of a Specific rule applicable to such cases in India, the courts are entitled to follow the broad and just

Assignment of chose in action-*Contd.*

principle underlying the English Statute Law culminating in the Apportionment Act of 1870 and hold that, as a matter of equity and good conscience, the assignee is entitled to the rent due till the period during which the life tenant was living. Per Davies J.—The rent having fallen due in the month at which the tenant for life died, though the right to sue the tenant for the rent would not accrue till the expiry of the month, the assignee is entitled to the rent a payment of which before the death of the tenant for life to the assignee being capable of working out a valid discharge. A right to have a thing often accrues before the right to sue for it does.

Lakshminaranappa v Meloth Raman Nair 26 Mad 540.

Notes.—Ref 33 Cal 786.

(21) Other Cases

51—Statutory powers-Exercise for collateral purpose—Validity of.

Where powers are conferred by a statute they can be exercised only for the purposes for which they were intended and not for any collateral object. **Bombay Tramways Co v Bombay Municipal Corporation 4 Bom L R 384.**

52—C P C Act III of 1901 (U. P. Land Revenue. Ss. 58, 99)—Assignee of Government revenue—Right of—Remission of revenue.

An assignee of Government revenue takes the assignment subject to all the rights of Government to assess, enhance, reduce, remit or suspend the revenue. **Beni Madho v Bhagwan Prasad. 8 A L J 534.**

52A—Cl 15—Order refusing to bring on the record assignee of plaintiff. An appeal lies from an order refusing to order assignee of plaintiff to be brought on the record, as such order amounts to a judgment. **Commercial Bank of India Limited v Sabju Saheb. 24 Mad 252.**

53—Hindu Law—Joint family property—Mortgage by father alone-Transferee from father acquiring title by adverse possession—Right to question validity of mortgage.

A transferee of joint family property is entitled to contest the validity of a transfer made by one of the members of family.

A mortgagor cannot be allowed to question the validity of his own mortgage and thereby derogate from his own grant. A transferee from him who stands in his shoes has no higher right.

Assignment of chose in action-*Concl'd.*

But where the transfer to him was made more than twelve years ago and he has been allowed to remain in possession, it must be presumed to be a transfer for necessity with the assent of the other members, and he is therefore entitled to call in question the validity of a mortgage made by the father alone without legal necessity, inasmuch as the transferee represents the whole family.

Per Chamier, J.—A person in possession of property can always resist a claim against the property, on the ground that no right or title has passed to the claimant or that an assignment to the claimant was made to defraud the person in possession, or was illegal or void or opposed to public policy ; but where an assignment is sufficient in law to pass title to the claimant and is only voidable at the instance of a third party, the party in possession cannot, as a rule, challenge the validity of the assignment, unless a trial for its validity is necessary for his protection against the claim of another person. **Muhammad Muzamilullah Khan v Mithu Lal 8 AL J 901 (F B).**

Assignment of Contract.

See (1) Hindu Law Contract.
(2) Contract-Assignment.

Assignment of Debt

See (1) Equitable Assignment.
(2) T P Act Ss 133—134 and Assignment of chose in action.

1—Promise to pay money when a debtor receives a debt due to him by a third person, does not constitute an assignment so as to charge the debt in the hands of such third person. It simply holds out to the promisee the expectation that he will receive the money when paid by the third person. Such an arrangement is countermandable. **Mool Chund v Jumyut Singh P R 63 of 1873.**

2—Equitable assignment of debt.

M borrowed money from plaintiff to enable him to carry out a building contract for B, it being arranged between the three that whatever became due from B to M up to the 20th December 1872, should be paid to plaintiff. Before that date and before any money was paid by B to plaintiff, the defendant obtained a decree against M and attached what was due from B to M (or what would have been due to M but for the arrangement with the plaintiff). Plaintiff sued to establish his right to receive the money from B

Held, that there was an assignment to plaintiff of B's debt to M, and he had a right to the money in preference to the defendant. **Lakha v Sobha. P R 66 of 1875.**

Assignment of debt-*Contd.*

3.—Assignment of debt—Right of assignee to sue.—

Held, that where a plaintiff sues for the recovery of a debt as an assignee, he is bound to prove that he was a *bona fide* assignee of the debt and capable of giving a valid discharge especially where the defence questions the validity of the alleged assignment. **Mul Chand v Piyare Lal. 23 P R 1903.**

4.—Chose in action—Assignment of debts—Notice of assignment to debtor—Transfer of Property Act (IV of 1882), Chapter VIII—Contract Act, 1872, Section 60.

The plaintiff as assignee of a debt sued two defendants, the debtor and the original creditor, the latter of whom was the plaintiff's assignor. The debtor-defendant pleaded that he had settled accounts with the original creditor, and was therefore, not liable to the assignee.

The first Court having found that the settlement between the debtor and the original creditor was subsequent to the assignment and did not include the debt in suit, and having given judgment in favour of plaintiff, defendant-debtor appealed to the District Judge on two grounds, 1st, that the item now in suit was entered in the deed of compromise between him and the original creditor, and 2nd, that he had no knowledge of the assignment.

The District Judge held that no notice whatever to the debtor of the assignment had been proved, and, relying upon Section 60 of the Contract Act, and without coming to any finding as to whether the defendant—debtor had as a matter of fact settled with his original creditor without notice of the assignment, he dismissed plaintiff's claim.

The plaintiff applied to the Chief Court for revision of the decree of the District Judge.

Held, that before plaintiff's suit could be dismissed, it was necessary to find that defendant had settled with his creditor.

Assignment of debt-*Concld.*

Held, also, that the Contract Act has nothing to do with the assignment of debts, and that, although the Transfer of Property Act, 1882, is not in force in the Punjab, the law on the subject in force in this Province is to the same effect as that contained in Chapter VIII and the principal rule in Section 131 of that Act.

Although a *chose in action* is assignable in this country, an assignment cannot operate to the prejudice of the original debtor so long as he has no notice of the assignment. Where, however, the debtor asserts that he has settled the debt with his original creditor, it is necessary to find both whether such settlement has actually taken place, and also whether the debtor was cognisant, or not, at the time of such settlement of the assignment. If it is found that the debt was not settled, as alleged, the absence of notice of the assignment is not material.

Held, further, that the institution of a suit by the assignee is itself notice of the assignment.

Jhoki Ram v Malik Kadir Bakhsh. P R 12. 1894.

Assignment of debt for value.

See T P Act S 135.

Assignment of debts secured on land.

See (1) Registration Act.
(2) T P Act S 135.

Assignment of decree.

See Cases under :—

(1) Appeal—Execution of decree.
(2) C. P. C. O. 21, r. 16, (Section 232 of 1882.)

Assignment of deposit.

—Security for office—Assignment of deposit —Subsequent attachment and realisation of money by creditor of assignor—Right of assignee to recover. **See** Assignment. **11 M L T 245.**

Assignment of equity of redemption to third person for value, but with notice of agreement.

See Equity of redemption.

Assignment of interest pending suit

See Lis pendens.

Assignment of interest under decree directing annual payments.

1.—A decree which merely directs annual payments to be made to the judgment-creditor does not impose on the judgment-debtor an obligation to pay until the end of the year, and meantime nothing accrues to the judgment—creditor which he can assign. **Balaji v Mahadev. 1878 P J 214.**

Assignment of Land Revenue for benefit of shrine.

See Pensions Act (XXIII of 1871) S 11.

Assignment of mortgage.

See (1) Mortgage.
(2) Limitation Act (1908) art 142.

Assignor and assignee.

1.—Assignor and assignee Unfair and unconscionable bargain and inadequate price raised by third party, if can be allowed.

In a suit by an assignee to enforce a right where the assignment is supported by the assignor, no question can be raised that the transaction was an unfair and unconscionable bargain, for an inadequate price as between the assignor and the assignee.

Raja Rai Bhagwat Dayal Singh v Debi Dayal Sahu. 7 C L J 335=35 Cal 420=12 C W N 393=18 M I. J 100=35 I A 48 P C.

See also cases under :—
Contract Act S 16.

Assizes.

See Court.

Association.

—Illegal—

See Company—Formation and Registration.

—Registration of—

See (1) Cases under Company—Formation and Registration.
(2) Injunction—Special Cases—Breach of Agreement.

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—**Withdrawal from**—

See Company—Winding up—Costs and Claims and Assets.

—Suit by—Power of Secretary to institute and conduct suit.

See (1) Civil Procedure Code (1908) O. 29 r. 1 (2) Company.

—Meaning of. **See** Act VI of 1882 (Companies). **8 A L J 32.**

Association and Disassociation,

See (1) Custom, Inheritance.

(2) Hindu Law, Inheritance.

Assurance.

Assurance—Marine—See Shipping.

For Other Cases—See Insurance.

Asura Marriage.

1.—Indian Contract Act (1872). sec. 23—Contract to pay money to a father in consideration of his giving his daughter in marriage—Whether immoral or opposed to public policy.

Held by the Full Bench, that a contract to make a payment to a father in consideration of his giving his daughter in marriage is immoral and opposed to public policy within the meaning of section 23 of the Indian Contract Act. (15 Mad 83; 17 Mad 9, 22 Bom 658 Con:) **Kalavagunta Venkata Kristnayya v Kalavanagunta Lakshmi Narayana 4 M L T 1 (F B)= 18 M L J 403=32 Mad 185.**

Atel property.

—Buddhist Law—Inheritance. L B R 1872—1892, 223.

Atrafi.

See cases under:—

(1) Custom, Cesses.

(2) Joinder of Causes of Action.

(3) Limitation Act (1908) art. 131.

Atrafi Dues—Small Cause Court, Mofussil, Jurisdiction of—General. **81 P R 1888= 108 P R 1887.**

Attachable Property.

See cases under—

C. P. C., S. 60 (s. 266 of 1882).

Attaching creditor.

1.—C. P. C. O. 21 r. 90 (1882 S. 311)—Any person whose immoveable property has been sold-Person interested—Attaching creditor.

A person who has attached the debtor's property in a Court different from that which sold the property is not one 'interested in the property sold' and therefore he cannot apply to have the sale set aside under s. 311, C. P. C.

Bejoy Singh v Hukum Chand. 29 Cal 548.

2.—Attaching creditor—Right of a creditor attaching a decree—Reversal of decree on appeal—Remedy of creditor.

G attached, in execution of a decree against R, a decree, got by the latter against M. Before G could reap the fruits of his attachment, an appeal, which had been preferred against the attached decree, was concluded by a compromise between R and M, the effect of such a compromise being to reduce the amount due to R under the original decree by a very large sum. The attaching-creditor, G, protested against the compromise, but the appellate Court passed a decree on the basis of the compromise, disallowing the objection of G. G, now, proceededed to execute the original decree, which he attached. The execution Court refused to execute the decree, on the ground that it had been replaced by the decree of the appellate Court based as it was on the compromise. Hence this appeal. Held, whatever might be the inconvenience or loss to which the attaching-creditor might be put by the compromise of the appeal, the original decree was no longer subsisting, the same having been replaced by the decree, of the appellate Court, and the attaching creditor was without remedy. He was himself to blame for having attached a decree as to the reversal of which, on appeal, there was a chance. **Ganpat Shah v Ram Chand. 22 P L R 1905**

3.—Right of suit Attachment, of—Wrongful removal of attached property by stranger—Right of suit of attaching creditor.

A judgment—creditor who attaches the property belonging to his judgment-debtor does not derive any greater interest in the property by reason of the attachment than he had in it before the attachment; and he has no right of suit against a person who has wrongfully removed the attached property. His proper remedy is to move

Attaching creditor-*Concld.*

the court executing the decree. (27 All 378 Ref: 6 Cal 663 Comp.) **Karuppan Chetti v Kandasami Thewan. 17 M L T 84=30 Mad 207**
On appeal 30 Mad 413.

4.—Attaching creditor's locus standi to set aside decree obtained by another.

An attaching decree-holder has no *locus standi* to dispute the validity of another decree in execution of which the attached property is about to be sold. Attachment only prevents alienation, but does not confer any title. 25 Cal 179 foll.
Lachmi Dayal v Har Danni Lal. 25 All 347.

See also cases under.

(1) **Execution of Decrees**
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Attaching creditor of decree holder respondent seeking to be brought on to the record as a respondent.

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26 Mad 263.

(1) SUBJECTS OF ATTACHMENT.

(A) ANNUITY OR PENSION.

(1) Annuity charged on estate.

1.—Civil Procedure Code, 1859 s. 205.

An annuity, the payment of which is a charge upon an estate, is property which can be attached under the provisions of s. 205, Act VIII of 1859, at the instance of the person who has inherited the estate from the grantor of the annuity and by whom the annuity is payable. **Dheraj Mahtab Chand v Dhun Coomaru Bibee.**

17 W R 254.

1 A -Ss. 18,73, 88, —Cause of action—attchment—Raiyat at fixed rate—Transfer of shares of holding—Suit by landlord against old tenant—Landlord's knowledge of transfer—Decree whether binding on transferee.

A mere attchment is sufficient invasion of a person's right to give him a cause of action.

A raiyat at fixed rates under S. 18 of the Bengal Tenancy Act is entitled to sell shares or specific portions of his holding: if he sells portions of his holding to several purchasers, such purchasers are not reduced to the position of ordinary occupancy raiyats.

A landlord in suing for rent is bound, if he is aware of the purchases, to implead the purchasers as parties to the suit.

Attachment-*Contd.*

(1) Subjects of Attachment—*Contd.*

If a landlord omits to join a purchaser of whose purchase he is aware, the purchaser will not be bound by the rent decree, and will be entitled to bring a suit for a declaration that the decree is inoperaive as against him. 11 C W N 217, Fol. **Akhoy Kumar Mitter v Sri Narian Dey,**

9 Ind. Cas. 663.

1B.—Ss. 282, 287—Decree—Execution—Attachment—Application to raise attachment—Attached property declared subject to lien—Sale of property—Auction purchaser—Intervenor suing the purchaser for the amount of the lien.

G obtained a money-decree against H, and in execution attached some property. U intervened and applied to have the attachment raised on the ground that he was the owner of the property. The claim was investigated under Ss. 280 and 281 of the Code of 1882, and the Court held that H was the owner of the property, but that U was entitled to a lien on the property to the extent of Rs. 687-11-3. The property was sold at a Court sale subject to the lien and purchased by N. U then sued N to recover the amount of the lien. N contended that the miscellaneous order did not bind him, and that he was entitled to question the existence of the lien:

Held. (1) That N was not bound by the miscellaneous order, for he could not be regarded as a party to it, being not a representative either of the judgment-debtor or of the judgment-creditor.

(2) That the Court's order that the property be sold subject to U's lien was not one passed under S. 282, but under S. 287 of the C. P. C. of 1882, for U sought to raise the attachment upon the ground that the property belonged to him, and the question of lien was not directly raised by him but came in only incidentally.

(3) That N was, therefore, entitled to question the existence of lien. (9 Bom 285; 15 Bom 290 Fol.) **Narayan Sadoba Halvai v Umbar Adam Memon,** **13 Bom L R 307.**

1C C.P.C.O. 21, rr. 46, 52-Annuity not due, if garnishable—Anticipatory attachment of money expectant to reach the hands of public officer.

A conveyance of all properties by a person in favour of his son for the payment of his debts

Attachment-*Contd.*

(1) Subjects of Attachment—*Contd.*

provided that the purchaser would pay the vendor a monthly sum of Rs. 4,000, the first payment to be made on 1st October, 1905, and the payment of every succeeding month, on the first day of the month following. The deed further provided that the vendor would not, by mortgage or otherwise, seek to charge or alienate the allowance payable to him; and that, on no account and under no circumstances, was the allowance to become payable to, or demandable by, any person other than the vendor or his duly constituted attorney. There was also a provision, that, so far as was consistent with the then subsisting mortgage executed by the vendor himself, the allowance payable was to be a first charge upon a specified share of the estate.

A decree-holder of the vendor applied for recovery of the judgment-debt by attachment of the allowance of Rs. 4,000 from April 1910, up to the date of realisation, and also for rateable distribution of a sum of money, which had been already deposited in Court and represented a portion of the allowance due to the judgment-debtor from November 1909 to January, 1910. He further asked that the allowance for the months of February and March, 1910, which had already accrued due might be attached and made available for the satisfaction of their dues:

Held, that an annuity, not yet due, was not garnishable under the provisions of the law, and that r. 46 of O. 21 of the Code was of no assistance to the decree-holder.

The term "debt" in O. 21, r. 46 of the Code is used in its legal sense of a debt either due or accruing due.

R. 52 of O. 21 of the Code applies only where the property to be attached is in the custody of a public officer. It does not allow of an anticipatory attachment of money expectant to reach the hands of a public officer, and is restricted only to money actually in his hands. (9 C W N 703; Dist: 22 Bom 39, Fol: **Raja Padmanund Singh v. Rama Prasad Malvi, 14 C L J 127.**

1*D*—C.P.C.S. 60 (1882 S. 266)—Right to future maintenance, if an annuity is—Annuity, if attachable.

An annuity given by will is not a right to future maintenance within the meaning of S. 266 of the Code and can be attached in execution of a decree. (10 C W N 1102, foot-note (1892), Fol:) **Gopal Lal Seal v F. J. Marsden, 10 C W N 1102.**

1*E*—C.P.C.S.60 (1882 s. 266 (1)—Execution of decree—Attachment—Annuity payable to vendor by vendee of immoveable property.

Held, that where a person made over property to the Court of Wards, partly in consideration of a present payment and partly in consideration of an annuity payable to the vendor such annuity was property of the vendor which was capable of being attached in execution of a decree against the vendor. 27 Cal 38, and 14 M I A 40 distinguished; 6 B L R 646 ref. to.

Harshankar Prasad Singh v. Baijnath Das, 1901 A W N 50=23 All 164.

Notes.—Dist: 6 A L J 227 Fol: 31 All 304.

2—Sale in execution without attachment—Validity.—

The power of attachment is intended for the protection of the decree-holder, and even where there has been no attachment as required by the Code, a sale in execution in pursuance of such attachment is none the less good. 8 W R 10; 18 Cal 188; 18 Mad 437 ref. to.— **Ramasami Naik v. Ramasami Chetti, 17 M L J 201.**

2*A*—Objection.—

The procedure held to be to make a summary inquiry, and if a *prima facie* objection were established, to refer the objector to a regular suit —

Jugool Kishore v. Dwarka Dass. P R 44 of 1866.

2*B*—Political pension.

Held, that a pension awarded by the, deed of trust, dated the 23rd November 1839, on the part of Mohamad Ali Shah, King of Oudh, printed at page 149, Aitchison's Treatise, is a political pension and *as such* it cannot be attached in execution of a decree against the pensioner. **Jafar Mirza v. Bhagwan Das, 1 0 C 170.**

3—s. 266 cl. (g) C. P. C.—Pensions Act—(Act XIII of 1871), sections 8, 11, 12—Government grant for services—Political pension—Liability to attachment in execution of decree.

The word "pension" in section 11 of the Pensions Act and section 266, clause (*g*), of the Code of Civil Procedure, imply periodical payments of

Attachment-*Contd.*

(1) Subjects of Attachment—*Contd.*

money by the Government to the pensioner in the manner prescribed by section 8 of the Act.

Where as a return for good services, land was granted once for all under a *sanad* by the Government, the grantee took proprietary rights in the subject of the grant which was transferable and attachable.

Quære—Whether if the grant had been of land revenue, different consideration would have arisen. (4 Bom 432) followed. (1902, 22 A W N 161), (17 I A 181; 18 Cal 216) referred to.

Lachmi Narain v. Makund Singh, 1 A L J 338.

(2) Stipends allowed to Mysore Prince.

4—The stipends allowed by Government to the members of the Mysore family cannot be attached. **Mahomed Kuzulbash v Mahomed Buseeroodeen, 7 W R 169.**

5—Onus.

An objection under s. 278 was taken to an attachment by the sons of the judgment-debtor on the ground that the property attached belonged to them and not to the judgment-debtor. They relied in support of their contention upon a sale-deed. The objection however was overruled and the sons brought a regular suit to have their claim to the property established. In defence the decree-holders contended that the sale-deed was fraudulent and collusive. *Held*, that though generally speaking the burden of proving fraud lies upon the party alleging it, in this case the burden of proof rested upon the plaintiffs who were impeaching the disallowance of their objections in the execution department.

Tulshi Rai v. Ram Das. 7 W N 71.

(3) Pay Carnatic Stipendiary.

6—Mad Reg IV of 1831—Act XXIII of 1838.

The stipend of a Carnatic stipendiary is not liable to attachment in execution of a decree obtained against the stipendiary, it being one of the descriptions of personal grants expressly protected from attachment in satisfaction of any decree or order of a Court by s. 3 Regulation IV of 1831, extended by Act XXIII of 1838. These enactments were not impliedly repealed by ss. 205 and 237 of the Code of Civil Procedure. **Mahomed Abdul Vakab Sahib v Comandur Rama Samy Aiyengar, 2 M H C R 277.**

Attachment-*Contd.*

(1) Subjects of Attachment—*Contd.*

(4) Allowance charged on estate.

7—Annuity-Civil Procedure Code, 1859 s.205.

Where a deed is executed stipulating the grant of a regular maintenance payable from the grantor's estate, and recoverable, in the event of non-payment, from that estate, the allowance so granted is property which can be attached under the provisions of s. 205, Act VIII of 1859. **Enaet Hossein v Nujeeboonissa Begum 11 W R 138.**

Notes:—Fol: 17 W R 254.

8 C P.C.S.60 (1882 S. 266(g)-Execution of decree—Attachment Pensions Act (No. XXIII of 1871) S. 11—Pensions—Sum of money payable by special arrangement to judgment-debtor out of increased revenue from family estate :

The estate known as the Gursari estate in the district of Jhansi was formerly held upon an 'Ubari' tenure, that is to say, the revenue assessed upon it was much below the usual amount. In 1895 the Government raised the assessment considerably, and directed that out of the increased revenue 'as an act of grace' the members of the family other than the head of the family should have certain shares assigned to them. *Held*, that these shares, whether they were to be regarded as assigned Government revenue or as profits due to a person entitled thereto from the estate were not a 'pension' within the meaning of Act XXIII of 1871 and were not exempt from attachment in execution of a decree. (4 Bom 432 ref to.)

Balkrishna Bhan v Govind Rao. 1902 A W N 161.

(5) Political pension.

9—Civil Procedure Code, (1882), S. 266, Sub. S. 1—Political pension—Payments due under the Oudh loans of 1838 and 1842—Exemption from liability to attachment for debt.

It is probable that the enactments of s. 266 (g) were not meant to cover pensions payable by a foreign state when remitted for payment to their pensioners in India ; but these certainly include all pensions of a political nature payable directly by the Government of India. A monthly allowance payable to the respondent by the Indian Government, under an arrangement made between the King of Oudh and the Governor-General of India in the year 1842, for the bene-

Attachment-*Contd.*

(1) Subjects of Attachment—*Contd.*

fit of the King's family and his heirs in perpetuity and payable to the heir who has inherited it, is a political pension within the meaning of S.266 sub S. (g) of the Civil Procedure Code (1882). The argument, that it is a provision made out of the King's private estate for the maintenance of the members of his family, ignores the fact that under a despotic Government like that of Oudh of 1842, there was really no distinction between state property and private property vested in the sovereign. **Bishambar Nath v Imdad Ali Khan** 18 Cal 216=17 I A 181.

Notes:—Ref: 26 Mad 423; I A L J 338 ; 26 All 617 ; (1904) W N 144. Fol: 26 Mad 69.

10—Pension

K M borrowed certain money from D D and hypothecated an annual pension of Rs 425-3-8 granted to him and his heirs by the Government by way of compensation for the assumption of an *altamgha jagir* belonging to K M. D D brought a suit thereupon and obtained a decree for Rs. 428-4-3 against K M "and Rs. 425 3 8 the hypothecated money." D D applied for the attachment and sale of K M's pension in execution of this decree. On K M's behalf it was contended that the pension was exempted from attachment and sale, (i) because it was exempted by s. 266 of Act X of 1877 ; (ii) because it fell under the class of pensions specially made inalienable by Act XXIII of 1871. *Held* that there was no force in the second plea. As to the first, even assuming that the pension in question was the "political pension" of (g) of s. 266, it did not follow that the judgment-debtor who had pledged it as an available asset in security for his debt should be allowed to avail himself of the protection of the section. The decree however did not apply to the pensioner's entire estate in such pension but only to one year's annual income thereof. Such a decree should not be executed by attachment and sale of the pensionary right but under the appropriate procedure provided in other sections of part F of Chapter XIX of the Code of Civil Procedure. The present application was therefore properly dismissed by the lower Courts. **Damodar Das v Khwajah Mir Muhammed** 1 W N 147.

Attachment *Contd.*

(1) Subjects of Attachment—*Contd.*

11—Political pension—Attachment in execution of a decree—Act XXIII of 1871, Sections 11 and 12.

The judgment-debtor pledged his *jagir* income as security for debt incurred to the decree-holder who obtained a decree charging the *jagir* income with payment, no objection based on the provisions of Section 11 of the Pension Act being raised until after the execution of the decree was sought.

On appeal to the Chief Court (both the lower Courts being of opinion that the pension being a political pension came within the purview of Pension Act, Section 11, and was not liable to attachment), *Held* by the majority that the executing Court could not refuse to attach the *jagir* income or pension as the decree is the final adjudication on the liability of the property sought to be charged, and so long as that decree stands the decree-holder has a right to execution.

Mussammat Mehr Nishan v Nawabzada Muhammad Kazim Ali Khan. 35 P R 1900.

12—Pensions Act, 1871—Jagir—Political pension, liability of, to attachment in execution of decree.

In 1862 Government granted a *jagir* of Rs. 10,000 in perpetuity to one N. Subsequently it was agreed that this amount should be paid by the land revenue of certain villages. On N's death the grant was continued to his son A. Money lying in the Government treasury as collections for a particular harvest was attached in execution of a decree against A. *Held*, having regard to the history and correspondence relating to the grant, that the *jagir* was a political pension within the meaning of Section 11 of the Pensions Act, 1871, and money due on account thereof could not be attached in execution of decree under S. 266 (g) of the Civil Procedure Code. The mere fact that the mode of payment was by mutual arrangement converted from cash into an assignment of land revenue did not alter the nature of the grant. **Bodhraj Shah v Sardar Amrikh Singh. 137 P R 1890.**

13—C.P C.S.60 (1882 S 266 (g)—Pensions Act, S.11-Pensions foreign payable in India, attaching of:—Pensions payable by the Ceylon Government

Attachment-*Contd.*

(1) Subjects of Attachment—*Contd.*

to members of the former Royal family of Ceylon but actually paid by the Indian Government, are political pensions within the meaning of Cl. 8 of S. 266 C. P. C. and are, therefore not attachable; but they do not fall within the exceptions provided by S. 11 of the Pensions Act not being the " pensions " granted or continued by the Indian Government. **Muthusami Naidu v. Prince Alagia Manavala Simmala Raja, 26 Mad 423.**

13A—S. 11—Political pension—Attachment—Code of Civil Procedure Act XIV of 1882. S 266 (g). A pension is a periodical allowance or stipend granted not in respect of any right, privilege, perquisite or office, but on account of past services or particular merits or as compensation to dethroned princes, their families and dependants.

Where certain immoveable property was granted in lieu of a pension and it was provided in the *sanad* that, upon the death of the original grantee, the estate would be continued in perpetuity in the manner of an hereditary holding (*zamindari mauroosi*) and at the desire of the grantee revenue was assessed and the members of the family had treated it as an ordinary zamindari property, subject simply to the payment of Government revenue, *held*, that the zamindari so granted was not a pension within the meaning of s, 11 of the Pensions Act and was liable to attachment and sale. **Amna Bibi v. Najm-un-nissa. 6 A L J 519=5 M L T 388=31 All 382=2 Ind Cas 100.**

14—C. P. C S. 60 (1882 S. 266 (g)—Political pension due at the time of pensioner's death.

Sum accrued due to a political pensioner on his death but which remained unpaid in the hands of Government retains its character as such and cannot be attached. **Valia Thambura-atti v Anujane Kunhunni 26 Mad 61**

Attachment-*Contd.*

(1) Subjects of Attachment—*Contd.*

(6) Arrears of yeomiah pension

15—Suit against representatives of yeomiahdar.

Arrears of yeomiah pension due to the estate of a deceased yeomiahdar. which have accidentally accumulated, are not subject to attachment in satisfaction of a decree of a Civil Court obtained against the representatives of the yeomiahdar. **Anonymous Case 5 M H C R 371**

Notes.—Fol 26 Mad 69; 71.

(7) Tora garas hak

16—The word pension in Section 11 of Act XXIII of 1871 is used in its ordinary and well known sense A Toda giras hak does not come within this meaning of the word pension & is not protected from attachment. **The Secretary of State for India in Council v Khemchand Jaichand. P J (1880) 96=4 Bom 432.**

Notes.—Fol 5 Mad 272;8 C W N 665; 30 Mad 153; 31 All 382; 6 A L J 519.Ref; 21 Mad 105; 16 Bom 731. (1904) W N 144; 26 All 617.

17—S 60 (1882 s 266)—Toda giras allowance—What interest in the allowance is attachable-Bombay Act (VII of 1887) Sec 5—Interpretation.

A decree holder in execution of his decree applied for the attachment sale of a toda giras allowance which the judgment-debtor was entitled to receive periodically from the Government treasury and which was to become payable to him during the twenty years following the application. The lower Courts held that the life-interest of the holder, computed at its valuation for twenty years, could be attached and sold in execution of the decree.

Held, reversing the order that it is clear from the language of s 5 of Bombay Act VII of 1887, that it is not the life-interest of the judgment-debtor in a *toda giras* allowance but something short of it that is allowed by the Act to be attached.

Attachment-*Contd.*

(1) Subjects of Attachment—*Contd.*

The word money likely to become due must be restricted to the case where, for instance, during the life-time of the judgment-debtor a sum of money is directed by the Collector to be paid to him on account of a *toda giras* allowance not immediately but on a date subsequent to the date of the order of direction, and the judgment-debtor dies before that date and, to other cases of a similar character.

Under what circumstances money is likely to become due on account of a *toda giras* allowance is a question which cannot be answered exhaustively and must depend on the facts of each case as it arises. **Amarsang v Jethalal 10 Bom L R 1201=33 Bom 258= 2 Ind Cas 271.**

(8) Arrears of pension due.

18—Civil Procedure Code 1877 s 266—Saleable property.

In case of pensions not exempted from attachment under s 266 of the Civil Procedure Code (Act X of 1877) it is only arrears in respect thereof actually accrued due that are attachable in execution of a decree. 14 I A 40; 7 B L R 186 cited and followed. **Bhoyrub Chunder Roy v Madhub Chunder Sen 6 C L R 19.**

19—Pensions—Before Act XXIII of 1871 *held*, that a pension could be attached, but not in anticipation of its becoming due. The pension could be attached when the money was lying in deposit in the Government Treasury at the call of the pensioner—(P R 79 of 1867 Civil). But held, that Military and Naval pensions and superannuation allowances, included in Act VI of 1849 were not liable to attachment; other pensions were liable to attachment under ordinary process or proceedings in Bankruptcy in the hands of the Treasury officer. **Nizakut-ul-nissa v Ram Sahai P R 100 of 1869.**

20—Act XXIII of 1871, s. 11.

Upon a case stated by the Judge of the Small Cause Court, Ludhiana, and involving the following questions: 1. "Can the money paid to a judgment-debtor on account of his pension be attached from the possession of the pensioner or his agent after he leaves the treasury ?" 2. "If the pension has become due and the pensioner admits

Attachment-*Contd.*

(1) Subjects of Attachment—*Contd.*

receipt of the same before the treasury officer, and the amount is charged off in the treasury accounts, but for his own convenience the pensioner leaves the amount in the hands of the Government treasurer, may a prohibitory order be issued to the treasurer at the instance of a decree holder?" —*Held*, that so long as the money was identifiable as a pension, it could not be attached : and clearly could not be attached while at the treasury, even if lying there at the pensioner's call. P R 30 of 1874, P R 87 of 1877 , it was *held* (impugning the above decision) that, the moment money on account of pension is paid by a Treasury officer to the pensioner or his agent it ceases to be "money due on account of the pension" within the meaning of Section 11 of Act XXIII of 1871, and there is no law which exempts it any longer from attachment. So long as the money remains in the Treasury officer's hands and has not been paid to the pensioner or his agent, it is "money due on account of the pension," and is exempt from attachment ; but the fund is not so indelibly impressed with the privilege that after it has been paid over, it still remains exempt.

In execution of decree the Court attached a pension coming to defendant and paid the amount to the judgment-creditor. Defendant appealed, and the Appellate Court held that the pension could not be attached, and ordered a refund of the money. *Held*, by the Chief Court, that though money was illegally attached, the Lower Appellate Court had no power to summarily order a refund of it. **Taba Shah v Rai Sarampat Rai P R 60 of 1876.**

(9) Gratuity.

21—s. 266 (g) C P C.

The bar in s 266 of the Code of Civil Procedure to the attachment of gratuities allowed by Government to its ex-servants, Military and Civil, is not limited to such gratuities as are allowed to "pensioners" but applies to a gratuity granted in consideration of past services. **Bawan Das v Mulchand. 6 All 173=4 W N 16**

22—S. 123—Transfer of Property Act—Gift of moveable propepty—How effected.

K, a servant in the employment of the East India Railway Company was recommended by the Tra-

Attachment-*Contd.*

(1) Subjects of Attachment—*Contd.*

ffic Manager a bonus in consideration of long and good services. This recommendation was sanctioned, and the amount of the bonus was received by the District Paymaster. Before payment to K, the money was attached in execution of a decree obtained against him by J. *Held* that inasmuch as the bestowal of the money was a gift of moveable property of a date subsequent to the 1st July.1882, and was not evidenced by a registered instrument, it could only be effected by actual delivery; that as there had been no such delivery as completed the transfer (s. 123 of the Transfer of Property Act,) the money was not at K's disposal, and he could not have enforced payment, and that the money was therefore not liable to attchment in execution of a decree against him. **Janki Das v The E. I. Railway Company. 6 All 634=4 W N 210.**

Notes:—Ref: 5 Bom L R 454.

(10) Pension payable by Government other than British Government.

22A—Civil Procedure Code(Act XIV of 1882) S. 266 (g)—Property liable to attachment—Pension payable by Government other than British Government.

Clause (g) of Section 266 of Act XIV of 1882 refers to pensions payable by the British Government and not by other authorities, and has no application to a sum of money paid as a charitable allowance out of the revenues of the Mamdot estate. **Hazari Mal v Khan Bahadur Khan. P R 58 of 1884.**

(11) Liability of jagir income to attachment.

22B—Civil Procedure Code (Act XIV of 1882), Section 266 (g)—Liability of jagir income to attachment— Pensions Act (XXIII of 1871), Section 11.

Held, that a sum of money paid by the lambardars of the village on account of jagir income due to a judgment creditor is liable to be attached in execution of decree. 57 P R 1884, followed.

Shankar Das v Basant Singh. P R 133 of 1888.

See also Mussammat Lachmi v Bhagwan Singh. P R 133 of 1888.

Attachment-*Contd.*

(1) Subjects of Attachment—*Contd.*

(12) Executing Court to require evidence as to nature of jagir liable to attachment.

22C—Pensions Act, 1871, Section 11—Civil Procedure Code,1882,Section 266 (g)-Attachment of jagir—Executing Court to require production of evidence as to nature of jagir.

Before a Court executing a decree makes an order for issue of process for the attachment of *jagir* income, it should require some evidence as to the nature of the *jagir*, as some *jagir* income may be liable to attachment while other such income may not.

The order for attachment in this particular case set aside. 57 and 58 P R 1884, and 137 P R., 1890, referred to. **Basant Singh v Asa Ram P R 47 of 1893.**

(13) Grant made to compensate for resumption of rent-free land.

23—Liability to—Pensions Act, Ss. 4, 11—Execution.

A grant of an annuity since made by Government as a compensation for loss sustained by the grantee on account of improper resumption by Government of rent-free lands formerly belonging to the grantee is not pension within the meaning of S. 11 of the Pensions Act and is liable to attachment. 4 Bom 432 followed. **Jiban Krishna Ghosh v Sripaticharan Dey. 8 C W N 665.**

Notes:—Fol: 30 Mad 153.

(14) Attachability of pension in the hands of the pensioner.

23A—Pension paid to judgment-debtor and in his possession not attachable—Act XXIII of 1871, s. 11.

Money paid to a judgment-debtor on account of his pension cannot be attached and so also while it is at the treasury, though waiting his call. **Kali Mall v Shazada Jilal-ud-din. 30 P R 1874.**

23B—Pension paid to the pensioner or his agent, attachable—Act XXIII of 1871, s. 11.

The money paid on account of pension to the pensioner or his agent ceases to be money due on account of the pension the moment it is so paid.

Attachment-*Contd.*

(1) Subjects of Attachment—*Contd*

It is exempted from attachment so long as it remains in the Treasury officer's hands and has not been paid to the pensioner or his agent. The moment it is paid it loses its privilege and becomes subject to attachment. (30 P R 1874, Diss)

Lallu Mal v Mahomed Sherdil Khan. 87 P R 1877.

23C—Pensions when attachable—Law before Act, XXIII of 1871.

Before Act XXIII of 1871 it was held that a pension was liable to attachment though not in anticipation of its becoming due and that it could also be attached when the amount was in deposit in the Government treasury at the pensioner's call. **Goordit Singh v Bisheshur. 79 P R 1867.**

(15) Attachment of proprietary right in the zamindari

23D.—Pensions Act XXIII of 1871, ss 8 and 11—Civ. Pro. Code s. 266—Grant of zamindari.

The word "pension" in s 11 of the Pensions Act and s 266 (g) Civ Pro Code, implies periodical payments of money by the Government to the pensioner in the manner prescribed by s 8 of the Act. Where, as a return for good services, land was granted once for all under a *sanad* by the Government, *held* that the grantee took the proprietary right in the subject of the grant which was transferable and attachable. Quære,—Whether, if the grant had been of land revenue, different considerations would not have arisen? (4 Bom 432, A W N 1902, 161; 17 I A 181, 18 Cal 216 Ref). **Lachmi Narain v Makund Singh. 26 All 617=1 A L J 338.**

Notes.—Fol 30 Mad 153=2 M L T 33, 6 A L J 519=31 All 382=5 M L T 388.

(B) BOOKS OF ACCOUNT.

(1) Account Books.

24.—Books of account cannot be attached in execution of a decree. **Pestanji Cursetji 3 B H C 42.**

Adjoodhya Pershad v Middleton Cohen & Co 3 N W 334.

Notes:—Ref: Rat Un Cr 210; 26 Cal 863, 3 C W N 653.

25.—Order for production in Court by Court executing decree.

Attachment *Contd.*

(1) Subjects of Attachment—*Contd.*

Although a Court will not allow account books to be attached and brought to sale as mere waste paper, yet to prevent a judgment debtor from making away with his books and defeating a decree-holder, it will be competent to a Court executing a decree, if execution is applied for by attachment of debts, to require the judgment-debtor to produce his books in Court and have them in the custody of the Court. **Adjoodhya Pershad v Middleton, Cohen & Co 3 N W 334**

(C) BUILDING AND HOUSE MATERIALS.

(1) Materials of house.

26.—Property specifically mortgaged—Civil Procedure Code, 1882 s 266.

S 266 of the Civil Procedure Code (Act X of 1877) prov. (c) does not prohibit the sale of property specifically mortgaged, albeit that the property be materials of a house belonging to or occupied by an agriculturist. **Bhagvandas v Hathibhai. 4 Bom 25.**

26A.—S 60 (1882 S 266)-Attachment and sale exemption from—Agriculturist—Town residence of an agriculturist.

Section 266 cl (c) of the Civil Procedure Code 1882 refers to a house occupied by an agriculturist as an agriculturist. It does not extend to the town residence of an agriculturist.

Manecklal v Manilal 7 Bom L R 685.

26B—S 60 (1882-S 266 (c)) Decree-Execution Attachment-Sale—Possession of the property—Objections under the section.

In execution of a decree, the house of the judgment debtor (defendant) was attached and sold. The sale was confirmed by the Court. The plaintiff being obstructed in seeking its possession, filed a suit to recover possession of the house. The defendant then contended that as he was an agriculturist and as the house was occupied by him, the materials of it could not be sold having regard to S 266 (c) of the Civil Procedure Code—*Held*, (1) that in the absence of proof the exemption from liability to attachment or sale of the house did not exist for the purpose of execution proceedings: therefore the executing Court has complete jurisdiction to make the order it did; and that therefore, it was not open to the defendant to contend that there was no jurisdiction to

Attachment-*Contd.*

(1) Subjects of Attachment—*Contd.*

order the sale of the house by reason of s 266 (c) of the Code (2) that as 'strangers to a suit are justified in believing that the Court has done that which by the direction of the Code it ought to do." the plaintiff, who was a stranger to the previous proceedings was justified in believing that the Court had authority to attach and sell the property.

In Courts of law only those facts can be taken to exist which are proved. **Pandurang v Krishna 5 Bom L R 799=28 Bom 125.**

(2) Building materials.

27.—An ordinary creditor is not entitled to rateable proportion of the proceeds of the sale of the materials of the house and buildings belonging to his judgment-debtor realized at the suit of the landlord. **Dayabhai Premchand v Mansing Lala P J (1880) 58=4 Bom 429.**

Notes.—Ap 23 All 106.

27A.—Civil Procedure Code 1882 Section 266 (c)—Building site—Building site of houses occupied by agriculturists not liable to attachment and sale in execution of decree.

A having obtained a decree against the representatives of an agriculturist attached the site of their houses and contended that under Section 266 (c) the materials of houses and other buildings, belonging to and occupied by agriculturists, are alone exempt from sale; that the judgment-debtors should be allowed to remove the materials, such as bricks, beams and doors, and that the site under the house be sold.—*Held*, that the house and its materials could not be attached and that the attachment of the site could not affect the tenant's immunity from the attachment of the materials of the house which constitute the house as it stands. 7 Bom 530 cited.

Kishna v Kanshi Ram P R 59 of 1902.

(3) House and buildings occupied by agriculturists.

28.—The effect of article (c) of Sec 266 of the Civil Procedure Code is to exempt from attachment houses belonging to and occupied *bona fide* by an agriculturist, but does not exempt other houses belonging to him but not forming part of the house dwelt in, by him and the farm buildings appended to such dwelling.

Radhakisan Hakumji v Nana P J (1883) 300=7 Bom 530.

Notes.—Ref 12 Bom 353.

28A.—Execution of decree—Attachment of house mortgaged by agriculturist—Liability of such house to attachment.

A decree-holder in execution of his decree against the defendant, an agriculturist, which specified that a house which the defendant had mortgaged as security for the payment of the sum due to the decree-holder was to be considered as hypothecated for payment of the decree, attached the house in question, which the lower Courts directed to be released as non-attachable with reference to the provion of section 266 (c) of the Civil Procedure Code

Held, that under the circumstances the above clause could not be correctly construed as controlling the operation of the decree. **Narain Das v Sher Khan P R 1 of 1889.**

28B.—Attachment in execution—Agriculturists.

The decree-holder in execution of his decree for some Rs 7000 applied for attachment of certain houses belonging to the judgment-debtor who, it appeared, was a large owner of land, deriving his income from rents paid by tenants but not cultivating any land himself. Of the four houses belonging to the judgment-debtor, the largest in which he himself resided was exempted by the District Judge from attachment on the ground that the debtor was an agriculturist, but the three other houses were duly attached. Subsequently the debtor applied for their release under Section 266 (c) Civil Procedure Code alleging that house No 2 was his *bythak*, in which his servants also lived, that house No 3 was used for the purpose of stacking fodder and as a residence for his son's tutor; and that in house No 4 his second wife resided. The District Judge after enquiry found these allegations proved and held that the judgment-debtor as a land owner was an agriculturist within the meaning of the said clause and that all the houses were entitled to the benefit of that provision of the law. He therefore accepted the application and released all the houses from attachment. The decree-holder appealed to the Chief Court.

Attachment-*Contd.*

(1) Subjects of Attachment—*Contd.*

Held, that the order of the District Judge must be set aside Clause (c) of Section 266 of the Code has the effect of conferring an exceptional exemption or privilege on certain classes of debtors, and of trenching on the ordinary rights of the creditor to realize his money from the property of his debtor and must therefore receive a strict construction and not be extended to cases to which it does not in terms apply. The word "agriculturist" as therein used denotes a husbandman and a person who carries on and makes his living by tillage, and not a mere owner of land.

Bawa Gurbakhsh Singh v Ghulam Qadir P R 47 of 1897.

28C—A khurli of the judgment-debtor, which he neither lived in nor used, is attachable. "Belonging to" and "occupied by" are not synonymous. The latter is not a mere repetition, but means "lived in by" or "used for agricultural purposes by." **Attar Singh v Bhagwan Das 65 P R 1909=104 P W R 1909= 2 Ind Cas 983.**

28D—House occupied by agriculturist as such—Agriculturists' town residence.

A house occupied by an agriculturist as an agriculturist cannot form the subject of attachment. The town residence of an agriculturist is liable to attachment. **Manecklal v Manilal 7 Bom L R 685**

(4) Execution against bhag

29—A house forming part of a bhag and occupied by bhagdar as such, is exempt from attachment as a building occupied by an agriculturist.

Jivan Bhaga v Hira Bhaiji. P J (1887) 201 =12 Bom 363.

30—Bhagdari Act (Bombay Act V of 1862), ss. 1, 3, and 5—Civil Procedure Code (1882), s.662 (c)—Bhagdari village-Bhag-"Homestead," Meaning of—

Per Farran, C J and Jardine, Parsons, and Ranade, JJ—The superstructure of a house belonging to a bhag in a bhagdari village is exempt from attachment under the provisions of the Bhagdari (Bombay Act V of 1862). *Per* Candy, J—Having regard to the decision in 4 Bom A C 46 and the object of the Bhagdari Act, it is doubtful whether the Legislature intended to exempt from attachment the materials of a house belonging to a bhag.

Collector of Broach v Venilal Keshavbhai. 21 Bom 588.

(D) DEBTS.

(1) Proclamation as to nature and value of property.

31—Where the property of which sale is sought in execution of a decree is a debt, and the Court receives notice from the alleged debtor that no such debt exists, the Court should satisfy itself as to the existence or otherwise of the debt and if it comes to the conclusion that the debt does not exist, should abstain from proceeding to sale.

Harilal Amthabhai v Abhesang Meru. P J (1880) 6=4 Bom 323.

Notes—Fol: 10 Mad 194. Ref. 27 Mad 67.

(2) Right and interest of vendor in purchase money.

32—Sale of mere expectancy or possible right Civ Pro. Code 1877, s. 266.—

The right or interest which the vendor of immoveable property has in the purchase-money, where it has been agreed that the same shall be paid on the execution of the conveyance, is not, so long as the conveyance has not been executed, a debt, but a merely possible right of interest, and as such, under this section, is not liable to attachment and sale in the execution of a decree. The person who purchases such a right or interest at a sale in the execution of a decree takes nothing by his purchase. **Ahmed-Ud-Din Khan v Majlis Rai. 3 All 12.**

(3) Claims over which British Courts have no jurisdiction.

33—Though Section 266 of the Civil Procedure Code does not restrict debts liable to attachment to debts due to a person living within the jurisdiction, still in case of a claim over which no Court in British India has jurisdiction there is no doubt that in the absence of proof of the extension of the usual comity of Courts of Justice by express agreement with the foreign State such claim cannot be attached under Section 266 of the Civil Procedure Code.

Goswami Shri Jadunathji Brijratanji v Bhansali Maneckchand Rupchand P J (1881) 15=5 Bom 249.

Attachment-*Contd.*

(1) Subjects of Attachment—*Contd*

Notes—Ref 26 Mad 423

(4) Debts secured by mortgage of immoveable property

34—Civil Procedure Code Act XIV of 1882 Sections 268, 274 and 311 Sale of mortgage debt-Execution—Irregularity—

In execution of a decree a debt secured by a mortgage of immoveable property was sold under the provisions of the Civil Procedure Code applicable to moveable property

Held, that the debt alone being sold the full value of the mortgage was not realized and that the sale should be set aside

Srinath Datt v Gopal Chunder Mitra 9 Cal 511=12 C L R 445

Notes-Disap 26 Bom 305 Fol 9 Mad 5 Dist 10 Mad 169 Ref 20 Cal 805

34A—S 268—Debt secured by a mortgage of immoveable property—Moveable property—Decree—Execution

A debt secured by a mortgage of immoveable property is, for the purposes of execution of a decree under the Code of Civil Procedure, to be regarded as moveable property, and can, in execution of such decree, be attached and sold in the manner provided for by S 264 of the Code. **Bholanatha v Bai Kashi 4 Bom L R 18 =26 Bom 305**

(5) Debt creating charge on immoveable property

35—Interest in immoveable property—Civil Procedure Code, 1882, s 266

Where a judgment-debtor is entitled to a debt secured by a collateral hyphothecation of land and the decree holder attaches and sells the judgment debtor's interest in the bond such interest is immoveable property for the purpose of attachment and sale under the Code of Civil Procedure 1882 *Per* Turner, C J—*Quære*—Whether the decree-holder could not sell the debt apart from the security as moveable property **Appasami v Scott 9 Mad 5**

Notes—Fol 19 Bom 121. Not Fol 26 Bom 305. Ref 10 Mad 169

(6) Attachment of debt

36—Where a debt, attached under s 268 of the Code of Civil Procedure, was paid out of Court to the only person who, had the money been paid into Court as required by the section, would have been entitled to withdraw it from Court and such payment was certified to the Court *held*, this was sufficient compliance with section 268 of the Code of Civil Procedure

Fida Husen v Maula Buksh, 21 All 145=19 W N 12

Notes—Ref 14 M L J 105

37—Of debt—Debt due by a company—Notice to manager—The notice describing the debt as due by him—Effect of.

Where a person intending to attach a debt due by a company gave notice to its manager but described the debt one due by the manager *Held* that the debt by the company was not attachable

Balkrishna v Oriental Life Assurance Company 4 Bom L R 340

37A—CPC S 60 (1882 s 266)—Mortgagees not advancing the whole amount balance whether a debt attachment suit by purchaser—Cause of action

The unpaid portion of a loan does not constitute a debt due by a mortgagee to a mortgagor, and could not be attached as such in execution of a simple money decree against the mortgagor The purchaser of such a debt has no cause of action to bring a suit against the mortgagees The South African Territories Limited. (1898 A C 309 Ref) **Phul Chand v Chandmal, 5 A L J 491=1908 A W N 105=30 All 252.**

(7) Attachment of maintenance allowance

38—s 266 'Debt"-Maintenance allowance if attachable

The debt referred to in sec 266, C P C, is a perfected and absolute debt, not merely a sum of money which may or may not become payable at some future time or the payment of which depends upon contingencies which may or may not happen An attachment must operate at the time of attachment upon some existing debt, and it cannot be of an anticipating character so as to fasten upon future state of property 14 Moo I A. 40, followed So where an attachment was made of a maintentance allowance which would become payable after the date of attachment, and which maintenance allowance was payable only during the

Attachment-*Contd*

(1) Subjects of attachment *Contd*

life time of the grantee *Held*—That there was no legal attachment of that money Where the previous suit was cognizable by the Munsif and was tried and determined by him it was *held*—that the judgment in the former suit was no bar as *res judicata* to the trial of the subsequent suit which was cognizable only by the Subordinate Judge and was tried by him **Hari Das Acharjee Chowdhury v Barada Kishore Acharjee Chowdhury** 27 Cal 38= 4 C W N 87

Notes—Fol 28 Cal 483 Ref 23 All 164 9 C W N 703,12 C W N 145 30 All 246=(1908) W N 101=5 A L J 251 12 C W N 145= 7 C L J 608

(8) Attachment of partnership debt

39—Execution of decree

An uncertain sum which may or may not be payable by one member to another of a partnership, not shown to have been wound up cannot be attached or sold in execution of a decree

Dwarika Mohun Das v Lukhimoni Dasi 14 Cal 384

Notes—Not Fol 13 Mad 447, Ex 20 Cal 693

(9) Attachment of debt due to a judgment debtor

40—Civil Procedure Code ss 268 284 301—Sale of debt—Payment into Court—Prohibitory order-A decree holder by a prohibitory order made under s 268 (a) of the Civil Procedure Code attached a debt due to his judgment debtor The debt was not paid into Court *Held* that the Court cannot, under s 268 of the Code of Civil Procedure, call on a person subject to a Prohibitory order to pay or show cause why he should not pay his debt into Court The Court is bound to satisfy itself that a debt is due the debt must then be sold and delivery made under ss 284 and 301 of the Code of Civil Procedure. **Siriah v Muckanachary** 10 Mad 194

41—Attachment of debt Payment into Court

Though under Section 268 of the Civil Procedure Code a debtor of a judgment debtor may pay the debt, attached by prohibitory order under that section, into the attaching Court, such payment is optional with him, and he is not bound and cannot be compelled by summary process to make such payment **Lachman Singh v Ram Sahai** P R 95 of 1886

Attachment-*Contd.*

(1) Subjects of attachment—*Contd*

41A C P C s 60 (1882 S 266) Attachment and sale of deposits under—Provident Funds Act S 4.

When a person retires from his service, the Provident Funds standing to his credit become repayable on his demand or at his option they are no longer compulsory deposits within the meaning of S 4 of the Provident Funds Act 1897 From that time forward, the sum becomes a debt due to him by the Provident Fund and can be attached under S 266 of the Civil Procedure Code 1882 **Miller v B B. and C I Ry** 5 Bom L R 454

(10) Attachment by a judgment creditor of a debt due to judgment debtor by a third party

42—Civil Procedure Code, 1882, ss 267, 268, and 503—Execution—Practice—Garnishee Order upon third party to pay where debt admitted—Procedure where existence of debt not admitted

When a debt alleged to be due by a third party to a judgment debtor has been attached by the judgment creditor the Court may under s. 268 of the Civil Procedure Code (Act XIV of 1882), make an order upon the garnishee for the payment of such debt to the judgment creditor in case the former admits it to be due to the judgment debtor. Where however, the garnishee denies the debt, there is no other course open to the judgment-creditor than to have it sold or to have a receiver appointed under s 503 of the Code **Toolsa Goolal v Antone** 11 Bom 448.

42A—Attachment—Debt—Garnishee order—Delivery of cheque to creditor—Effect of subsequent receipt of attachment order—Stopping payment—Failure to affix copy of order in Court house—Civ Pro Code (Act XIV of 1882), Ss. 268, 484, 486 493

Where a cheque has been given in respect of a pre existing debt and the drawee is served with a garnishee order, he is under no obligation to stop payment

Where an order attaching money payable to A and lying in the hands of a Government officer is served upon such officer, but he has already delivered a cheque to an assignee of A, the cheque becomes completely the assignee's property and cannot be affected by any subsequent attachment against A

Where a debt is attached, whether before judgment or in execution of decree, copy of the order

Attachment-*Contd.*

(1) Subjects of attachment—*Contd.*

of attachment must be fixed up in a conspicuous part of the Court-house. Failure to comply with this provision invalidates the attachment as against third parties. (1898) 2 Ch D. 582; 78 L. T. 804; 47 W R 350; 67 L J Ch 513; (1884) C & E 362, Fol. 3 Bom 49, Fol. 9 C W N 693, Fol.

R. M. A. R. M. Arunachellam Chetty v Somasundaram Chetty, 12 Ind. Cas 869

43—Application for attachment of debts said to be due to judgment debtor—Denial of Debts and alleged debtors—Procedure.—Where a Court is asked in execution of a decree to attach debts alleged by the decree-holder to be due by third person to the judgment-debtor, it is no business of the Court to determine in the first instance whether the debts are really due or not, or to refuse execution if the parties alleged to be debtors to the judgment-debtor deny that they are so. But after attachment the Court may either sell the debts after giving notice to the intending purchasers that, the existence of some of them is denied by the alleged debtors, or may appoint a receiver to realize the debts by bringing suits against the debtors. **Maharaja of Benares v. Patarj Kunwar.**

A W N (1905) 277=28 All 262.

(11) Order prohibiting Creditor from recovering debt.

44—Suit in respect of debt attached.

S. 268, clause (*a*) of the Code of Civil Procedure does not mean that, while a debt is under attachment, the person to whom the debt was originally owing, should be debarred from bringing a suit in respect of it. What it prohibits is the recovery of the debt, and the payment of it by the debtor to the creditor. **Shib Singh v Sita Ram. 13 All 76=10 W N 194**

Notes—Ap: 17 All 198 P C; Fol: 14 All 162.

45—C P C S. 60; O 21. r. 46 (1882-Ss. 266-208) —Attachment — Debt — Monthly allowance of 'debt'—Contingent and existing debt—Debt payable in future Attachment of part already accrued due:

A monthly allowance given in payment of an antecedent debt and acknowledged by the debtor as such is attachable in execution, being a debt accruing due and actually existing with a right to payment on and after the first of the following months. The decree holder applied on the 21st December for the issue of a prohibitory order in respect of half of the allowance for the month of December, and the order was issued on the 23rd December.—*Held*, that the attachment was validly made, inasmuch as three weeks of the December allowance had already become an existing debt, though payable on a future date. *27 Cal* (38) 14 Moo I A 40 ref to. **Maharani Dambar Koeri v Rai Shan Kissen Das 9 C W N 703**

Notes—Re. 12 C W N 115=7 C L J 658.

46—C P. C O. 21, r. *46*-Prohibitory order—Suit by creditor to recover attached debt—"Recovery."

Held, that a written order made in execution of a decree under Section 268 (*a*) of the Civil Procedure Code, prohibiting a creditor from recovering a debt and the debtor from making payment thereof until the further order of the Court does not incapacitate the creditor from instituting a suit against the debtor in order to recover the debt. 13 All 76 cited. **Nandu v Sundar. P R 142 of 1894.**

(12) Debt of which the amount is unascertained.

47—Principal and agent—Vendor and purchaser—Civil Procedure Code (1882) s. 266.

Where money is due by an agent or vendee to his principal or vendor, the principal's or vendor's claim against his agent or vendee may be attached and sold in execution of a decree against the principal or vendor as a debt under s. 266 of the Code of Civil Procedure, and it is not necessary that the exact amount due to the principal or vendor should be ascertained prior to attachment and sale. 7 B L R 186: 14 moor's I A 40;6 moore's I A 510; 5 B L R 382,L R 4 Ex 260 considered. **Madho Das v Ramji Patak 16 All 286**

Notes—Ap: 22 All 248; Ex 21 All 20;Ref: 11 C W N 1133 F B; 9 C L J 485; 34 Cal 954 F B. Diss: 6 C L J 255 F B Ref: 28 Cal 492; 17 All 69: 34 All 954 F B; 19 All 334; 28 All 545 F B=3 A L J 266=(1906) W N 99; (1904) W N 61; 26 All 447 F B; Appl: 3 A L J 511; Fol: 3 A L J 511=(1906) W N 19.

Attachment-*Contd.*

(1) Subjects of attachment—*Contd.*

(13) Suit by judgment debtor pending attachment of debt.

47 A—Right of suit-Plaintiff's decree against defendant's landlord—Attachment of rent due to landlord—Suit for rent by plaintiff—Whether suit is for rent—Attachment of debt—Right to sue debtor—Small Cause Court—Jurisdiction.

The plaintiff alleged that, in execution of a decree held by him against the landlord of the defendant, he attached the rent which had already accrued due, and he sought to recover in this suit the money payable by the defendant to his landlord the plaintiff's judgment-debtor.

Held, that the suit was not one for rent, but for money due to the plaintiff, and the Small Cause Court had jurisdiction to try the suit.

Obiter dictum:—Mere attachment of a debt does not prevent the judgment-debtor from suing his debtor, though he is not entitled to receive payment from his debtor, unless the claim in respect of which the debt is attached has been satisfied 13 All 76; 17 All 198; 22 I A 94. Ref. **Amrita Lal v Shyama Charan 10 Ind Cas 569.**

(14) Collecting debts under attachment.

47 B— Execution of decree - Debts under attachment-Contempt of Court—Inherent powers of a Court-Limitation. Where debts have been attached under an order of the Court and, so are in its custody, any person collecting them, acts in contempt of Court. An application by the attaching creditor asking the Court to compel such person to disgorge the money and pay it into Court, under the penalty in case of refusal of being arrested, is not an application for execution of his decree, but an application to the Court to exercise its inherent powers in compelling restitution of money improperly collected in defiance of its orders. To such an application the limitation rules provided for applications to execute decree are not applicable. **Godu Ram v Suraj Mal 2 A L J 16=1905 A W N 9=27 All 378.**

(e) DECREES.

(1) Other property.

48—Act VIII of 1859, s. 205—Decree.

A decree of Court fell within the description of "other property" in s. 205 of the Civil Procedure Code, and was therefore, liable to attachment, which should be made under s, 237. **Gholam Mahomed v Indra Chand Jahuri. 7 B L R 318=15 W R 34.**

(2) Immoveable property.

49—Execution of decree, Sale in.

A decree is held to be part of a judgment-debtor's effects and not to fall under the head of immoveable property. **Bunshee Mohun Doss v Hurochunder Doss Chowdhry. W R 1864 Mis 28**

(3) Decree for mesne profits.

50.—Civil Procedure Code, 1859, s. 232—Decree for money—Attachment pending ascertainment of mesne profits.

A decree for mesne profits to be ascertained an execution is a decree for within the meaning of s. 232, Act VIII of 1859; and there is no irregularity in the decree holder applying for attachment of the judgment-debtor's property pending the ascertainment of the mesne profits. **Sharoda Moyee Burmonee v Wooma Moyee Burmonee. 8 W R 9.**

Notes:—Ref: 2 M L J 288=30 Mad 255.

50A.—Execution of decree—Attaching creditor—Only person entitled to execute—Original decree-holder not entitled until Court cancels attachment—Application by decree—holder—Does not save limitation—Section 273, C. P. C. 1882.

A instituted a suit against B for recovery of damages on the ground that B who attached, in execution of his decree against A, a decree for money held by A against C, and who realised otherwise the amount due from A to himself allowed the decree by negligence or in collusion with C to lapse by efflux of time.

Held that A was entitled to a decree. The attaching judgment-creditor is the only person who could have executed the attached decree and the original holder of the decree is absolutely precluded from executing his decree, unless the Court which issued the notice of attachment cancels the notice (Section 273, C P C, 1882).

Any application for execution made by the holder would be infructuous and any such appli-

Attachment-*Contd.*

(1) Subjects of attachment—*Contd*

cation by him would have been useless to save limitation 13 M L J 265 . 21 Mad. 417 and 24 Cal 778 Ref 27 All 619, 33 Cal 867; 7 Bom 459 (464),Ref. **Thachakavil Unni Koya v Arapayil Pathutti Ummah, 9 M L T 312=21 M L J 577=9 Ind Cas 786.**

50B.-C P C O. 21 r 53 , s.144 (1) (1882 ss. 273 583)—Money decree—Right to recover mesne profits by way of restitution is not a decree for money. A right to recover mesne profits by way of restitution is not a decree for money, and so cannot be attached as such. Section 273 C P C, applies only to cases where the right attached is one expressly settled by the decree. *Semble*:—If summary order under sec. 583, C P C, awarding mesne profits, is passed prior to the attachment, it might be a decree under S 273, C P C. **Vasudeva Rai Varman v Narayan Patter. 24 Mad 342.**

(4) Decree for money obtained by Judgment-debtor.

51.—Debt—Civil Procedure Code (1877), (1882) ss. 266, 273.

A decree for money obtained by a judgment-debter is not a debt which, by virtue of s. 266 of the Code of Civil Procedure, can be attached and sold. Where a decree-holder desires to render a decree obtained by his judgment-detber available for the satisfaction of his own decree, the procedure laid down by s. 273 of the Code of Civil Procedure must be allowed. **Tiruvengada Chari v Vythilinga Pillai. 6 Mad 418**

Notes: –Fol: 20 Cal 111, 16 Bom 522.

(5) Money-Decree.

52.—Sale—Civil Pro 1877, s. 273.

Held, that Act X of 1877 does not contemplate the sale of a decree for money as the result of its attachment in the execution of a decree, and the attachment of a decree for money in the mode ordained in this section cannot lead to its sale.

Held also that the last clause of this section applies to other than money-decree

Where two decrees for money, although they were not passed by the same Court, were being executed by the same Court, *held* that the provi-

Attachment-*Contd.*

(1) Subjects of attachment—*Contd.*

sions of the first clause of this section were applicable on principle. **Sultan Kuar v Gulzari Lal. 2 All 290.**

Notes:—Fol: 20 Cal 111; 16 Bom 522 Dist: 21 All 405. Ref · 28 All 771 F B=1 M L T 247 =3 A L J 585=(1906) W N 237.

52A.—C P C.O 21 r 53 (1882 S. 273)—Money decree—Decree on a mortgage—Applicability of section 273.

A decree upon a mortgage is not a money decree within the provisions of section 273. **Baij Nath Lohea v Binoyendra Nath Palit 6 C W N 5.**

Notes :—Ref : 28 All 771 F B=1 M L T 247 =3 A L J 585=(1906) W N 237. Fol: 12 C W N 625=2 C L J 499.

53B.—C P C O 21 r 53 (1882 s. 273). A decree in a suit for dissolution of partnership is, for the purposes of execution, to be regarded as a money decree. It can be attached but cannot be sold ; and the only remedy respecting it is the procedure under s. 273 Civil Procedure Code, 1882. **Sidlingaya v Shankarapa. 5 Bom L R 529 =27 Bom 556.**

52C.—C P C O. 21, r 53 (1882—S 273) Decree for sale on mortgage—Attachable in execution. A decree for sale upon a mortgage is not a decree for money and can be attached and sold in execution of a money decree under the penultimate clause of section 273 of the Code of Civil Procedure. A. W. N. 1885 P. 123 *Overruled* ; A. W. N. 1893, P. 184, 27 All, 501; 4 C.W. N. 35 ; 6 C. W. N. 5 ; 26 All 91, *Referred to* 28 Mad 244, Not followed. 2 All 290, Referred to **Delhi London Bank, Ld. v Kunwar Partap Singh (F B) 1 M L T 247=28 All 771= 1906 W N 236=3 A L J 585.**

53—"Saleable property"—Civil Procedure Code (Act XIV of 1882), ss. 266 and 273—Adjustment of decree after attachment.

The particular procedure prescribed by s. 273 of the Civil Procedure Code (Act XIV of 1882) is clearly confined to money-decrees, and therefore such decrees cannot be sold after being attached; all other decrees are both attachable and

Attachment-*Contd.*

(1) Subjects of attachment—*Contd.*

saleable as " saleable property " under s. 266 of the Code. A decree being attached as directed by s. 273 of the Civil Procedure Code, its adjustment subsequent to such attachment cannot be recognized by the Court.

Gopal Nanashet v Joharimal. Dada Balshet v Joharimal. 16 Bom 522.

Notes.— Ref : 27 Bom 556 ; 28 All 771 F B =1 M L T 247=3 A L J 585= (1906) W N 237. Fol : 2 C L J 499.

54.—Sale of money-decree—Suit in forma pauperis—Recovery of Court-fees by Government —Mode of executing a decree—Civil Procedure Code (Act XIV of 1882), ss. 273, 284, 411—A plaintiff sued in forma pauperis and obtained a decree for money. When the suit was decreed an order was made in favour of the Collector in pursuance of which order the Collector attached the decree under s. 273 and sold it under s. 284. Subsequently the decree-holder applied for execution of his decree. It was held, that the provisions of s. 273 did not contemplate the sale of a decree for money but they were introduced into the Code for the purpose of showing in what manner the attachment of decree under the Code shall be made available on behalf of the attaching person. 2 All 290, and 6 Mad 418, followed. *Semble*—S. 411 does not justify the Court in selling a decree on the application of the Collector because the section provides that persons who have been successful as paupers shall, so far as the subject-matter of the success is concerned, be liable to satisfy, out of what they recover, the amount of the fees which have been for a time, pending the decision of their suit, remitted to them. **Jotindro Nath Chowdhry v Dwarka Nath Dey. 20 Cal 111.**

(6) Decree for possession of land

55.—Immoveable property.

A decree for possession of land is of the nature of immoveable property, and a Judge has no jurisdiction to interfere with the order of a lower Court setting aside the sale of such a decree.

Mobkoonissa v. Dewan Ali. 4 W R Mis., 22.

Attachment-*Contd.*

(1) Subjects of attachment—*Contd.*

(7) Decree for redemption.

56—The omission to do so nothing in the attachment and sale of a decree, which ought to have been done under the Civil Procedure Code does not invalidate the sale or the purchaser's title, but is at most a material irregularity to which objection may be taken by the proper persons, in default of which the sale becomes absolute. **Naigar Timapa v Bhaskar Parmaya. P J (1886) 52=10 Bom 444.**

(8) Attachment of decree of Revenue Court in execution of a Civil Court decree.

57.—Revenue Court decree.

A Revenue Court decree cannot be attached under s. 273 of the Code of Civil Procedure, but may be attached as an ordinary debt under s. 268, Code of Civil Procedure. (26 All 496), and (7 B L R 318), referred to. (5 W N 123), and 2 All 290 distinguished. **Auba Bibi v Abu Jafar. 21 All 405=19 W N 157.**

Notes.—Ref: 24 All 182.

(9) Decree dissolving partnership.

57A.—What can be attached.

A decree dissolving partnership can be attached. **Sidlingaya v Shankarapa. 5 Bom L R 529=27 Bom 556.**

Attachment—Subjects of attachment—decrees See Right of suit. **7 M L T 143.**

(10) Effect of reversal of decree attached by a creditor.

57B.—Right of a creditor attaching a decree —Reversal of decree on appeal—Remedy of creditor.

G attached, in execution of a decree against R, a decree, got by the letter against M. Before G could reap the fruits of his attachment, an appeal, which had been preferred against the attached decree, was concluded by a compromise between R and M, the effect of such a compromise being to reduce the amount due to R under the original decree by a very large sum. The attaching creditor G, protested against the compromise but the appellate Court passed a decree

Attachment-*Contd.*

(1) Subjects of attachment—*Contd.*

on the basis of the compromise, disallowing the objection of G. G, now, proceeded to execute the original decree, which he attached. The execution Court refused to execute the decree, on the ground that it had been re-placed by the decree of the appellate Court based as it was on the compromise. Hence this appeal. *Held*, whatever might be the inconvenience or loss to which the attaching creditor might be put by the compromise of the appeal, the original decree was no longer subsisting, the same having been replaced by the decree of the appellate Court, and the attaching-creditor was without remedy He was himself to blame for having attached a decree as to the reversal of which on appeal, there was a chance. **Ganpat Shah v Ram Chand. 22 P L R 1905.**

(F) EQUITY OE REDEMPTION.

58.—Civil Procedure Code (1882), ss. 266 & 274—Transfer of Property Act (IV of 1882), s. 60—Immoveable property.

The equity of redemption of the mortgagor is in moveable property, and is, as such, liable to be attached and sold in execution of a decree under s. 266 of the Civil Procedure Code (Act XIV of 1882). Its attachment can be effected under s. 274 of the Code by an order prohibiting the judgment-debtor from dealing with it in any way and all persons from receiving it, such order being proclaimed and notified as therein directed.

Parashram Harlal v Govind Ganesh Porgaumkar. 21 Bom 226.

Notes.—Rel: 26 Bom 305. Ref: 11 Bom L R 26; 33 Bom 311.

(G) EXPECTANCY.

(1) Sum to be paid in future.

59.—*Quære*—Whether a mere expectancy is liable to attachment and sale in execution of decree. **Dooli Chand v Brij Bhukan Lal Awasti. 6 C L R 528=10 C L R 61.**

60.—C P C O 20, r.14; S.60 (Act XIV of 1882, sections 214, 266) clause (K) decree for pre emption—Attachment of property by decree-holder of the successful pre emptor prior to sell illegal-Contigent right.

When a suit for pre emption is decreed, but prior to acquisition of the property by the pre-emptor a decree holder of his attaches the property and it is subsequently sold, held that what the decree-holder of the pre emptor attached is a contigent interest not liable to attachment under the provisions of section 266, clause (K) Code of C P., and that the subsequent acquisition of the property will not validate the attachment.

Gorakh Singh v Sidh Gopal. 3 A L J 183=(1906) A W N 69=28 All 383.

61.—C P C s. 266 (k) Resulting trust is not a mere expectancy or contingency under S. 266 (k) of the Civil Procedure Code, 1882.

Antao v Ardeshir Byramji 1 Bom L R 303.

60B.- C P C S. 60 (1882 s 266) Attachment, whether offerings to deity liable to—Hindu Law.

Offerings which may in future be made to a Hindu Deity cannot be attached in execution of a decree for money against the Deity inasmuch as the offerings, being voluntary, are entirely uncertain. **Shoilajaund Ojha v Peary Churn Dey. 6 C W N 798=29 Cal 470.**

61.—Civil Procedure Code, 1859 s. 205.

A sum receivable by way of assignment is not liable to be attached and sold in execution of decree. **Sham Chunder Baboo v Teeluck Chunder Baboo. 2 Hay 142.**

61A.—C. P. C S. 60. (1882 section 266) Right to get profits in future years—Attachment.

The decree-holders applied for attachment of profits then due to their judgment debtor from the lambardar as well as profits which would accrue at a future date. *Held* that in the profits of future harvest, the judgment debtor had only a possible right to get a share, and this possible right was not liable to attachment having regard to the provisions of section 266 of the Code of Civil Procedure. **Sher Singh v Sri Ram. 4 M L T 10=5 A L J 251=1908 W N 101=30 All 246.**

(2) Claim under pending award,

62.—Property, Definition of.

Under s, 205 of the Civil Procedure Code, sums to be attached must not be inchoate, but existing and definite; and although liquidated demands in their nature definite and certain, though *sub lite* and unproved, may be seized, a mere expectancy or a mere right of suit cannot be attached; the attachment must operate at the time of attachment, and not be anticipatory, so as to fasten on some future state of property in which the suit may result. A claim which may

Attachment-*Contd.*

(1) Subjects of Attachment—*Contd.*

accrue under a pending award cannot be sold in execution. **Tuffazal Hossein Khan v Raghonath Prasad. 7 B L R 186= 14 Moore's I A 40**

See Bhaichand Bin Khemchand v Fulchand Harichand 8 Bom A C 150.

Notes:—See 14 M I A 40.

(3) Attachment of future estate

63.—Construction according to Mahomedan law, of grant of such estate——Civil Procedure Code (1882). s. 266.

A mahomedan settled on his wife a fractional interest in certain property. That interest was bestowed previously to a mortgagè. The interest was purchased by the plaintiff, the mortgagee at a judicial sale. The settlement was made on the condition that, if he should have no child by her, his two sons by another wife should each have an estate therein. He died without other children. *Held* that the two sons had taken definite interests capable of being attached within s. 266 of the Civil Procedure Code, not being mere expectancies. **Umesh Chunder Sircar v Zahur Fatima, 18 Cal 164= 17 I A 201.**

(4) Expectancy of succession by survivorship.

64.—A spes successionis, "an expectancy of succession by survivorship," is not attachable under s. 266 (k) of the Civil Procedure Code.

Anandibai v Rajaram Chintaman Pethe. P J (1897) 440=22 Bom 984

Notes:—Ref: 1 Bom L R 303.

64A—C P. C. S. 266:--Future melvaram—Inalienable shrotriem—Pensions Act XXIII of 1871, Ss. 4, 11.

Future melvaram rents of an inalienable shrotriem Inam cannot be attached under S. 266 of the Civil Procedure Code in execution of a decree against the shrotriemdar, nor can a receiver be appointed to collect such rents for the discharge of the decree. **Rajabadar Naidu v Chandrappa Naidu. 4 M L J 13.**

(H) IMMOVEABLE PROPERTY CHARGED WITH MAINTENANCE.

(1) Immoveable property assigned for maintenance with proviso against alienation.

65.—Civil Procedure Code (Act XIV of 1882) s. 266, cl. (1)—Land assigned for maintenance of widow with proviso against alienation—Such land exempt from attachment.

Attachment-*Contd.*

(1) Subjects of Attachment—*Contd.*

By a deed of assignment the usufruct of certain land was given to a Hindu widow for her maintenance, the deed expressly stipulating that the same was not to be in any way alienated A judgment-creditor of the widow caused the land to be attached in execution of a money decrèe. The widow contended that the land was protected from attachment under s.266 of the Civil Procedure Code (Act XIV of 1882). Both the lower Courts disallowed the widow's contention. On appeal to the High Court,—*Held*, reversing the orders of the lower Courts, that having regard to the proviso against alienation contained in the deed of assignment, the usufructuary interest in the land assigned to the widow was one over which she had no power of disposal, and, consequently, could not be attached and sold in execution of a money decree against her. **Diwali v Apaji Ganesh. 10 Bom 342.**

Notes:—D.st: 20 Cal 273, 15 All 371. Ref: 16 All 443; 9 C W N 309. Fol: 15 M L J 7.

(2) Property assigned to Hindu widow in lieu of maintenance.

66.—S. 266 (1) C. P. C—Immoveable property assigned in lieu of maintenance.

Held, that an interest in the income of immoveable property assigned by way of maintenance to a Hindu widow by the members of her family is not capable of being attached and sold in execution of a decree against the widow. (10 Bom 542) ref. **Gulab Kumar v Banshidhar 15 All 371=13 W N 149.**

(3) Crops standing on land given for maintenance.

66A.—C. P. C S. 60, cl. (n)—Attachment in execution of a decree-Crops standing on land given for maintenance—Such crops, whether liable to attachment—Distinction between them and a right to future maintenance, pointed out.

Where a certain land is given to a Hindu widow by the will of her deceased husband, to be enjoyed by her during life in lieu of maintenance what she acquries under the grant is not a right to maintenance but to the usufruct of the property; so that the produce of the land, as it accrued, becomes at once her property. Therefore the crop growing on the land, being her property must be available to answer her debt and is liable to attachment in execution of a decree obtained against her.

Attachment-*Contd.*

(1) Subjects of Attachment--*Contd.*

What is interdicted by the legislature in cl. (n) of S. 60 of the Civ. Pro. Code, is attachment of a mere right to a future maintenance, and not of a debtor's property or any interest in property though such property or interest might have been granted to him or her for maintenance.

Quære:—Whether cl. (n) of S. 60, Civ. Pro. Code, would apply where the right to maintenance is derived under the general Hindu or Mahomedan Law, or under an instrument in the nature of deed or will' 15 M L J 7; 10 Bom 342, Dist. **Govinda Pillai v Ganapathy Pillai. (1911) 2 M W N 563=10 M L T 493.**

(I-J) JOINT FAMILY & REVERSIONARY INTERESTS.

(1) Interest of member of joint family

67.—Civil Procedure Code, 1859, s. 205.

Quære—May not the creditor of a member of a joint Hindu family have, under Act VIII of 1859, s. 205, some remedy against the property to which his debtor may be entitled' **Kali Pudo Banerjee v Choitun Pandah. 22 W R 214.**

68—An undivided share in a joint Hindu family can be attched in execution, aud even before sale an attchment and order for sale suffice to create such a charge as will defeat the right of survivorship.

An attaching creditor who has taken actual possession of a share cannot be deprived of any part of it by an arrangement made by his debtor behind his back and subsequent to the acquisition of his rights.

Per *Ranade, J.*—An attachment placed by a judgment creditor, before a suit for partition is instituted, has the effect of a sort of judicial hypothecation which cannot be disturbed by the results of any partition suit to which such judgment-creditor is not a party. **Parikh Girdarlal v Thakor Fetehsing. 2 Bom. L. R. 32.**

68A.—S. 60 (1882 s.266)—"Disposing power" —Meaning of.

Disposing power includes the power of a Hindu father or manager to dispose of the shares of other members of the family in joint property for necessary purposes. 11 Bom 37 and 19 Mad 74 followed. **Nana Chetti v Chidara Boyina. 26 Mad 214.**

Attachment-*Contd.*

(1) Subjects of Attachment—*Contd.*

Notes.—Ref: 6 Bom L R 925; 11 C W N 478. Appl: 27 Mad 375.

(2) Reversionary interest.

69.—Execution of decree.

R C D, a Hindu, died possessed of property, leaving as his heiress his widow, R. D. He also left four daughters, two of whom died in the lifetime of their mother, each leaving a son. R D died, leaving her surviving two daughters, P D and J D, who succeeded to the estate of R C D. *Held* that J B, one of the sons of J D, had no such interest in the property as could be attached and sold in execution of a decree against him. **Bhoobunmohun Banerjea v Thakoor-Doss Biswas. 2 Ind Jur N S 277= 15 W R F B 18 note.**

70.—C P C Act VIII of 1859,s 205—Property, Right of—Interest of Hindu heir expectant on death of widow.

The interest of an heir, according to the Hindu Law, expectant on the death of a widow in possession, is not property, and, therefore, not liable to attachment and sale in execution of a decree under s. 205 of Act VIII of 1859.

Ram Chandra Tantra Das v Dharmo Narayan Chuckerbutty. 7 B L R 341= 15 W R F B 17.

Koraj Koonwar v Komal Koonwar. 6 W R 34.

But see **Gaur Hari Dutt v Radha Gobind Shaha. 7 B L R 343=12 W R 54.**

Notes —See 15 W R F B 17.

(3) Interest of grandson on in Mitakshara.

71.—In a joint Hindu family governed by the Mitakshara, a grandson can enforce partition in the life time of his father and grandfather.

Jogul Kishore v Shib Sahai. 5 All 430.

Notes.—Fol: 18 Mad 179; 31 Cal 111; 7 C W N 688. Con: 16 Bom 29 F B. Ref: 7 Bom L R 232.

(4) Interest of undivided member of joint family.

72.—Death of judgment-debtor—Avoidance of right of survivorship by the attachment.

In the Madras Presidency, where the interest of an undivided member in the joint property of

Attachment-*Contd.*

(1) Subjects of Attachment—*Contd.*

a Hindu family has been attached in execution of a decree for the personal debt of such member, and the judgment-debtor dies pending attachment, a valid charge is constituted in favour of the judgment-creditor which will prevent the accrual to the other co-parceners of the right of survivorship. **Bailur Krishna Rau v Lakshmana Shanbhogue. 4 Mad 202.**

Notes.—Dist: 19 M L J 401. Ref: 8 Mad 506; 10 Mad 357; 22 Bom 640; 17 M L J 334; 30 Mad 413, 32 Mad 429.

(5) Right of son to succeed by survivorship.

73.—Civil Procedure Code, 1859, s. 205.

The right of a son to succeed by survivorship to his father's specific share of property cannot be sold in execution of decree, such right being too remote. S. 205 of the Code of Civil Procedure which specifies the kinds of property which are liable to attachment and sale in execution of decree, makes no mention of contingent interests. The property must belong at the time to the defendants. **Gour Surun Doss v Ram Surun Bhukut. 8 W R 253.**

(6) Son's interest in ancestral estate.

74.—Reversionary rights—Death of son between attachment and sale.

The rights of a Hindu son during his father's lifetime in ancestral property, viz, a right of joint enjoyment thereof under the father's management, and a right of partition under certain circumstances, together with the right of succeeding the father in the management after his death, may be vested rights, and are undoubtedly rights of an incipient proprietary character, but they do not constitute a transferable or inheritable property, and they cannot survive the person in whom they are vested. **Goor Pershad v Sheodeen. 4 N W 137.**

Notes.—Over: 5 Cal 148 P C, Not Fol: 4 Mad 302. Ap: 11 B H C R 76. Ref: 7 N W P 261 F B; 20 Cal 895; 4 Mad 73 F B; 15 Bom 673; 8 All 495.

(7) Property liable to attachment and sale.

75.—Gift—Hindu widow.

One *N*, the sole owner of a certain village, had son *J*. *J*. had two wives. By his first wife he had a son *U*. *J*'s second wife was *G* by whom he had a son whose widow is *K*, the defendant in the suit. *J* died leaving *U* his son, *G* his widow, and *K* his son's widow, and on his death *U* inherited the

Attachment-*Contd.*

(1) Subjects of Attachment—*Contd.*

village. Prior to the year 1874, *U* had made a gift to *G* of 105 *bighas* situate in the village. In 1874 the rights and interests of *U* in the village were sold by auction and purchased by *T*, the ancestor of the plaintiffs. *G* by a deed of gift conveyed the 105 *bighas* to *K* and ultimately died on 26th January, 1883. Plaintiffs then sued to set aside the gift and for possession of the land. The learned Judge found that the land was given to *G* in lieu of her maintenance which she was to hold rent-free for her life and that she had been in possession thereof for twenty years. Further that *U* had the right to resume the land and assess it to rent on the death of *G*, and that all the rights and interests of U, in the land were attached and sold in 1874. On second appeal it was contented that the interest of *U* in the land at the time of the sale of the village by auction was in the nature of a mere expectancy and therefore could not be sold and was not sold. *Held* that *U* gave to *G* the usufruct of the land for her life in lieu of her maintenance. That after the gift the interest of *U* in the land was of the same character and carried with it the same consequences, as the reversion which the lessor would have for land leased for life or years, analogous to the right which a mortgagor who had granted a usufructuary mortgage would have. That *U* had a vested right in the land which was capable of being sold, and that that right passed to the auction purchaser at the sale of 1874. Counsel for appellant cited the following cases in the course of his argument. 6 W R C R 34. 15 W R F B R 17, 14 Moo I A 41. **Kachwain v Sarup Chand. 10 All 462=8 W N 200.**

76.—Questioning legality of decree by claimant—Civ. Pro. Code 1859, s. 229.

In claims arising under this section there is nothing to prevent the "claimants" from questioning the legality of the decree obtained by the decree-holder against the judgment-debtor. **Mahomed Ali Khan v Kalunder Ali Khan. 4 N W P 81**

77—C P C Ss. 38, 39, O 41, rr. 4, 5; O 21 r. 6; 42 (1882 S. 223, 224, 228)—Attachment by Court to which the decree was sent for execution—Revival of execution proceedings by the Court which passed the decree, after it was transferred for execution and returned—Mitakshara School, family governed by—Representatives of judgment-debtor, relief against by attachment and sale of joint property.

Attachment-*Contd.*

(1) Subjects of Attachment—*Contd*

The Court to which a decree is sent for execution must on the termination of the proceedings in that Court certify to the Court which passed the decree the result of those proceedings, and after such a certificate, it is necessary that in order that the decree holder may subsequently proceed to execute the decree he should make an application to the Court which passed the decree so that the decree may again be sent back for execution to the other Court but it was not the intention of the legislature nor dose it follow from this procedure that when an application for execution has been sent back a second time to the same Court for execution against the same property it must be held that the attachment of that property which was made in the proceedings in execution in that Court of necessity came to an end when that case was struck off The same effect should follow in the course of the proceedings taken in execution in the Court to which the decree had been sent under section 223 of the Code of Civil Procedure, as would have followed if the proceedings had been taken in the Court which passed the decree and the same principles should apply. 20 W R 133, 19 All 482 Ref.

When the Court to which a decree had been transferred for execution sends it back under section 223 Civil Procedure Code to the Court which passed the decree that Court i e the Court which passed the decree has power to decide whether the decree-holder could execute the decree against the legal representatives of the judgment-debtor The property of the judgment debtor having already been attached by the Court to which it had been sent for execution, and an order for its sale having been made, the decree holder was entitled to follow that property in execution against the sons 7 Mad 339 Ref

Durga Dass Narain v Umatul Hosein Begum 9 C L J 239

78—Civil Procedure Code Sec 266—Attachable interest—Vested remainder Gift—Gift to a woman gives a life interest

The plaintiff sued to have it declared that a certain house was liable to be attached and sold in execution of a decree obtained by him against the defendant's son. The defendant who was 80 years of age, claimed the house as her absolute property, alleging that her son by a deed had given it to her as a provision for her maintenance. The deed stated that she had been made the owner of the house, that the donor had no rights to it and that it wholly belonged to her

Held that the plaintiff was entitled to the declaration prayed for. The surrounding circumstances showed that the house was revertible to the donor on the defendant s death He had what in English law would be termed a vested remainder on her death and he had, therefore, a saleable interest during her life He had an interest which could be attached and sold under Sec 266 of the Civil Procedure Code In the case of gifts, as in the case of wills the well established rule must be followed that in the absence of express words showing such an intention a gift to a woman does not confer an absolute estate of inheritance which she is enabled to alienate.

Annaji Dattatraya v Chandrabai P J 1892 270 =17 Bom 503

Notes—Dist 22 Bom 984 32 Cal 1051=9 C W N 784=2 C L J 50 Ref 19 Bom 36, 1 Bom L R 303, 3 Bom L R 790 6 Bom L R 625 975 29 Bom 306

78A—C P C S 60 (1882 s 266)—Creation of lifeinterest—A vested remainder—Shias

The creation of life interest is allowed among Shias During the period of the life interest the differed interest can be dealt with by way of sale gift or otherwise, provided there is no interference with the particular estate and the purchaser or donee could deal with the interest so acquired by him

A Mahomedan can create a definite interest like the one known to English Law as vested remainder, and such a remainder though liable to be displaced is not a mere expectancy in succession by survivorship or other merely contingent or possible right or interest but an interest that can be attached and sold 17 I A 201, Fol **Banoo Begum v Mir Abed Ali 9 Bom L R 1152= 32 Bom 172.**

79—Civil Procedure Code, 1882 s 272—Post Office Act (XIV of 1866), s. 5—Letters *held* in trust for judgment-debtor.

An attachment was placed under Civil Procedure Code, s 272, on letters in the post office addressed to certain judgmet-debtors. The day before the attachment the senders of the letters had applied to have the letters returned to them. *Held* that the Postmaster held the letters in trust for, or on behalf of, the judgment-debtors, and they were accordingly liable to attachment on the

Attachment-*Contd.*

(1) Subjects of Attachment—*Contd*

application of the decree holder **Narsimhulu v Adiappa 13 Mad 242**

(8) Attachment of moveable property of Tarwad in execution

80—Malabar Law—Decree against Karnavan and senior Anandravan for debt incurred for Tarwad—Attachment of moveable property of Tarwad in execution—C P C S. 266 —

The moveable properties of a Tarwad are liable to be attached and held in execution of a decree obtained against the Karnavan and the senior Anandravan in respect of a debt incurred for Tarwad purposes even though in the suit the impleaded parties were not impleaded in a representative capacity 8 Mad 484 and 15 Mad 333 declared shaken by 20 Mad 129 F B 26 Mad 24 at 223, 223 ref to — **Manakat Velamma v. Ibrahim Labbe 27 Mad 375.**

(K) MAINTENANCE.

(1) Right of future maintenance

81—Civil Procedure Code 1859 S 205 —

A prospective right of maintenance cannot be attached and a contingency of this kind is not included in Act VIII of 1859 s 205 as something capable of attachment. **Monessur Doss v Kishen Protab Shahee 23 W R 427**

82—s. 266 (k) & (l) C. P C — Contingent right—Future maintenance

A applied to execute a decree held by him against B a Hindu widow by attachment and sale of a village which was given to B by her husband with every right except the power of alienation This application was refused by the Court on the objection of C,the next reversioner A then applied for execution of his decree by sale of B s right to receive the rents and profits of the village B contended that the right was not saleable with reference to s 266, Code of Civil Procedure *Held*, that as the right to receive the rents and profits was neither a contingent right or interest, nor a right to future maintenance within the meaning of s 266, Code of Civil Procedure, that section had no application to the case **Jairaj Kuari v Debi 3 W N 9**

82A—C P C S 60 (1882 Ss 266 (b) and 273) Attachment of right to future maintenance

The decree for maintenance, is a right to future maintenance and cannot therefore be attached under S. 266 (*b*), nor can it be attached under S. 273 as a money decree

The proper procedure to be followed would be that laid down in (15 W R 188) **Nanamma v The Collector of Trichinopoly. 20 M L J 97=5 Ind Cas 879**

83—Act VIII of 1859, ss 205 243—Attachment of future maintenance or Babooana '—Procedure —

Where a judgment debtor was possessed of a decree entitling him to maintenance from a third party,—*Held* that his judgment creditor could attach the amount before it accrued due, by prohibitory order forbidding such third party to pay the judgment-debtor and directing him to pay to such person only as the Court might direct, or an arrangement might be made for the collection or administration if necessary of the amount of maintenance **Maniswar Das v Bir Pertab Sahu, 6 B L R 646=15 W R 188**

84—Right to appeal —

A decree-holder cannot attach his judgment-debtor s right to appeal or his right to future maintenance nor can the Court prescribe to the decree holder what course he is to take for the realization of his claim or what property he is to attach **Bipro Protap Sahu v. Deo Narain Roy 3 W R Mis 16**

Kasheshuree Debia v Greesh Chunder Lahooree 6 W R Mis 64

Duloon Koonwar v Sungum Singh, 7 W R 311.

Chukowree Misser v Numoodah Kooer, 24 W R 5.

Notes.—Dol 7 W R 311, 6 W R Mis 64.

85—C P C S. 60 (1882 S 266)-Right to future maintenance if an annuity is — Annuity if attachable.

An annuity given by will is not a right to future maintenance within the meaning of S. 266 of the Code and can be attached in execution of a decree (10 C W N 1102 foot-note (1892) Dol) **Gopal Lal Seal v F J Marsden, 10 C W N 1102.**

(2) Money allowance for maintenance.

86—A was liable to pay B a widow, a monthly allowance for maintenance B obtained a decree against A as heir of her husband for a debt of her husband *Held* without deciding as to whether a money allowance for maintenance can be attached in execution of a decree, that under the circumstances of this case he was not entitled to attach the maintenance under the decree. **Komaree Dabee v Greesh Chunder Lahoory, Marsh 200=1 Hay 583.**

Attachment-*Contd.*

(1) Subjects of Attachment—*Contd.*

(3) Money allowance charged on land.

87—A Hindu widow's right to maintenance out of lands which belonged to her husband and have devolved on her son is a purely personal right which cannot be sold in execution of a decree or otherwise transferred.

Bhoyrub Chunder Ghose v. Nubo Chunder Gooho, 5 W R 111.

Notes:—Fol: 7 W R 311. Ref: 5 Bom 99.

88—Execution of decree—Personal decree—Hindu widow—Only life interest liable to attachment and sale.—

In execution of a personal decree against a Hindu widow nothing more than her life interest in an estate inherited by her from her husband can be attached and sold. 11 C P L R 226 affirmed; 16 Cal 611; and 17 Mad 208 refd. to.

Nanhu and Kashiram v. Salgram 15 C P L R 85.

(4) Right to monthly allowance in lieu of share of land.

89—Civil Procedure Code (Act XIV of 1882) s. 266, proviso, cl. (1)—Attachment of monthly allowance.—

A heritable right to receive a certain monthly allowance originally assigned in lieu of a share of landed property is not a mere right to maintenance or anything else exempted by the proviso to s. 266 of the Civil Procedure Code, and is saleable in execution of a decree. **Salamat Hossein v. Luckhi Ram. 10 Cal 521.**

Notes:—Ref: 12 Mad 250.

90—Civil Procedure Code (Act XIV of 1882) S. 266—Meaning of 'debt' in that section—Attachment of maintenance allowance.—

The word "debt" in Section 266 of the Civil Procedure Code, means & may include a sum of money due by one person to another & which is actually payable at the time as well as a sum of money which is one but not actually payable then. It means a perfected & absolute debt not merely a sum of money which may or may not become payable at some future time or the payment of which depends upon contingencies which may or may not happen. It is an actually existing debt not merely a debt which might or might not become due. So there was a maintenance allowance payable by B to S during the lifetime of the latter. No portion of the allowance becoming payable at some future date, can be validly attached before that time by a prohibitory order issued to B. **Haridas Acharjia Chowdhry v. Baroda Kishore Acharjia Chowdhry, 27 Cal 38=4 C W N 87.**

Attachment-*Contd.*

(1) Subjects of Attachment—*Contd.*

Notes:—Fol: 28 Cal 483, Ref: 23 All 164: 9 C W N 703; 12 C W N 145; 30 All 246=(1908) W N 101=5 A L J 251; 12 C W N 145=7 C L J 658.

(5) Land granted by way of maintenance, liable to attachment.

91—Maintenance—Land—Attachment—Sale—Money decree—Grantee—Prohibition—Alienation—Civil Procedure Code, Section 206.—

Land granted by way of maintenance is liable to attachment and sale in execution of a money decree obtained against the grantee notwithstanding that the grant contains a prohibition against alienation. 15 All 371; 16 All 443; 5 Bom 99; 10 Bom 342; 20 Cal 273; 17 Cal 826; 7 Bom 262; 6 Mad 159, refd. to. **Singai Parmanand Sao v. Bajirao Bhaoo 14 C P L R 114.**

91.—Maintenance, right to, when attachable—Civ Pro Code (Act XIV of 1882) S 266-Gift, deed of.—When a question arises whether a right to maintenance is assignable or not, the true test to be applied is, whether the intention of the grantor was to create a purely personal right to receive a certain sum of money in the grantee, and consequently inalienable, or whether his intention was to create an interest in property, either a fund or an estate, which should be treated as alienable property.

When a claim has been merged in an actual judgment, ordinarily the right to the judgment is assignable and the nature of the chose in action is immaterial: but this rule is not of universal application. If the right conferred upon the decree holder is essentially of a personal nature, it cannot be transferred by way of alienation or transmitted by inheritance.

Where a father feeling his duty to make adequate provision for his daughter whom he had given in marriage more from the point of view of social rank than worldly prosperity, executed a deed of gift in her favour, which recited that it was the duty of the grantor to bear the burden of maintaining his daughter, the grantee and her children, that a similar liability rested upon the son of the grantor, according to the family custom, that, to make some provision for the maintenance of the grantee with her children the grantor gave her an annual sum of Rs. 600, which was to be paid out of the income of two specified properties owned by the grantor, and a lump sum of Rs. 1,000 for the acquisition of a suitable site and Rs. 5,000 for the construction of a house, which two sums were made payable out of the estate of the

Attachment-*Contd.*

(1) Subjects of Attachment--*Contd.*

donor, and that the lump sum granted as also the annual payment, were not to be paid till, by reason of disagreement between the grantee and the members of the family of the grantor, the former found it necessary to become separate in mess from them, and that in due course the grantee received from the holders of the estate the sum of Rs. 6,000 with which she purchased land and built a house, it was *held* that her interest in the house, and not her right to receive the allowance, was liable to attachment. **Tara Sundari Debi v Saroda Charan Banerjee 12 C L J 146=7 Ind Cas 80.**

(L) PARTNERSHIP PROPERTY.

(1) Share in partnerships assets.

92.—Act VIII of 1859, s 205 and ss. 233, 234 —A decree-holder, who was also a partner of the judgment debtor, sought to attach, in execution of his decree, the share of the judgment-debtor in the assets of the partnership business, the business then being in the hands of the Receiver of the Court under a decree for dissolution and winding up. *Held*, that such share of the judgment-debtor was not "property" within the meaning of s 205 of Act VIII of 1859, and therefore, not liable to attachment in execution. **Abbott v Abbott and Crump. 5 B L R 382.**

Notes:—Not Fol 13 Mad 447;Ap; 8 B H C R 150; Ref: 16 All 286.

(2) Property of partnership.

93.—Attachment limited to share of partner —Act VIII of 1859, ss 233, 234.—

A decree-holder in execution attached and seized certain property which belonged to the judgment-debtor in partnership with another person, who alone, at the time of attachment, was in actual possession. *Held* that such property was the subject of attachment in the execution of the decree against the one partner, but such attachment must be limited to his share, and the attachment should be by prohibitory order, not by actual manual seizure. **Thama Sing v Kalidas Roy 5 B L R 386.**

94.—Partnership property cannot be attached in execution of a decree got against one partner only. The proper course is for the decree-holder to sue for a dissolution of partnership and for an account all the partners being made parties to such suit. **Karimbhai valad Gulamhussen v The Conservator of Forest PJ (1879) 490=4 Bom 222.**

Notes:—Dist 13 Mad 447.

95.—Alienation before remarriage—Remarriage—Reversioners, right of.

T died in 1884 leaving his widow L and sister P L alienated some property of her husband to defendant No 1 in 1885. In 1886, L contracted a remarriage upon which P became the legal owner. In 1895,P sold the property to the plaintiff, who sued to recover the possession of the property from defendant No,1, and his alleged vendors:

Held, that P was entitled to sell the property, and that the possession by defendant of the property did not create any bar or estoppel against P. **Haribhai v Uka 1 Bom L R 201= 4 Bom 229 Note.**

(3) Unascertained interest in a partnership.

96.—Right of suit–Civil Procedure Code, s 266. In a suit by the purchaser at an execution-sale of the interest of the judgment-debtor in a partnership of which the undivided father (deceased) of the judgment-debtor had been a member against the other partners praying that an account be taken and that the share of the judgment-debtor be paid to him, it was contended that the share in the partnership was not liable to be attached and sold in execution,—*Held* that a share in a partnership could be the subject of attachment under s 266 of the Civil Procedure Code; that the execution-sale was not bad in law; and that the present suit was accordingly maintainable. 14 Calc 384 dissented from. **Parvatheesam v Bapanna 13 Mad 447.**

Notes:—Dist 20 Cal 693.

(4)Share of partner in partnership business

97.—Partner's share in partnership business C P Code s 266. A decree-holder against a partner can attach and sell the share of the partner in the partnership business, because it is saleable property within the meaning of s.266 C P Code. 14 Cal 384; 7 B L R 186; 14 Moore's I A 40; 3 Cal 198; 4 I A 247;13 Mad 447 referred to. **Jagat Chunder Roy v Iswar Chunder Roy 20 Cal 693.**

97A—Art. 106—Suit by a partner to recover his share in the assets realised by other partners, applicability of, to.

Attachment-*Contd.*

(1) Subjects of Attachment—*Contd.*

The plaintiff and the manager of a joint Hindu family had entered into a partnership. Subsequent to the latter's death the other members of family received certain sums as assets of the partnership. The present suit was for the recovery of a moiety in the amount so received by the defendant's family. The defendants contended that, as the suit was brought more than three years after the death of the deceased partner. it was barred under Art. 106.

Held, the fact that a suit for a general account was no longer maintainable could not be used to secure to some of the partners exclusively the benefit of realisation of assets made under circumstances which raised no question of limitation with reference to a claim strictly confined to a share of what was then realised. The suit was instituted within three years from the date of the realisation of the assets by the defendants. Therefore, the suit was not barred. (6 Bom 628 and L. R. 5 H L 656 Fol.) **Sokkanadha Vannimundar v Sokkandha Vannimundar. 28 Mad 344.**

97B—Wrongful attachment of partnership property—Right of individual members to sue for damages.

Any member of a firm, whose property has been wrongfully attached by a Court—bailiff, must necessarily suffer some damage to his business reputation, and distress of mind He has, therefore, a right to maintain a suit for damages against the attaching creditor. **Maghanmal Rochiram v Tikamdas Hotchand, 2 Sind L R 26.**

(M) PERISHABLE ARTICLES.

(1) Articles of perishable nature.

98.—Articles of such a perishable nature that they cannot be kept for fifteen days and sold, according to the Civil Procedure Code ought not to be taken in execution. **Sadashiv Morsehvar v Hanso Bin Shravan 5 B H C R A C 156.**

(N) PROPRIETY AND INTEREST IN PROPERTY OF VARIOUS KINDS.

(1) Service tenure.

99.—Interest in property—Civil Procedure Code 1859 s 205.—

Where a tenant had an hereditary interest in property, paying a small quit-rent for it, holding it subject only to the duty to the zamindar of furnishing a few men in aid of the regular police

Attachment-*Contd.*

(1) Subjects of Attachment—*Contd.*

Held that the interest was a beneficial one which could be attached and sold by the tenant's creditor. **Ramessur Nath Singh v Golamee Sahoo 24 W R 309.**

Notes:—See 1 Cal 11.

99A.—Civil Procedure Code (Act XIV of 1882) S 266 (g)—Liability of jagir income to attachment—Pensions *Act* (XXIII of 1871) s 11—Attachment of assigned land revenue in hands of lambardars.—

There is nothing either in Cl (g) of Section 266 of the Civil Procedure Code or Section 11 of the Pensions Act, which protects the income of a jagir from attachment in execution of decree.

Quere, Whether assigned land revenue can be attached in the hands of the lambardars of the village before it has reached the assignee! **Kundan Lal v Dalip Singh P R 57 of 1884.**

100—S. 266 (c) C. P. C.—House of occupancy tenant.

In execution of a simple money decree against an occupancy tenant a house owned by him was put up for sale and purchased by T R, one of the defendants. The plaintiffs, *zemindars* of the village, brought this suit more than eight years after the date of sale, for possession of the house on the ground that under s. 266 (c) of the Code of Civil Procedure, it was not saleable in execution of the decree and the tenant having abandoned the village, the house reverted to the *zemindars*. The suit was resisted on the ground that the legality of the sale not having been challenged by the tenant the sale was not inoperative. *Held*, that the sale was expressly prohibited by the law and could not therefore convey any title to the purchaser. 4 Bom 25; 4 Bom 429; 7 Bom 530; 3 All 121 distinguished. 3 All 12 followed. **Tota Ram v Chain Sukh. 8 W N 154**

100A—C P C S. 60 (1882 s. 266) Future rent and profits—Attachability of Ghatwali tenure.

An order to a Ghatwal not to receive any rents or profits from the tenants may have the effect of attaching such rents and profits. Future rents and profits payable to a Ghatwal by his tenants cannot be attached, 23 Cal 873 ; 27 Cal 38 fol. **Udoy Kumari Ghalwalin v Harivamsha 28 Cal 483.**

Notes:—Ref: 30 All 246=(1908) W N 101=5 A L J 251=4 M L T 10.

Attachment *Contd.*

(1) Subjects of Attachment—*Contd.*

(2) Shipowner. interest of.

101—Sale under prior mortgage.

A ship-owner having mortgaged his ship has still an interest in her, seizable in attachment under the Civil Procedure Code. An attachment on a vessel in respect of the mortgagor's right and interest does not affect the validity of sale under a prior mortgage. **Auhin v Ahmed Mahomed 1 Ind Jur., N S., 241.**

Notes:—Ref: 5 B L R O 380.

(3) Profits of property.

102—When a party attaches property, he also attaches the profits thereof. **Ram Coomar Ghose v Gobind Chunder Sandyal. 12 W R 391**

Ram Coomar Ghose v Gobind Nath Sandyal 9 W R 450

102A—Crim. Pro. Code, s. 146—Attachment of immoveable property by Magistrate—Right to profits of such property accruing during attachment.

Where immoveable property has been attached by a Magistrate under the provisions of s. 146 of the Crim. Pro. Code, pending the decision of a Civil Court in respect thereof, such Magistrate is not entitled, after the final decision of the Civil Court, to retain in hands the profits derived from such property during attachment.

Avadh Narain Lal, A W N 1893, 100.

(4) Profits already realized.

103——When attaching the property, he allows the original owner to remain in possession and enjoy the profits, those profits cease, from the moment they find their way into the pockets of the owner, to be specifically liable for the judgment debt under the attachment. **Ram Coomar Ghose v Gobind Chunder Sandyal 12 W R 391.**

(5) Attachment of property of tenant for rent.

104—A landlord may have a right to receive a share of the produce as rent; and if the share is not made over, to compel it to be done or to recover damages; but the property in the crops is in the raiyat until transferred by some act of his own. It is illegal for the landlord to attach everything in the possession of the raiyat which he considers may be liable to satisfy the rent: all that he can do by way of attachment is to treat the rent as a debt due from the raiyat to the landlord and to attach it as such.

Attachment—*Contd.*

(1) Subjects of Attachment—*Contd.*

Pritun Koormee v Edil Singh. 18 W R 464.

(6) Doors and window shutters.

105—Execution of decree—Attachable property—Doors and windows-Immoveable property.

The doors and window-shutters of a pucca building cannot be separately attached in execution of decree, forming as they do part of an immoveable property and having no separate existence. **Peru Bepari v Ronuo Maifarash. 11 Cal, 164.**

Notes:—Foll: 13 Mad 518.

(7) Property which is the subject of a suit.

106—Interest in property contingent on suit.

The fact of a judgment-debtor's property being the subject of an existing suit is no hindrance to its being attached in execution, but it is in the discretion of the Court to order its sale at the fittest and most proper time. **Ram Chunder v Nund Lall Bose. 19 W R 132.**

(8) Actionable claim.

107—Transfer of Property Act (IV of 1882), s. 6, cl (d)—Transferable claim—Civil Procedure Code. s. 266—Execution of decree.

Under the Transfer of Property Act, property includes an actionable claim. There was sold in execution of the decree the judgment debtor's right to get by division a quantity of land which had been reserved by him for his own use in a deed of gift, but which, at the time of the execution sale, was in the possession of the donee of the estate, the land never having been appropriated by measurement as provided in the deed. In a suit brought by the auction-purchaser (decree-holder) for the area of the land reserved by measurement and division.—*Held* that the claim of the judgment-debtor to the land was a transferable claim, and therefore capabale of being attached and sold in execution under s. 266 of the Civil Procedure Code. **Rudra Perkash Misser v Krishna Mohun Ghatuck. 14 Cal 241.**

Notes:—Ref: 16 All 315 F B.

(9) Property in Zenana

108—There is nothing in Act VIII of 1859 which exempts from attachment property to be found in the zenana of a judgment-debtor.

Doorga Churn Mitter v Huree Mohun Gooho 17 W R 86.

(10) Property necessary for liveli-hood.

109—Civil Procedure Code (Act XIV of 1882 Sec. 266—Property exempted from attachment—Execution of decree—Rules of High Court.

Attachment-*Contd.*

(1) Subjects of Attachment—*Contd.*

Before property of a judgment-debtor can be exempted from execution as falling under the head of the property described in s. 266 of the Code of Civil Procedure, it is necessary that the Court should first express its opinion that such property is necessary to enable the execution-debtor to earn his livelihood, and the Court which must decide this point is the Court which issues the execution. S. 14 (a), Part II, Chapter V, of the General Rules and Circular Orders of the High Court commented on.

Bakhir Mohammad v Doorga Churn Shaha, 10 Cal 39=13 C L R 200

(11) Property in hands of the receiver.

110—Order on receiver to sell property in his hands—Attachment—Execution of decree.

D M brought a suit on a mortgage against B C and P C. The High Court passed a decree in November 1871 dismissing the suit as against P C and orderding that the amount found due on the mortgaged should be paid to D M by B C. The decree further stated that the mortgaged property in Calcutta and in mofussil should be sold in default of payment, and any deficency should be made good by B C. The property in calcutta was sold and did not realize sufficient to satisfy the decree. D M thereupon obtained an order for the transfer of the decree to the mofussil Court for execution, in August 1873. B C died in December 1874 and the suit was revived aginst his widow and adopted son as representatives. The decree, however, was returned to the High Court unexecuted. In a suit for partition of the estate of P C deceased, brought by P C against B C in the High Court, a decree was made in February 1871 for an injunction to restrain B C from interfering with the estate or the accumulations, and for appointment of the Receiver of the Court as receiver, to whom all parties were to give up quiet possession. In that suit B C was declared entitled to a moiety of the properey in suit. Held, on application by S M to the High Court for an order that the Receiver should sell the right, title, and interest of the widow and son of B C in the estate in his hands to satisfy the balance of his debt, that D M was entitled to an order that their interest should be attached in the hands of the Receiver and that the Receiver should proceed to sell the same property in the hands of the receiver of the High Court cannot be proceeded against by attachment in the mofussil.

Hemchunder Chunder v Pran Kristo Chunder. 1 Cal 403.

Notes:—Dist: 26 Cal 127.

(12) Government promissory notes in the Bank of Bengal

111—Civil Procedure Code, ss. 259, 268, 272, construction of.

By a decree of a mofussil Court the plaintiff had been declared to be entitled to certain Government promissory notes which were then in the custody of the Bank of Bengal on account of one K D, regarding the title to whose estate the suit was brought. On an application to the High Court by the plaintiff decree-holder for execution of the decree by attachment, *held* that s. 259 provides for the delivery of specific moveable property in the possession of the judgment-debtor, and was therefore inapplicable to a case where the property sought to be attached was not in the possession of the judgment-debtor, but of the Bank. *Held* also that ss. 272 and 268 apply to the cases of moveable property belonging to the judgment debtor in the possession of a third party and in that of a Court or public officer, respectively, and were not, therefore, applicable where the property sought to be attached had been declared to belong to the plaintiff. The only remedy open to a plaintiff to recover possession of moveable property decreed to belong to him, and not in the possession or power of the defendants, is to proceed by suit against the person in whose possession or power it is. **Pudmanund Singh v Chundi Dat Jha. 1 C W N 170.**

(13) Malikkana rights payable for ever.

112.—Attachment—Right to receive Malikkana—Act VIII of 1859, Ss. 235, 237, 240.

An attachment of a right to receive malikkana from the Collector, if made under Act VIII of 1859, S. 237, is not good and will not invalidate a mortgage of the right executed while such attachment was pending.

Under that section, attachment can be made only of a specific amount which may be set forth in the request as then payable or likely to become payable to the debtor. **Nilkunto Dey v Hurro Sunderee Dossee, 3 Cal 414=1 C L R 412.**

Notes:—Fol: 23 Cal 851, Dist: 2 Mad 208; 12 Bom 443, Ref: 18 Bom 369; 24 Bom 360.

Attachment-*Contd.*

(1) Subjects of attachment—*Contd.*

(14) Allowance payable through post office.

113—Attachment of money in hands of public officer—Anticipatory attachment—Civil Procedure Code (Act XIV of 1882), s. 272, sch. 4, form 142.

S. 272 of the Civil Procedure Code (Act XIV of 1882) does not allow of an anticipatory attachment of money expected to reach the hands of a public officer, but applies only to moneys actually in his hand. **Tulaj Fatesing v Balabhai Lakhmichand. 22 Bom 39.**

113A—S. 60 (1882 Sec 266 cl L)—Hereditary maintenance allowance.

A hereditary right to an allowance or account of maintenance out of the melvaram on a land is attachable in execution. (9 M L J 113 Fol.)

Vaidhynatha Sastrial v Eggia Venkatarama Dikshitar. 2 M L T 338=17 M L J 373 =30 Mad 279.

(15) Deposit by servant of Railway Company.

114—Civil Procedure Code, s. 268—Rights of attaching creditor.

Where money deposited with a railway company by one of its servants as a guarantee for the due performance of his duties was attached by a judgment-creditor of such servant under s. 268 of the Code of Civil Procedure,—*Held* that the creditor was not entitled to have his decree satisfied out of the deposit, but was entitled to a stop order under cl (c) of s. 268, and also to payment of the interest, if any, due by the company on such deposit to the servant. **Karuthan v Subramanya 9 Mad 203.**

115—Money contributed to a Provident Fund.

Certain creditors of a deceased employee of a Railway Company sued and obtained a decree against his widow and children for a debt owing by the deceased. In execution of that decree they sought to attach certain moneys, which, under certain rules, framed by the Company, had been contributed to the Provident Fund of the Railway Company by the deceased debtor. *Held* that the attaching creditors were bound to show that the property sought to be attached was property which was attachable under the decree which they had obtained and that in order to do so it was necessary for them to produce the rules under which the deceased had made the contributions to the fund which it was sought to attach. **Bindraban v The Indian Midland Railway Company. 17 W N 88.**

(16) Cheque for money due on contracts.

116—An instrument authorising a person to receive on behalf of another, such sums as should become due in the execution of a certain work, is not an assignment of money, but a general power of attorney, and, as such, is covered by a stamp of Rs 8 (XVIII of 1869, Schedule II, Article 32.)

A, a contractor under the public Works Department, having assigned his interest to B, B received a Cheque from the Executive Engineer in payment of a debt due to A, and A gave a discharge to Executive Engineer. Subsequently, a decree holder against A got a notice issued attaching money due to A in the Executive Engineer's hands. On this, the Executive Engineer stopped payment of the cheque and paid the decree-holder. *Held* also that if B was in truth the principal and the only person really interested in the contract, and were merely his agent, money due on account of the contract attached by creditor of A could be recovered by *B* from such creditor. **Bhagvandas Kishordas v Abdul Husen Valad Mahomed Ali. P J (1878) 215=3 Bom 49.**

Notes:—Ref: 28 Bom 264.

(17) Deposit of material for carrying out contract.

117—Interest liable to attachment.

Where a person deposited upon the works of another certain materials to be used in carrying out a contract with such second person, and the latter had recognized and accepted such deposit by the advance of the value thereof,—*Held* that such materials had vested in the person with whom they were deposited as a purchaser, and were not liable to attachment under a decree against the depositor. **Anonymous Case. 2 N W 337.**

(18) Money deposited in Court.

118—Discretion of Court—Civil Procedure Code, 1877, s. 272.

Attachment-*Contd.*

(1) Subjects of attachment—*Contd.*

The Court has no discretion to refuse an application for attachment of property in Court made under s. 272 of the Civil Procedure Code.

Noor Jehan Begum v Mashitty Khanum. 8 C L R 7.

Notes:—See 6 Cal 543.

(19) Standing crops

119—Civil Procedure Code Section 266—Immoveable property.

Standing crops are for the purposes of the Code of Civil Procedure immoveable property, and cannot therefore be attached under section, 266 of the same Code. **Madayya v Yenkata. 11 Mad 193.**

Notes:—Fol: 14 All 30; 15 All 394. Ref: 22 Cal 877; 7 C L J 152.

119A—C P C Ss. 60=266 (b). Attachment—Fodder, liability of, to attachment in execution of decree.

Held, that fodder is not exempt from attachment in whole or in part in execution of a decree against an agriculturist. **Wasil v Muhammad Din. P R 93 of 1904.**

120—Immoveable property—Standing crops.

Standing crops are immoveable property in the sense of the General Clauses Act (1 of 1868), and clause (6) of the second schedule of Act IX of 1887 and of the Code of Civil Procedure. 11 Mad 193 approved. **Mindai v Kundan Singh. 14 All 30=11 W N 417.**

Notes:—Fol: 15 All 394. Ref: 22 Cal 877.

(20) Lease.

121—Saleable interest—Alienation by operation of law—Condition restraining alienation—Civil Procedure Code (Act XIV of 1882), s 266

A sued to recover possession of certain land which was leased in osathowla by his father to B. The lease expressly prohibited the lessee and his heir from making any assignment of the property either by sale or gift, but it did not contain any provision for forfeiture or for re-entry by reason of an assignment in violation of its terms, nor was there any provision restricting a sale in execution of a decree. The osathowla passed to B's executor, and was sold in execution of a decree against B. *Held* the sale passed a good title. B, and also his executor at the time of the sale, had an interest in the lease, which was "saleable" within the meaning of s. 266 of the Civil Procedure Code, 10 Bom., 242 distinguished.

Golak Nath Roy Chowdhry v Mathura Nath Roy Chowdhry 20 Cal. 273.

121A—C P C S. 60=s 266-Execution of decree—Sale of land—Sanction of superior authority-Act XVIII of 1876 (Oudh Laws Act), s. 20—Act IV of 1882 (Transfer of Property Act), ss. 88 and 89—Restriction attached to sale of land——Oudh, practice as regards sale of land in execution of decree in.

Under the provisions of s. 20 of the Oudh Laws Act (XVIII of 1876), in Oudh, a decree or order passed under ss. 88 and 89 of the Transfer of Property Act (IV of 1882) would be subject to the restriction attached to s. 266 of the Code of Civil Procedure; and the sanction of superior authority would be necessary for the sale of land in all cases of mortgage A sale in pursuance of an order under s. 89 of Act IV of 1882 is a sale in execution of a decree. **Syed Fida Husain v Kailasa. 3 O C 1.**

121B.—S. 60=S 266 C. P. C.—"Saleable property."

With reference to Government notification, dated 11th October, 1827, a lease of certain land situated in the Kasganj Cantonment had been granted to one *A*. Under the terms of the lease, A held the land at the pleasure of Government. *Held* that A had a saleable interest in the land within the meaning of s. 266 of Act X of 1877. **Mul Chund v D. Gardner. 2 W N 100.**

121C—s 60 (1882 S 266), Land granted for maintenance—Maintenance-holder not entitled to sell etc.—Estoppel by judgment—Uncertainty.

Where some land is given for the maintenance of a Hindu female, and it is provided that the latter has the right only to enjoy the income and no right to make any alienation by way of sale etc, such land is not attachable under S 266 cl. (b) C P C, in execution of a personal decree against the female. 10 Bom 344 foll. **Munisami Naidu v Ammani Ammal. 15 M L J 7**

(21) Interest taken under will

122—Bequest to wife with obligation of

Attachment-*Contd.*

(1) Subjects of attachment—*Contd.*

maintaining and educating children—Interest taken under such bequest—Decree against wife —Attachment of intesest under will—Civil Procedure Code (Act XIV of 1882, ss 286, 274, 276—Assignment of interest while under attachment.

B died in 1891, leaving a widow (defendant No 1) and two sons, P and D (defendants Nos 4 and 5). By his will he bequeathed the residue of his property to trustees (of whom his widow was one) in trust to pay the rents and income thereof to his widow for life, "she thereout maintaining, educating, and bringing up" his children in a manner suitable to their degree in life. After his death the property, moveable and immoveable was to be divided among his sons equally when D should attain the age of twenty-five. He attained majority in October 1895. At the date of suit, D was eighteen years old and P was twenty five. It was contended that the widow was only a trustee of the rents for the benefit of her sons P and D. On the 13th June 1895, the plaintiffs obtained a decree for R3,976-10-10 against the widow and her son P. In execution of that decree, they attached, under an order dated 2nd July 1895, the immoveable properties which had belonged to the testator's estate on the ground that both the widow and P had an interest in them. The attachment was issued under s 274 of the Civil Procedure Code (Act XIV of 1882). The defendants contended that the widow had no attachable interest at all in the said properties, she being under the will merely a trustee as above mentioned for her sons, and that, if she had. it was an interest in moveable property, which should have been attached under s. 268 of the Code, and that the attachment under s 274 was ineffectual and inoperative. They further alleged that by an assignment dated the 20th February 1896 she had assigned and surrendered her life-interest to her son D and that such interest was, therefore, not available to satisfy the plaintiff's decree against her. As to P's interest, the defendants alleged that by a deed of settlement, dated the 9th February 1895, it was validly settled for the benefit of himself and his family, and that, therefore he had no interest in him which could be attached under the order of the 2nd July 1895. *Held* (1) that the widow had an attachable interest in the property; (2) That the interest was an interest in immoveable property and was validly

Attachment-*Contd.*

(1) Subjects of attachment—*Contd.*

attached under s 274 of the Civil Procedure Code; (3) That her assignment of the 20th February 1896 was invalid as against the plaintiffs under s 276 of the Civil Procedure Code. **Natha Kerra v Dhunbaiji 23 Bom 1.**

Notes.—Ex 25 Bom 202.

(22) Right of personal service

123—Where a voluntary settlement, not purporting to be for valuable consideration, is impugned, as colourable the question to be considered is, whether it is shown from the actual circumstances that the alienation was fraudulent and necessarily tended to delay or defeat creditors.

Ganesh Ramchandra Date v Shankar Ram Chundra P J (1886) 17=10 Bom 395

Notes.—Fol 12 Bom 366=23 Bom 131

123A—S 60 (1882 S 266) Restraint of anticipation—Transfer of Property Act S. 10—Married Women's Property Act of 1874 Sec 8—Sucession Act 1865 Sec 4—Presidency Small Cause Court Rules Sec 220.

The doctrine of restraint on anticipation established by Courts of equity for the protection of married women during coverture is one which has always been recognised and enforced by Courts in India. Statutory effect is given to this doctrine by s 10 of the Transfer of Property Act. Its operation is not affected by s 8 of Married Women's Property Act nor by s 4 of the Indian Succession Act. A rule of procedure such as the one enacted in s 266 Civil Procedure Code cannot be read as authorising the attachment of property which by a rule of substantive law is incapable of being transferred or charged by the beneficiary. The exception in Sec. 266 Civil Pro. Code are not stated in terms to be exhaustive 1 Bom 348; 13 B L R 383 Ref; 18 Mad 10 Fol; 12 Cal 522 Diss; 11 Ch D 648 Ref; (1905) Ac 98 Ref (1894) 2 Q B 589; (1896) 2 Q B 48; (1896) Ac 174; (1905) Ac 98 Ref.

Mrs G Goudoin v P A Venkatasa Mudali. 2 M L T 322=17 M L J 363=30 Mad 378

Attachment-*Contd.*

(1) Subjects of Attachment—*Contd.*

123B—S. 60=s. 266 (f) C P C—Birt jajmani.

A *birt Mahabrahmani* or right to officiate as a priest at the funeral ceremonies of Hindus dying within a particular district is a right of personal service within the meaning of s 266 (f) of the Code of Civil Procedure, and as such is not liable to attachment or sale in execution of decree. (16 W R 171) and 10 Bom 395 referred to.

Durga Prasad v Genda **9 W N 169.**

124—A Jotishi vritti is a right of personal service not liable to attachment. **Govind Lakshman Joshi v Ramkrishna Hari Joshi** **P J (1887) 197=12 Bom 366.**

Notes.—Ref 23 Bom 131.

(23) Vritti or religious office.

125—The gift of a Vritti is complete if it is carried out by the donor taking all the steps in his power to revoke it by a subsequent will. The validity of the alienation of a Vritti depends upon what sort of a Vritti it is, whether it is the right of hereditary service in a private or public temple and whether the alienation is to a stranger or to a member of the family, and whether it is a compulsory or private alienation. Compulsary alienation by way of sale in execution of decrees has been disallowed in all cases in being not only opposed to Hindu Law and Public Policy but against the provision, of s. 266 of the Civil Procedure Code as being rights of personal service. In the case of private alienations the prohibition is not of general application. There is no general custom in such matters. The rules of succession depend upon the nature of each particular foundation or office and in respect of it custom and practice must govern and prevail over the text law which admits or prohibits both partition and alienation.

Where an objection that a Vritti is inalienable is raised and decided in the first Court, and though raised but not pressed in the lower appellate Court, it is not precluded from being raised in second appeal. **Rajaram Shanker Ruikar v Ganesh Dinkar Pradakshine** **P J (1898) 76=23 Bom 131.**

Notes—Ref: 27 Bom 31; 26 Mad 31; 34 Cal 828; 11 C W N 782; 36 Cal 975.

Attachment-*Contd.*

(1) Subjects of Attachment—*Contd.*

(24) Attachment before judgment of joint property.

125A—Attachment before judgment of joint property—Application for removal of the attachment by another buyer from one of the owners—Value of attached property—Costs in the miscellaneous proceedings not to be awarded in the regular case.

The plaintiffs sued the judgment debtors for moneys advanced to them and obtained an attachment before judgment on certain bricks. They were attached on the fields where they were stacked The first defendant applied for removal of attachment and obtained it The plaintiffs then brought the present suit to have their right to attach the bricks declared, or in the alternative for the value of the bricks.

The first defendant set up that the attached bricks were his, having been bought at different times by him for value before the attachment from one of the judgment-debtors to whom alone they were said to have belonged.

The District Court gave the plaintiffs a decree for Rs. 4,575, being the value of the bricks at the contract rate, which was for delivery at Rangoon and included cart hire to Rangoon.

He also gave the plaintiffs a decree for the costs incurred by them in the proceedings for removal of attachment and he allowed them their costs of suit calculated on the total amount:

Held, (1) on the facts, that the bricks were the property of the judgment-debtor, at the time of the attachment;

(2) that the District Judge was in error in allowing the plaintiffs the value of the attached bricks at the rate in their contract, which was for delivery in Rangoon and included cart-hire to Rangoon, and that not more than the value of the bricks at the brick-fields should have been allowed;

(3) that the allowance to the plaintiffs of the costs in the removal of attachment proceedings was not justified as these costs had been provided for in these proceedings. **Rugbeer Misser v Mareappa Pillay.** **11 Ind Cas 828.**

Attachment-*Contd.*

(1) Subjects of attachment—*Contd*

(25) Right of residence in house belonging to a shrine.

125B—Plaintiff obtained a decree against defendant to the effect that certain properties, including the house in dispute, belonged to a certain shrine and that he (plaintiff), as the eldest son of the late *mahant*, was entitled to succeed thereto: defendant's right of maintenance and residence in the house were never disputed in the suit and were expressly reserved by the decree, but in execution of the decree for costs, the house was attached and sold.

Held, that the defendant, merely as a dependant of the shrine, had no saleable interest in the house, which was *waqf* and attached to the shrine, and that his interest in the house, which was merely a right of residence and maintenance, personal to himself and inalienable by him, was therefore incapable of attachment.

Held, further, that the defendant had sufficient interest in the institution to be able to object as against the *mahant* that the house as *waqf* property could not be sold, though the decree was against himself.

Section 266 of the Civil Procedure Code clearly requires as a preliminary condition to attachment that the property sought to be attached should be saleable, or that over it, or its profits, the judgment debtor should have a disposing power which he may exercise for his own benefit.

Nanak Chand v Kishen Chand. 8 P R 1900.

(26) Attachment of oil mills.

126—Exemption from attachment—Oil mills.

Oil mills set up on a Teli's premises are not exempted from attachment under s. 266.

Parashram v Ganesh. 1883 P J 237.

(27) Attachment of property in the custody of a Court.

126A.—Attachment of property in the custody of a Court—Civ. Pro Code (Act V of 1908) O. XXI, r. 52—Any other attachment irregular and ineffective.

A obtained a decree against B in the Township Court and attached B's paddy in execution thereof. Subsequently, C obtained a decree also against B in the Sub-Divisional Court, and attached the same paddy by putting the bailiff of the Sub-Divisional Court in possession. The next day the paddy was sold by the bailiff of the Township Court under A's decree, and A withdrew the sale-proceeds. On C's suing A for his rateable share in the sale-proceeds,

Held, that A was not liable for taking no notice of an irregular attachment. As the attached paddy was in the custody of the Township Court, C ought to have made his attachment by notice to that Court under O. XXI r. 52. **Maung Taung Bo v Vyraven Chetty. 11 Ind Cas 859.**

(28) Attachment of legatee's interest before distribution of estate in due course of administration.

126B—Will—Construction—Attachment of legatee's interest, validity of—Parties—Administrator-General—The Indian Succession Act, Ss. 91, 106 and 107.

In execution of a decree obtained against D, certain properties were attached on the snpposition that D was solely entitled to them. At the date of the attachment, these and other properties were in the hands of the Administrator-General who had obtained probate of the will of the deceased father of D, and D had only a partial interest in the properties attached. The Administrator-General had not been made a party to the execution proceedings.

Held, that the attachment was nevertheless legal and could form the basis of a sale. The attachment of a judgment-debtor's property is not illegal because property which did not in fact belong to the judgment-debtor had also been included in the attachment.

The Administrator-General is a necessary party to the execution petition, but the omission to make him a party is not a grounnd for holding the attachment invalid.

A bequest, unless the testator intended otherwise as in the case of a contingent bequest, becomes vested in interest in the devisee or legatee from the date of the testator's death, although he may not be entitled to receive what has been bequeathed to him except in due course of administration, such an interest is attachable and saleable before an administrator has distibut-

Attachment-*Contd.*

(1) Subjects of Attachment—*Contd.*

ed the estate in due course of administration. 23 Mad 428 Dist; 23 Mad 216 Expl.)

Adusupatti Yenkata Row v Sami Pillai. (1912) 1 M W N 56.

(29) Attachment of Singer's Sewing Machine.

127.—A Signer's sewing machine in ordinary use by a tailor is within this clause.

Nathu v Rama 1892 P J 239.

(30) Provident fund.

127A.—Attachment of—The Calcutta Municipal (Act III, B C of 1899) Sec 73—Transfer of the Fund, claim of—Suit—Application—C. P. C. S. 266.

The Provident Fund established by the Corporation of Calcutta to which the provisions of the provident Funds Act IX of 1897 (and consequently the amending Act IV of 1903) were made applicable by the Local Government Notification, dated 8th July 1902, is not liable to attachment. **Sett Munna Lall Parruck v Frederic Gainsford. 12 C W N 633= 35 Cal 641.**

(31) Attachment of offerings to deity.

127B.—Section 60 (1882 s. 266) Attachment, whether offerings to deity liable to—Hindu Law.

Offerings which may in future made to a Hindu Deity by cannot be attached in execution of a decree for money against the Deity inasmuch as the offerings, being voluntary, are entirely uncertain. **Shoilajaund Ojha v Peary Churn Dey. 6 C W N 728= 29 Cal 470.**

(Q) RIGHT OF SUIT.

(1) Right to bring a suit.

128.—A right to bring a suit cannot be attached under the Civil Procedure Code, 1859

Carapiet v Pannalal Seal. 14 W R 152.
Drury v Haradhun Bhuttacharjee. 3 W R Mis 8.
Mahomed Hadee v Sheo Sevuk Doobey. 6 N W 95.

Attachment-*Contd.*

(1) Subjects of attachment—*Contd.*

(2) Right to sue for damages.

129.—Civil Procedure Code Act X of 1877, Section 266 (e)—Sale—proceeds—Execution—Mesne profits—Right of suit.

In execution of a decree held by the Land Mortgage Bank upon a mortgage of an 8 annas share of a putni, a claim having been successfully made to 4 annas of that share by a Bank sued to have it declared that the whole 8 annas' share belonged to the mortgagor. Before the suit was decided half of the 8 annas' share thus claimed by A was sold in execution of a decree agaist him. The suit of the Land Mortgage Bank having subsequently been decided in its favour, the Bank was about to execute their original decree, but before this could be done the entire putni was sold for arrears of revenue. The Bank having received half of the surplus sale proceeds sued to recover mesne profits from the claimant of the disputed 4 annas' share and the purchaser from him during the time they had been in possession of the ground that the Bank had become entitled to the mortgagor's right to sue for mesne profits and also recover Rs. 1,254 the amount of the arrears of the 4 annas' share in consequence of which the sale took place.

Held, that the suit was not properly framed. **Shyam Chund Koondu v Land Mortgage Bank of India. 9 Cal 695= 12 C L R 440.**

(3) Right to appeal.

130.—A judgment-debter's right to appeal cannot be attached in execution of a decree.

Bipro Protap Sahu v Deo Narain Roy. 3 W R, Mis 16.

Notes:—Fol. 7 W R 311; 6 W R Mis 64.

(P) SALARY.

(1) Salary of officer of Small Cause Court Calcutta.

131—Execution of decree of High Court.—

The pay of an officer of the Small Cause Court will be set aside by an order of the High Court, in satisfaction of judgment obtained in that Court. **Koomkurrun v. Michael, Bourke. O C, 259.**

Attachment-*Contd.*

(1) Subjects of attachment—*Contd.*

(1A) Attachment of official salary.

132.—Official salary, attachment of.

Before the salary of an officer is in deposit in the office, no prohibitory order can be issued for its attachment. **Hurdeo Dass v Clifton. 113 P R 1868.**

(3) Salary of Railway Company's servants.

133—134.—Jurisdiction of Mofussil Small Cause Courts—Act VIII of 1859, Secs. 236, 239.

Salaries or other debts due from the Railway Company to any of its servants can be attached in satisfaction of Small Cause Court decree under Act VIII of 1859 sec 236. The attaching Court must make a written order to be fixed up in some conspicuous part of the Court-house, and a copy is to be delivered or sent registered by post to the debtor. The registered letter should be addressed to the Agent of the Railway Company at the head office of the Company It need not be sent through the High Court, although the head office is within the jurisdiction of the High Court. **Hollick. 2 B L R A C 109=10 W R 447.**

135.—C P C O 21, r 46 (1882 Section 268)—Decree—Execution——Attachment of salary—Prohibitory order—Railway servants—Salaries—Small Cause Court—Jurisdiction.

Where a Railway servant resides, works for gain and receives his salary within the local jurisdiction of the Court that passed the decreee and the disbursing officer holds his office beyond the local jurisdiction of the Court, the Court cannot attach the salary that fell due and that was to fall due, by a prohibitory order, under S 268 of the C P C, issued to disbursing officer.

Sayadkhan v Davies. 5 Bom L R 803= 28 Bom 198.

—O 21 rr 53 68 (1882 Ss 273, 290)—

Attachment of decree—Execution in spite of —**See** Executing Court—Jurisdiction.

32 Cal 1104.

(3) Salary of Telegraph Officer.

136.—The salary of a telegraph officer which is due for past service is a debt which may be attached under s. 236, Act VIII of 1859.

Hussen Bhamjee v Hicks 18 W R 124.

Attachment-*Contd.*

(1) Subjects of attachment—*Contd.*

Notes:—Fol: 24 W R 446.

(4) Salary of peon of Mamlatdar.

137.—The whole salary of a peon in the service of a mamlatdar under Government is liable to attachment as it becomes due. **Tejram Jagrupaji v Kusaji bin Gangji. 7 B H C R A C 110.**

Notes:—Ex 21 Mad 393.

(5) Percentage received by Khot.

138.—A Khot is not a 'public officer', and the percentage received by him for collecting the assessment is not 'salary' within the meaning of Section 266 (h), Civil Procedure Code.

Ravji Moreshwar Gokhle v Sayajirav Ganpatrav. P J (1889) 91=13 Bom 673.

(6) Salary of hereditary officer.

139.—Act XI of 1843.—

The official remuneration of the officiating hereditary officer is not liable to civil process so long as it is in the hands of the Collector or other disbursing officer; but as soon as it is in the hands of the hereditary officer himself, it is deprived of any special protection. **Ganpatlal Anupram v Sampatram Ghelabhai. 10 B H C R 400**

(7) Salary already due.

140—Civil Procedure Code, 1859, ss. 236, 237.

A judgment-debtor's salary, which has become due, is a debt within the meaning of Act VIII of 1859, s. 236, which indicates the remedy open to the judgment-creditor. S. 237 has no bearing on such a case. **Kalu Shaikh Khansama v Beatson. 24 W R 446.**

140 A—S. 60=S. 266 (s. 237 of Act VIII of 1859)—Attachment of salary—Salary not due till date of attachment—Salary earned by each day's labour.

A Civil Court cannot issue a general order directing that the pay of a judgment-debtor shall be paid into the Court month by month, until further orders, but it is bound, on the application of the judgment-creditor, to issue a separate order for each month's pay. Sums attachable in execution of decree must be not inchoate but, existing and definite, So a salary not actually due could not be attached, but any portion of a salary

Attachment-*Contd.*

(1) Subjects of attachment—*Contd.*

due at the date of attachment, whether that salary be payable monthly, quarterly, half-yearly or yearly, is attachable. A salary though payable at certain periods is earned by each day's labour.

Messrs Murray & Co v Mr E R H Hoff. Book Cir 18 of 1872.

140 B—S. 60 (1882 S. 266)—Execution of decree—Attachment of future salary of private servant.

Where a decree-holder applied on the 18th November, 1907, for attachment of the judgment detor's salary for November and the succeeding months, the judgment-debtor being a lawyer's clerk *held*, that the unearned salary of a private servant in whole or in part was not liable to attachment in advance.

Semble.— Where a servant cannot sue his master for salary before it is earned, such salary is not "property," nor even a "debt" payable in future. (1893) I Q B 557 and 21 Mad 93 Ref. and Fol; 23 All 164 Dist.)

Debi Prasad v Lewis 6 A L J 227=31 All 304=I Ind Cas 186.

(8) Wages of private servant.

141—Civil Procedure Code (Act XIV of 1882) s. 266.—

The wages of a private servant cannot be attached in whole or in part before they become due and a debt exists. **Ayyavayar v Virasami Mudali. 21 Mad 393.**

Notes—Fol: 31 All 304; 6 A L J 227.

(9) Moiety of salary of officer on half pay.

142—Civil Procedure Code, 1877 s. 266 (*h*)—Attachment of moiety of salary of officer on half-pay.—

Under cl. (*h*) of s. 266 of the Code of Civil Procedure, 1882, a moiety of the salary of a public officer drawing half pay (exceeding Rs 20 per mensem) on sick leave is liable to attachment. **Beard v Egerton 6 Mad 179.**

(10) Moiety of salary of Military Officer

143—Civil Procedure Code, s. 266, expl. (*b*)-Debtor subject to military law—Attachment of moiety of salary under Rs 20 per mensem-Army Act, s. 151.

S. 151 of the Army Act, 1881, not being affected by the provisions of s. 266 of the Code of Civil Procedure, the attachment by a Civil Court of a moiety of the monthly salary of a debtor subject to military law, not exceeding Rs 20, is legal.

Viraragava v Ramudu 9 Mad 170.

143A-C P C Act X of 1877, S. 266-Attachment of pay—Native grass-cutter attached to European battery—Indian Articles of war (Act V of 1869) —Army Discipline and Regulation Act, 1879.—

Held, that neither the Army Discipline and Regulatin Act of 1879, nor the Indian Articles of War, 1869, contains, any provision which exempts from attachment the pay of a Native grass-cutter attached to a battery of artillery of H. M's British Army while cantoned in British India, and not on active service within the meaning of that expression, as defined in the former Act.

Thalli v Ganga. (41 P R of 1882)

(11) Pay of military officer in Indian Staff Crops.

144.—Officer not officer of regular forces—Civil Procedure Code (1882), s. 266, cl. (h)—Army Act, 1881, s. 151—Public officer.

An officer of the Indian Staff Crops is a "public officer" within the meaning of cl. (h) of s, 266 of the Civil Procedure Code, read with the interpretation clause. His pay is therefore subject to attachment in execution of a decree against him, but the operation of the attachment must be restricted to pay received from the Indian Government. The pay of an officer of the regular forces is not so subject to attachment. The attachment in this case was allowed subject to a decree previously passed against the defendant, by which, under s. 151 of the Army Act, half his pay was ordered to be deducted and applied in payment of the amount due under that decree. The repeal of that section does not affect a decree previously passed under it, and the right to enforce such a decree continues until satisfaction has been obtained. **Calcutta Trades Association v Ryland. 24 Cal 102=1 C W N 138.**

Notes—Fol: 25 Mad 402.

144A.—Army Act (44 & 45 Vic., C. 58), Ss. 136, 151—Army (Annual) Act (58 Vic., C. 7, S. 4)-Civil Procedure Code (XIV of 1882) ss. 2, 266—

Attachment *Contd.*

(1) Subjects of Attachment—*Contd.*

Public officer—Attachment of moiety of pay of officer of Indian Staff Crops.

The effect of S. 136 of the Army (Annual)Act, 1895, is to empower Civil Courts to attach one moiety of the salary of an officer in the Indian Staff Corps under s. 266 (*i*) of the Code of Civil Procedure. 26 Cal 102 foll. **Watson v Lloyd. 25 Mad 402.**

(12) Pay of military officer.

145.—Where, with reference to section 99 of the Mutiny Act, a decree for money made against a military officer serving in India directed that the judgment-debt should be stopped out of a moiety of such officer's pay, *held* that the decree-holder could not obtain satisfaction of the decree by attachment of such officer's moveable property. **Mercer v Narpat Rai. 1 All 730.**

146.—Execution of decree—Soldier's pay, liability for attachment of—Warrant officers—Assistant Surgeons in the Indian Subordinate Medical Department-Army Act, S.144.

The respondents, judgment-debtors, were Assistant Surgeons in the Indian Subordinate Medical Department. The question was whether the whole or any portion of their pay was liable to attachment in execution of the decree.

Held, that the respondents being warrant officers were "soldiers" as defined by the Army Act, and therefore their pay was exempt altogether from attachment under the proviso to S 144 of the Act. (25 Mad 402; 24 Cal 102, Ref.)

Murray & Co, Ld. v. Prins. E G. A. 14 O C 82.

146A—Attachment—Pay of officer of British Regiment serving in India—Army Act, 1881, Section 151.

An officer of a British Regiment serving under the orders of the Government of India is a "public officer" within the meaning of Section 2 of the Civil Procedure Code, 1882, and under Section 266 (h) (iii) a moiety of his salary as such public officer is liable to attachment in execution of decree.

Dictum in 24 Calc. 166, not approved.

Kerring v Raikes, P R 59 of 1897.

146B.—C P C S. 60 (1) (i) and O 21, r.48 (3)—Pay of Military Assistant Surgeon-Army Act 1881 (44 & 45 Vic. c.58), s 144—Refusal by officer commanding to comply with order of attachment—Procedure.

Attachment—*Contd.*

(1) Subjects of Attachment—*Contd.*

Held, that the pay of an Assistant Surgeon in the Military employ is absolutely protected from attachment in execution of a decree. (s. 144 (3), proviso 1, Army Act, 1881, 44 and 45 vic. c. 58).

Where an officer commanding refuses to comply with an order of attachment of the pay of an officer which is liable to such attachment.

Held, that the Civil Court ought to act under the provisions of O. XXI r 18 (3), C P C., 1908 that is to say, the Court should proceed to recover from Government, for the benefit of the decree-holder, the sums which should have been stopped out of the judgment-debtor's pay and remitted to the Court by the officer authorised to disburse the judgment-debtor's pay leaving the Government to settle up as it pleases with its officer. the judgment debtor.

Oakes & Co. Ltd. of Madras v Mr J P Discarcie. 10 P R 1910=23 P W R 1910= 5 Ind Cas 802.

147.—Civil Procedure Code, 1859, s. 205——Omission to provide for stoppage of pay in decree.

The pay of a military officer cannot be attached in the hands of the Paymaster in the execution of a decree where no provision for its stoppage has been made in the decree. **Bansi Lal v Mercer. 7 N W 331.**

(13) Pay of non-commissioned officer in civil employ.

148.—Execution of a decree against the pay of a non-commissioned officer in civil employ is entirely in conformity with law. **Cohen v. Mc Carthy. 14 W R 231.**

(14) Military pay attached, refund of

149.—Where a part of the military pay of a sergeant employed under the Executive Engineer was erroneously remitted by his superior to a Small Cause Court, which had directed execution against the sergeant's pay, it was *held* that the sum remitted should be refunded to the Executive Engineer. **Cohen v Mc Carthy. 14 W R 441.**

(15) Salary in the hands of disbursing officers holding office outside jurisdiction of Court.

149A.—Attachment of salary to accrue due—Salary in the hands of disbursing officer holding

Attachment-*Contd.*

(1) Subjects of Attachment—*Contd.*

office outside jurisdiction of Court-C.P.C. s.268—Court competent to issue order under.

An attachment of salary that is not to fall due in the hands of the disbursing officer can be made only by the Court having jurisdiction at the place where the disbursing officer has his office. the attachment should be made by the competent Court after transfer of the decree to it for execution. 3 C L R 30, 6 All 243, foll, 2 B L R A C 108, 10 W R 447 expl. **Abdul Gafur v Albyn. 7 C W N 821=30 Cal 713.**

(16) Salary of a village patel.

150.—Exemption from.

The salary of a patel of a village of less than Rs. 20 a month which is paid to him half yearly, is not liable to attachment. **Lalchand v Budhi. 1883 P J 359.**

(Q) TRUST PROPERTY.

(1) Debtor's interest in property assigned to trustees before benefit of creditors.

151.—A *bona fide* assignment by a debtor of his entire property to trustees for the benefit of his creditors divests him of any interest which can be the subject of attachment subsequently issued in execution of a decree against such debtor until the trusts of the deed of assignment have been carried out. **Bamanji Manickji v Naoroji Palanji. 1 B H C R 233.**

Notes. Ap: 8 B H C R 245. Ref: 10 B H C R 327; 3 Bom L R 905.

(2) Property placed in trust with managers.

152.—Property placed in trust with parties as managers, but not beneficial owners, is not liable to be taken in execution of a decree against them. **Moheeput Singh v Etbaree Chowdhry. 19 W R 226.**

(3) Property held by judgment-debtor in trust for a specific purpose.

153.—Civil Procedure Code (1882) s 266.

Property held by a judgment-debtor as trustee for a specific purpose—Attachment of surplus after fulfilling the trust.

Neither the whole corpus, nor any specific portion of the corpus of a trust property in the hands of a trustee who is a judgment-debtor is liable to be attached in execution of a decree against him personally, on the ground that a surplus of income requires in his own hands for his own benefit after the due discharge of the trusts. S. 266 of the code is not applicable to such property, which only enacts the attachment of the property over which the judgment debtor has a disposing power for his own benefit. **Bishen Chand Basawat v Nadir Hossein. 15 Cal 329=15 I A 1.**

Notes -Ref: 6 C W N 663; 19 M L J 272. Rel: 26 Mad 450; 20 All 46.

153A.—C P C S 60 (1882 s. 266)—Disposing power—Attachment of money in the hands of an auctioneer as proceeds of goods sold by him at auction.

Held, that money payable to an auctioneer by purchasers of goods entrusted to him for auction could not be attached by the creditors of the auctioneer except as to such an amount as the judgment-debtor had a disposing power over, which he could exercise for his own benefit; and, further, that if such money was attached the auctioneer was a proper person to raise the objection that it was not attachable under S. 266.

T. H. Smith v The Allahabad Bank. Ld. 1901 A W N 20=23 All 135.

153B—Trust property (2) Money kept in deposit for a specific purpose—Liability to attachment and sale in execution.

A mortgagor placed in deposit with the mortgagee a portion of the mortgage-amount in trust to be expended by the latter on the occasion of the marriage of the former's daughter. A creditor of the mortgagor attached and sold, in execution of a decree obtained against the mortgagor, the deposit amount, and himself having become the purchaser now sued the mortgagee for recovery of the amount. *Held*, that such suit must fail since it was kept by the mortgagor with the mortgagee in trust for a specific purpose of meeting the expenses of his daughter's marriage in the discharge of parental duty. **Mehr Chand v Gokal Mal. 7 P L R 1905.**

(R) WAGES.

(1) Money paid to sirdar as wages of coolies.

154.—Act VIII of 1859, ss. 236, 237.

The defendants were sirdars of coolies. A decree was obtained against them by the plaintiff in respect of goods supplied for the coolies. It was proved that, by virtue of custom, a sirdar of coolies was entitled to have the wages of coolies paid to him so that he might deduct the amounts due to him by the respective coolies for food sup-

Attachment-*Contd.*

(1) Subjects of Attachment—*Contd.*

plied by him to them; but it was not found that the coolies were hired on the basis of such custom. In execution of the decree, an order was made upon the officer of the Public Works Department in whose employ the coolies were, attaching "all moneys which are or may become payable to the debtors, whether on their own personal account or on account of the coolies over whom they were sirdars." *Held* that the attachment could not be maintained. The wages of the coolies were not liable to attachment under s. 236 or 237 of Act VIII of 1859. **Sajiwan v Gopal. 1 B L R S N 15=10 W R 149.**

(2) Money paid for spinning cotton

155.—Those persons are "labourers" within the meaning of section 266 of Act X of 1877 who earn their daily bread by personal manual labour, in occupation with little or no art, skill or previous education. **Jechand Khushalchand-Shet v Aba & Hema valad Rupa. P J (1880) 172=5 Bom 132.**

155A—Weaver—Wages—Execution—Attachment.

Wages of Khudabax were attached in execution. He applied to raise the attachment alleging that he received the wages weekly as a labourer and not monthly.

Held, following 5 Bom 132, that wages due to a person for work done as a weaver, cannot be attached in execution of a decree. **Khudabax v Ganesh Hirachand. P J 1897 p 14.**

(S) WEARING APPAREL & ORNAMENTS.

(1) Wearing apparel

156—Civil Procedure Code, 1859, s. 205

Necessary wearing apparel is not liable to attachment under s. 205 of the Code of Civil Procedure. **Gangaram Velji v Parbhu Dayaram 9 Bom 272.**

Notes.—Ap: 10 Mad 216. Ex: 11 Bom 106. Ref: Rat Un Cr 399, 797.

157.—C. P. C. O 38 r. 5; S. 136 (1882 Ss. 483,484)—Attachment before judgment—Property outside jurisdiction.

Under the provisions of Ss. 483 and 484 of the Civil Procedure Code, 1882, a Court has no power to attach before judgment property outside the limits of its jurisdiction. **Raja Gokuldas v Jankibai. Jamna Das v Raichand. 5 Bom L R 570.**

(2) Ornaments.

158.—The Mangalsutra, a neck ornament worn by a Hindu married woman during the life-time of her husband without ever removing it, is a part of necessary wearing apparel and is exempted from execution under Sec. 266 of the Code of Civil Procedure. **Mundedi Appana v Tungamma. P J (1884) 256=9 Bom 106.**

159.—Execution against husband.

Ornaments on the person of a Hindu wife, if forming part of her stridhan, cannot be taken under an execution against her husband. On certain occasions, however, the husband may take them, but the right is personal to him. **Tukaram Bin Ramkrishna v Gunaji Bin Mhaloji. 8 B H C R A C 129.**

(4) Right of personal service.

160.—Right to receive and appropriate offerings made by pilgrims in the temple where the defendants is a *pujari* is a right of personal service and plaintiff's attachment and sale of it is prohibited by this clause. **Trimbak v Krishna bai. 1888 P J 177.**

(5) Attachment of vendor's lien for unpaid purchase money.

161.—S. 283—Attachment of vendor's lien.

A vendor's lien for unpaid purchase money may be attached and sold in execution of a decree against the vendor, but this is no ground for setting aside a decree dismissing a suit for a declaration that the property sold is liable to sale in execution of a decree against the vendor as being his absolute property, where the sale by him is established. **Visaji v Ganesh. 1882 P J 27.**

(6) Compulsory deposits.

161.A—Compulsory deposit—Railway servants—Provident fund—Civil Procedure Code (XIV of 1882), Sec. 278—Attachment.

The deposit which a railway servant makes towards the Provident Fund is "compulsory deposit;" and it does not cease to be so when he leaves the service of the Company. The deposit when it was made was not repayable on demand, and therefore at that time was "a compulsory deposit;" and having once acquired that character with the attendant consequences, it continues to retain it.

The expression, "compulsory deposit" is not merely descriptive of the sum deposited, but is a term of art, which by virtue of legislative provision includes that which is not within its natural meaning, for it includes "any contribution

Attachment-*Contd.*

(1) Subjects of Attachment—*Contd.*

which may have been credited in respect of any interest or increment which may have accrued on such subscription or deposit under the rules of the fund" S. 2 (4).

The compulsory deposits of the above description are not liable to be attached under s. 268 of the Civil Procedure Code. **Veerchand v B. B. & C. I. Ry C. Doola v B. B. & C. I. Ry. Co 6 Bom L R 921=29 Bom 259**

Attachment—Subjects of attachment **See** Execution of decree—Transfer of decree for execution. **40 P R 1895.**

Attachment—Subjects of attachment. **See** Pre-emption. **28 All 383.**

Attachment—Subjects of attachment. **See** Punjab Alienation of Land Act S. 16. **4 P R 1903.**

(2) ATTACHMENT BEFORE JUDGMENT

(1) Attachment before judgment, effect of.

Attachment—Attachment before judgment. **See** Transfer of Civil case. **6 Ind Cas 746.**

Attachment.—Before judgment— Effect of: See C. P. C. O. 38 rr, 10.11.

162.—An attachment before judgment places the property in the custody of the law, but does not alter the right to it. **Petumber Mundle v Gocool Das Soonderjee. 1 Ind Jur N S 32=Burke O C 24.**

163.—Before judgment—Attachment in execution of decree.

Held. that an attachment before judgment cannot stand good against an attachment in execution of decree, whether the attachment issues from the same or from different Courts. **Amir Ali v Nawab Hadi Ali Khan. S C 18.**

164.—Attachment creates no lien in the nature of an encumbrance under Act XI of 1859 (Ben). **Mahadeo Saran Saha v Thakur Prosad Singh. 6 Ind Cas 40=11 C L J 528.**

165.—Effect of—Death of judgment-debtor pending attachment.

Property under attachment must be considered as in the custody of the law. The attachment in force does not abate on the death of the judgment-debtor. An attachment only prevents alienation and does not confer any title. 12 All 410: 24 I A 170 ref to. **Pearv Lal Singh v Chandi Charan Singh. 5 C L J 80= 11 C W N 163.**

See also **33 Cal 666.**

Attachment-*Contd.*

2. Attachment before judgment—*Contd.*

166.—The present Code of C P.C.(Act XIV of 1882). S. 295, has altered the law.

Where the plaintiff obtained before judgment an attachment of a debt due to his debtor by Messrs. Parry & Co, and subsequently obtained a decree and after such decree, the debtor filed his schedule and a vesting order was made in favor of the Official Assignee:—*Held*, that the Official Assignee was entitled as against the attaching creditor to receive the debt due to the insolvent from Messrs. Parry & Co. **Krishnaswami Mudaliar v The Official Assignee. 13 M L J 278=26 Mad 673=4 C L J 97.**

Notes.—Fol: 29 Bom 405=7 Bom L R 488 Dist: 30 Mad 413, Ref: 17 M L J 334; 19 M L J 401; 32 Mad 429.

167.—Attachment does not create a title in the judgment-creditor to the property. It merely keeps the property in *custodia legis* pending the determination of his rights. 29 Cal 428; 4 Mad 302 foll.; 8 M L J 64. Diss, from **Zamindar of Karvetnagar v Prayag Dossji. 19 M L J 401.**

168.—Insolvency Act (11 & 12 Vic., C. 21)—Insolvency proceedings—Vesting order—Prior attachment—Priority of claim—Attaching creditor and official assignee-Civil Procedure Code (Act XIV of 1882) S. 244—Official assignee. whether representative of judgment-debtor—Appeal.

A vesting order made under the Insolvency Act, 11 & 12 Vic, Cal 2, has not the effect of giving the Official Assignee priority over the claim of a judgment-creditor in respect of property attached at his instance previous to the passing of such order. The Official Assignee stands in the shoes of the insolvent and takes the property subject to any equities which are good against the latter. 14 W R F B 33 foll: 10 Cal 150 distinguished. **Mitter v Lakhimani Debi 5 C W N 761=28 Cal 419.**

Notes.—Over: 29 Cal 428 F B=6 C W N 577 Dist: 25 Mad 394. Ref: 29 Bom 405=7 Bom L R 488; 26 Mad 673.

169.—C. P. C. O. 38, rr. 11, 13; S. 81 (1882 Ss. 489, 490. 425.)—Attachment before judgment, effect of—Realization in execution—S. 490, effect of—No priority to the decree-holder who had attached before judgment.

The object and effect of an attachment before judgment is simply to safeguard the property at-

Attachment-*Contd.*

2 Attachment before judgment—*Contd.*

tached so as to enable the plaintiff to realize the amount of his decree if he should get one. Though he has a security he has no charge on the property which remains that of the defendant available for other decree-holders. Nor does a decree following such attachment constitute a plaintiff a secured creditor; but the latter must, as any other creditor, apply for execution from which application he is not exempted by S. 490 of the C. P. C. In short a plaintiff decree-holder who has attached before judgment has not by reason of such attachment or process incidental thereto any right to be treated preferentially to other judgment-creditors. There must be realization in execution to give right of priority. 12 Bom 400 ref to. **Sewdut Rao v Sreecantol Maity. 10 C W N 634.**

Notes.—Ref: 13 C W N 1177.

170—Attachment before judgment—Objection that property not transferable if to be taken then or on application for execution—C P C (Act XIV of 1882), Ss. 483, 487, 488, 490.

When property is attached before judgment, the Defendant is not bound to take exception to the attachment on the ground that the property is not transferable. Attachment before judgment stands on a different footing from attachment in execution in this respect.

In such a case the proper time to take this objection is when the decree-holder applies for execution. **Basiram Malo v Srimati Katyayani Debi. 15 C W N 795.**

170A.—When right of contribution arises.

The right of contribution arises when two or more persons are liable to discharge a common burden. A creditor, who before judgment attaches the property of the judgment debtor, does not acquire any lien or charge on the property. Where, therefore, a portion of the attached property is purchased by a third person, who pays up the amount due to the attaching creditor, the payment is gratuitous, and he does not acquire any right of contribution. 25 Cal 179; 29 Cal 428; 28 Cal 419 Ref. **Sahu Lalta Prasad v Zahar-ud-din. 7 A L J 409 = 6 Ind Cas 113 = 32 All 479.**

171—Civil Procedure Code, 1859, ss. 83 and 84.

Attachment-*Contd.*

2 Attachment before judgment—*Contd.*

In attachment before judgment under ss. 83, and 84 of Act VIII of 1859, the Court does not interfere with the legal disposal of the property attached, beyond declaring that possession shall not be taken without its previous sanction, undertaking only that, if no subsequent order to the contrary be made, the property shall be forthcoming at the time of pronouncing the decree to abide whatever order it shall make about it. **Java Ramji v Jadhavji Nathu. 1 B H C R 224.**

Notes—Ref: 8 B H C R O 140; 20 Bom 403

172—Civil Procedure Code. 1859, s. 89.

S 89 of the Code of Civil Procedure renders an attachment before Judgment ineffectual as a bar to process of execution against the property attached in satisfaction of a decree in another suit whether obtained before or after the attachment. **Anonymous Case 6 M H C R 135.**

(2) Attachment before judgment, operation of, where there are no conflicting attachments.

173—If there are no conflicting attachments, a sale of property under a decree may legally follow upon an attachment made before decree. **Mustan Saib v Brooks 7 M H C R 347.**

(3) Subsequent attachment.

174-Civil Procedure Code. 1859, s. 89.

Semble S. 89 of the Code of Civil Procedure was introduced, not for the purpose of restraining the ordinary effect of attachment, but for the purpose of preventing the same view being taken of attachments before judgment as had been taken by the Indian Courts of the writ of sequestration. When attachment of property has preceded decree, no fresh attachment is necessary subsequent to decree. **Sarkies v Bundhoo Baee 1 N W Part 6 p. 81; Fd 1873, 172.**
Contra **See Satbhawan v Sahoo Ranarasee Doss 2 N W 365.**

175—Attachment.

The law requires the issue of attachment after judgment although a plaintiff may have already obtained attachment before judgment. **Musammat Satbhawan v Sahoo Banarsee Dass. 2 N W P 365.**

Attachment-*Contd.*

2 Attachment before judgment – *Contd.*

176—Attachment before judgment-Execution of decree—Sale by Munsiff under Small Cause Court decree—Attachment by Subordinate Judge pending—Salt, a nullity—Jurisdiction—Code of Civil Procedure (Act XIV of 1882), Ss 285, 490.

Where property is placed under attachment before judgment, it is not necessary to re-attach it after the passing of the decree.

Where property had been attached before judgment by the Subordinate Judge, the decree being passed afterwards and the property was sold in execution of a Small Cause Court decree by the Munsiff to whom that decree had been transferred, *held*, that a re attachment by the Subordinate Judge being unnecessary, the Munsiff had no jurisdiction to the property pending attachment by a Higher Court, and the sale was a nullity. **Durpati Bibi v Ramrach Pal.**
6 A L J 703=3 Ind Cas 31.

177—C P C Ss. 63. 73—(1882 Ss. 285, 295) Attachment before judgment—Decree before sale by another Court—Rateable distribution of sale proceeds—Decree in Munsiff's Court-Decree in Subordinate judge's Court.

When an attachment has been taken out by the plaintiff before judgment if a decree is subsequently obtained in the suit the attachment already effected becomes operative.

Regard being had to the Provisions of ss. 285 and 295 of the Code of Civil Procedure, when a property attached in the Court of a Subordinate Judge is sold in an execution proceeding pending in Court of a Munsiff, the Court of the Subordinate Judge is the only Court competent to determine any claim for rateable distribution of the assets realised by the sale.

After the Subordinate Judge had called for (as he had full authority to do) the record of the execution case from the file of the Munsiff, the latter had no power to distribute the sale proceeds amongst the decree-holders claiming rateable distribution in his own Court.

Quære:—Whether the Subordinate Judge had authority to order the decree-holders to refund the sums drawn by them in accordance with the order of the Munsiff in excess of what was legitimately due to them. 4 All 359 Refd:
Bhagwan Chandra v Chandra Mala.
I C L J 97=29 Cal 773.

Attachment-*Contd.*

2 Attachment before judgment- *Contd.*

178—C P C (Act XIV of 1882), S 488—Suit, dismissal of—Reversal on appeal, effect of—Court's inherent power—C P C. (Act V of 1908) O 21. r. 58-Sale without attachment, order for-Validity – Objection as to legality of proceedings.

It is obligatory upon the Court to withdraw an attachment before judgment upon the dismissal of the suit. The reversal of the judgment of dismissal on appeal does not operate to revive an attachment which has been cancelled under S 488 of the Code. Hence a decree-holder is not entitled to bring the properties to sale without a fresh attachment thereof.

If a Court is invited by a decree-holder to sell property which has not, as a matter of fact, been duly attached and the Court is apprised of that circumstance by a person claiming to be interested therein, the Court has inherent power to investigate the matter.

When a sale of immoveable property has actually taken place and its validity is impeached on the ground that it was not attached, the absence of attachment does not, by itself, vitiate the sale. But the position is different when objection is taken to the legality of the proceedings before the sale has taken place. The duty of the Court, under such circumstances, is to ensure compliance with the provisions of the Code when there is still ample time left for necessary action **Sasirama Kumari v Meherban Khan.**
13 C L J 243.

178A—Attachment before judgment—Execution of decree – Sale by Munsiff under Small Cause Court decree—Attachment by Subordinate Judge pending sale a nullity—Jurisdiction—Code of Civil Procedure (Act XIV of 1882), ss. 285, 490

Where property is placed under attachment before judgment, it is not necessary to re-attach it after the passing of the decree. Where property had been attached before judgment by the Subordinate Judge, the decree being passed afterwards and the property was sold in execution of a Small Cause Court decree by the Munsiff, to whom that decree had been transferred, *held*, that a re attachment by the Subordinate Judge being unnecessary, the Munsiff had no jurisdiction to sell the property pending attachment by a

Attachment-*Contd.*

2 Attachment before judgment—*Contd.*

Higher Court, and the sale was a nullity.

Durpati Bibi v Ramrach Pal 6 A L J 703 = 3 Ind Cas 31 = 31 All 527.

(4) Writ of execution, priority of

179—Lodging writ in office of Sheriff.

In considering which of two writs of attachment in execution of a decree is to have priority over the other, the time when the writs are lodged in the office of the Sheriff is the criterion by which priority is to be determined, and not the time when such writs reach the hands of that officer. **Narsingdas Multanchand v. Nahunurai. Sumarmal Joharimal v Nahanubai 7 B C R O C 183**

180—Where one of several writs first reaches the Sheriff it is priority and he has no power to deprive it of such priority and transfer it to another by first executing a writ delivered to him later.

Dwarkanath Shaw v Prankristo Paul Chowdhry Bourke O C 260

(5) Priority.

181—Civil Procedure Code 1859 s 81.

V S and subsequently J S filed plaints and obtained attachment orders against J P's property. J S who got a decree on the 13th and an order for sale on the 16th of February claimed priority. Claim disallowed, *Held* that, of several creditors who have attached a debtor's property under s 81 of Act VIII of 1859, the one who first obtains judgment is entitled to priority.

Juggurnauth Shaw v Issurchunder Roy Bourke O C 146

Lutchmeeput Dogaree v Kenaram Sen 1 Ind Jur N S 393

Shumbhoonath Ghose v Nobinmoney Dossee Robert and Charriol v Nobinmoney Dossee Bourke O C 92.

(6) Suit against one member of undivided Hindu family.

182—A member of undivided Hindu family as defendant.

Attachment-*Contd.*

2 Attachment before judgment—*Contd.*

An attachment before judgment of family property of undivided Hindu family was effected because a suit was filed against a member of the family who did not represent the family.

The defendant died before the decree was passed. *Held* that the right of survivorship begins before the attachment becomes effectual for the purpose of execution Principle of decision in, 8 Mad 554 followed. **Ramanayya v Rangappayya 17 Mad 144**

Notes—Dist 26 Mad 604; 606

(7) Suit on hypothecation bond.

183—C.P.C.S 483-"Poperty"-Moveable Immoveable—Attachment of unhypothecated property.

S 483 of the Code of Civil Procedure does not refer exclusively to moveable property. Where in a suit on an hypothecation bond the plaintiff sought to attach before judgment immoveable property of the defendant other than that hypothecated. *Held*, that it was not necessary, in order that the Court might be satisfied that the proceeds of the sale of the hypothecated property were likely to prove insufficient to meet the decree which the plaintiff might obtain in his suit that such property should be actually brought to sale.

Bishambar Sahai v Sukhdevi. 16 All 186 = 14 W N 20

see also **Chhedi Lal v Kuarji Dichit 17 All 82 = 15 W N 14.**

(8) Attachment of money deposited in Court

184—ss 483 & 484 C P C —"Property"—Moveable—Notice.

The term property as used in ss 483 and 484 of the Code of Civil Procedure is wide enough to include property of every description moveable and immoveable whether in the actual possession of the defendant or of some other person on his behalf and the words "the Court may require him... to produce and place at the disposal of the Court" only refer to such property as is capable being produced in Court. Where property ordered to be attached is deposited in the Court which made the order for attachment that order is sufficient notice to itself that the property

Attachment-*Contd.*

2 Attachment before judgment—*Contd.*

ordered to be attached is to be held subject to the further orders of the Court, and it is not necessary that a separate formal notice should be drawn up. **Chhedi Lal v Kuraji Dichit.**

17 All 82=15 W N 14

See also **Bishambar Sahai v Sukhdevi 16 All 186=14 W N 20.**

(9) Attachment before judgment of company's property.

185.—Indian Companies Act, VI of 1882, S. 177—Civil Procedure Code, Act XIV of 1882, Ss. 483, 484, 485, 588 and 622—Attachment of Company's property in suit to which company not party—Registered company—Property of company attached—Order—Appeal—Notice.

After a resolution was passed to voluntarily wind up a company registered under the Companies Act, VI of 1882, having its registered office at Bombay, but carrying on business at Dhulia, and was subsequently confirmed, the liquidator appointed under S 177 of the Act entered into an agreement, the negotiations as to which were opened before the first resolution was passed and were pending while the second was passed, to sell the factory of the company. Under the agreement the purchaser was to enter into possession of the factory, but the company was to have a lien until the completion of the purchase a few months afterwards. A month before the date fixed for the completion of the purchase, B filed a suit in the Subordinate Judge's Court at Dhulia to recover Rs 10,552 against M in his own individual capacity and as manager of the company, without making the company a defendant, against which his claim professedly was. After the suit was filed, B applied under S. 483 to attach before judgment the company's factory at Dhulia. The Subordinate Court passed an order attaching the factory, no notice of the application or of the order having been given to the liquidator as required by S. 177 of the Company's Act. On the day the order was passed the liquidator applied to raise the attachment. The Court three months after, made the company a party to the suit and confirmed its previous order. *Held*, setting aside the order, that the company not being a party to the suit, and property admittedly belonging to it having been attached in such suit, the Subordinate Judge would have no jurisdiction to pass the order, which the Court would set aside under S. 622 of the Civil Procedure Code, but the order having been made against the company under S. 485, it was appealable under S. 588 of the Code.

Mir Ali Mahomed v Biharilal. 21 Bom 273 =P J 1895, 523.

(10) Attachment, effect of.

186.—Necessity of subsequent attachment—Civil Procedure Code 1859 s 89—

R R filed a plaint against I R on the 15th and obtained a decree on the 27th of February and a prohibitory order was made against I R's property on the 18th of March, subject to three prior attachments; one by J S whose plaint was filed on the 30th of January, and who obtained a prohibitory order on the 13th and a decree on the 16th of February: a second by N S who filed his plaint and obtained a prohibitory order on the 30th of January and obtained a decree on February 22nd; and a third by K S, who also filed his plaint and got a prohibitory order on January 30th, and a decree on February 28th for an order for the sale of the goods on notice to the other three plaintiffs; and the Court ruled that N S and K S were entitled to priority over R R. *Held* that the process in attachment before judgment is in all respects the same as in cases of attachment after judgment, and the effect in binding the property attached so as to prevent alienation, is the same. That an attachment whether before or after judgment places the property in the custody of the law. That if property have been attached before judgment there is no need of a second attachment in the same suit after judgment. That the words "attachment before judgment" in S. 89 of Act VIII of 1859 must be read as equivalent to "attachments

Attachment-*Contd.*

2 Attachment before judgment-*Contd.*

in pending suits," or in other words, the phrase "before judgment" must be read as meaning "until after judgment." **Rajchunder Roy v Isser Chunder Roy. Bourke O C 139,**

Notes:—Dist 13 W R F B 9 Fol: 26 Cal 531.

(11) Jurisdiction of High Court.

187.—Property situate out of jurisdiction.

The High Court has no power to attach before judgment a defendant's property situate outside the limits of its ordinary original civil jurisdiction. **Nur Muhammad v Abubakar Ibrahim Meman 8 B H C R O C 29.**

Notes:—Dist: 2 Bom L R 960; Ref; 8 All 452. Fol: 5 Bom L R 570.

(12) Attachment before judgment, effect of.

188.—Civil Procedure Code (Act XIV of 1882, ss 483, 484, 485, 486, 487, 488, 489, 490 The effect of an attachment of property under the Civil Procedure Code, whether made before or after decree, is the same, provided that in the former case a decree is made for the plaintiff at whose instance the attachment takes place.

O C 139, referred to, **Ganu Singh v Jangi Lal 26 Cal 531.**

189.—Act XXIII of 1840,——Warrant by Mofussil Court.

It was competent to the High Court, under Act XXIII of 1840 to order a warrant of attachment before judgment issued by a Mofussil Court to be executed within the limits of the High Court's ordinary original civil jurisdiction. **Abraham 6 B. H. C. R. A. C. 170.**

190—Civil Procedure Code. 1859, s. 81—Execution of decree—Endorsement of decree under Act XXIII of 1840, s. 1.—

The words in s. 81 of Act VIII of 1859, 'where the defendant is about to dispose of this property or any part thereof," refer only to property within the jurisdiction of the Court where the suit is pending; therefore, where an order under that section by the First Subordinate Judge of the 24-Pergunnahs in respect of property in Calcutta was sent up to the High Court, in order that it might be endorsed in accordance with the provisions of s. 1 of Act XXIII of 1840, the High Court refused to endorse it. **Balaram Mullick v Solano. 8 B L R 335.**

Notes:—Fol: 5 Bom L R 570.

Attachment-*Contd.*

2 Attachment before judgment—*Contd.*

(13) Grounds of application.

191—Grounds of application—suit not commenced—Civil Procedure Code, 1859 s. 81.—

In an application made under s. 81, Act VIII of 1859, the Court must be satisfied that a removal of goods is being made, or about to be made, with a view to evade the execution of a decree in a specific suit, though it is not necessary that the suit should be actually commenced at the time of their removal.

Ramnarain Poddar v Levy. 2 Hyde 183.

192—C. P. C. O. 21 r. 1=Ss. 268 (a) 503—Garnishee denying debt due, it must be sold or receiver appointed—Penal Code s. 206, Criminal Procedure Code, 1882, s. 195—Costs.—

E got a prohibitory order directing W. not to pay certain money alleged to be due to his judgment-debtor K W, who was Vice-President of a Local Board, consulted C the President of the Board and as they were of opinion that the money did not belong to K but to his surety to whom the payment was made, *held* that the case was not distinguishable from 11 Bom 449, as no undertaking to pay to E the judgment-creditor was given by either W or C, the only course open to the creditor was to get an order for sale or appointment of receiver.

E obtained an order calling on W and C to show cause why sanction should not be granted to prosecute them under section 206 of the Indian Penal Code, *held* that the Judge should not have granted the order as there was no specific allegation of fraudulent intent but vaguest surmises and that he should not have saddled them with costs. *Held*, further that there was great need of caution as W and C were public servants of responsibility and the public as well as they had valuable property in their character. **Eknath v Ramchandra. 1894 P J 393.**

(14) Property within Jurisdiction.

193—Civil Procedure Code, 1877, s. 483.—

The words "any portion of his property" in the latter part of s. 483 of the Code of Civil Procedure, 1877, mean any portion of the property of the defendant which is within the jurisdiction of the Court in which the suit is pending.

Kedar Nath Dutt v Seeva Veyana Rana Luchman Chetty. 1 C L R 336.

Notes—Fol; 5 Bom L R 570,

Attachment-*Contd.*

2 Attachment before judgment- *Contd.*

(15) Property not in jurisdiction.

194—Property not in jurisdiction—Civil Procedure Code, 1882, ss. 483, 484—

Under the provisions of ss. 483 and 484 of the Code of Civil Procedure, 1882, property of the defendant, which is not within the jurisdiction of the Court, cannot be attached before judgment. **Krishnasami v Engel. 8 Mad 20**

Notes—Fol: 5 Bom L R 570.

195—C P C O 38 r 6; S. 136 (1882 Ss. 485, 642)—Attachment before judgment—Property outside jurisdiction. A case in which an order was made attaching before judgment property outside jurisdiction. **Ram Pertab Jhowar v Madho Rai. 7 C W N 216.**

Notes:—Diss: 5 Bom L R 570. Ref: 31 Mad 502.

196—C P C O 32 r 6; S. 113; O 46 r 1 (1882 Ss. 461, 483 and 617—Attachment before judgment of property outside jurisdiction, validity of-Grounds of reference to Chief Court under s. 617.

Property outside the local limits of the jurisdiction of a Court cannot be attached before judgment under Ch. XXXIV of the Code.

A Subordinate Court in Lower Burma is bound to follow the rulings of the Chief Court, Lower Burma, and the fact that there is a conflict between the Chief Court's ruling and another High Court's ruling is no ground for referring the question to the Chief Court under S 617 C P C I L B R 310, 8 Mad 20, 5 Bom L R 570 Fol: 7 C W N 216 not Fol. **Siva Sawmy Sitia v Suliman Dawoodji Parek. 3 L B R 255**

196A—Of property outside jurisdiction—S 648 Civ. Pro. Code, 1882.—

The property of a defendant, which is not within the jurisdiction of the Court cannot be attached before judgment under the provisions of s. 648 Civ. Pro. Code. **A. M. Madar Saib Brothers & Co. v Moona Abdul Kassim. L B R 1893—1900. 56.**

196B—C. P. C. O. 38 r. 5; S. 136 (1882 Ss. 483, 484)-Attachment before judgment-Property outside jurisdisction. Under the provisions of Ss. 483 and 484 of the Civil Procedure Code, 1882, a Court has no power to attach, before judgment, property outside the limits of its jurisdiction. **Raja Gokuldas v. Jankibai. Jamna Das v Rai Chand. 5 Bom L R 570**

(16) Security for satisfaction of decree.

197—Defendants were on the 10th March ordered to give security for the fulfilment of any decree that might be passed in the suit or show cause on the 28th March why they should not furnish security. On 12th March to avoid an interim attachment of their property they furnished security. On the 28th they wished to show cause why security was unnecessary but the subordinate Judge held that as they had given security they could not show cause. This was a mistake and his order was set aside with a direction to consider the application of the 28th March, Section 484 of the Civil Procedure Code. **Wasudev Balkrishna Lotlikar v Anant Ramchandra Lotlikar. P J (1881) 173; 5 Bom 643.**

198—C P C O 38 rr 6, 10; S.145 (1882 S. 485). When in a suit an attachment before judgment is removed on giving security, and the suit is dismissed but decreed on appeal, a surety is not liable for amount of appellate decree, as the attachment itself is void under S. 488 C P C. 12 Bom 71 Fol. **Ma Bi v S Kalidas 5 Ind Cas 985= 5 L B R 156.**

199—S. 484—'Adjudge' meaning of.—

A surety who had given security under s. 484 contended that he was discharged as the suit terminated by a consent decree and was not *adjudged* and that the arrangement was not communicated to him. *Held* that he was liable as the word *adjudge* cannot be construed in this limited meaning, and as the arrangement was not inconsistent with the terms of the contract of the surety nor was it prejudicial to his interest. **Shivapa v Nagapa. 1894 P J 25.**

(17) Grounds for granting application.

200—Grounds for granting application—Defendant leaving jurisdiction to avoid or delay process—Civil Procedure Code, 1859, ss. 74, 75.—

Applications under ss. 74 and 75, Act VIII of 1859, on the ground first mentioned in s. 74, must show at least that defendant is about to leave the jurisdiction, with a view to avoid process, or to delay the plaintiff in the prosecution of his suit. Evidence sufficient to support this must be adduced in all cases. **Teenaram v Ramrutton 2 Hyde 181.**

201—C P C O. 38 r.6; The Second Schedule, O. 19 r. 3 (1882 Ss 485 and 196)-Attachment before judgment—Partnership property—Appointment of Receiver—Affidavits—Contents—Practice.

Attachment-*Contd.*

2 Attachment before judgment—*Contd.*

S. 483 of the Civ. Pro. Code provides for the attachment of the property of the judgment-debtor it does not apply to the joint property of a partnership, of which the judgment-debtor is a member. In cases of this kind, the proper order to make is the appointment of a Receiver under S. 503 of the Code.

Affidavits produced in a case should comply with the terms of s 196 of the Code. In cases of interlocutory application the statements of the declarant's belief are admissible ; but the belief must be stated and reasonable grounds thereof set forth. **Damodar Nandram v Panalal Madiram. 9 Bom L R 540**

202—C. P. C. O. 38 r. 6 (1882—Attachment before judgment-S. 485)-Court to consider what-Conduct of defendant.

In considering application for attachment before judgment, the Court is not restricted to the conduct of the defendant subsequent to the commencement of the action. It is open to the Court to look to the conduct of the parties immediately before the suit and to examine also the surrounding circumstances and from these to draw an inference as to whether the defendant is about to dispose of his property, and if so, with what intention. **Macgregor v The Cawnpore Sugar Works Ld. 11 C L J 19=5 Ind Cas 181.**

203—Defendant leaving jurisdiction or dealing with property so as to make it unavailable—Ground for arrest of debtor.

A creditor is not entitled, merely because he has a just demand against his debtor to move the Courts to put in force the extraordinary processes of arrest or attachment on mesne process ; he must also have good reason to believe that his debtor is about to depart from the jurisdiction of the Court, or to deal with his property in such a manner that it will be unavailable for satisfaction of the claim against him. **Goutiere v Charriol. 1 N W, Part 2, 32: Ed 1873, 91.**

204—Defendant leaving India—Good cause—Civil Procedure Code, 1859, ss. 74-80.

When it appears *prima facie* that the defendant is going to leave India with intent to remain absent so long that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant, he will be ordered, unless he show good cause, to find security for the amount of the claim and the costs of the suit. And "good cause" must be either (1) that he is not going to leave India, or not for so long a time as will obstruct, or be likely to obstruct, the plaintiff, should he succeed; or (2) that the suit is not a *bona fide* one; or (3) that, even if it is, the institution of it has been vexatiously delayed till the defendant is about to depart from India, in order to embarrass or coerce him. **Spence's Hotel Company v Anderson. 1 Ind Jur N S 294 note.**

205—Defendant leaving jurisdiction—Civil Procedure Code, 1859, s. 80.

It is not necessary for the plaintiff to show that the defendant intends to obstruct or delay the plaintiff in execution of his decree, in order to justify an application to the Court for his arrest before judgment under Act VIII of 1859, s 80; it is enough if his going away will have that effect. **Agra and Masterman's Bank v Minto. 1 Ind Jur, N S, 265.**

206—Defendant leaving the jurisdiction—Repairs of ship, Suit for price of.

The defendant having employed the plaineiffs to do repairs to his ship on the promise that they would be paid for out of the proceeds of a letter of credit from the owners for that purpose, afterwards drew bills on the credit for other purposes. The defendant being about to leave Calcutta, on the application of the plaintiffs an attachment order was issued against him and the proceeds of the bills in the hands of P's agent. **Calcutta Docking Company v Passmore. Bourke, O C. 125, Cor 151**

207—Arrest of master and part owner of ship where ship was lost—Repairs of ship—Suit for price of.

In an action for repairs, where the ship had been lost, the Court granted an order for personal arrest of the defendant, the master and part owner, under s. 80 of Act VIII of 1859. **Charriol v Courtois. Cor 123.**

208—Security for personal appearance of defendant—Civil Procedure Code (Act XVI of 1882) ss. 477, 479—Bona-fide suit.

A suit was instituted against the master ofea vessel for repairs done to his vessel and for hir of a dock in which the vessel had been. The mas-

Attachment-*Contd.*

2. Attachment before judgment—*Contd.*

ter being about to leave the jurisdiction of the Court with his vessel, the plaintiffs, under s. 477 Code of Civil Procedure, applied for an order that the defendant should give security for his appearance to answer any decree that might be passed against him and a rule was issued calling on him to show cause why such security should not be furnished. The defendant showed cause, and alleged that the amount claimed for the repairs was excessive, that the repairs were badly done, that the plaintiffs were not entitled to dockhire, and that some of the repairs charged for had not been executed. He further counterclained for a large sum for demurrage owing to the detention of his vessel and damages caused to it by the wrongful act of the plaintiffs. It was contended that as the claim was on a contested account which on the face of it was stated, but unsettled, on the principle of the English authorities, the plaintiffs were not entitled to the order asked for. It was further contended that the suit was not a *bona fide* one, but brought merely to harass the defendant and that for this reason security should not be ordered to be given. It was not disputed that the defendant had no domicile in this country, and that he was shortly leaving in his vessel in the ordinary course of his business. The Court found the plaintiffs were undoubtedly entitled to recover some amount on account of repairs, and that the mere fact that the plaintiffs added on to such a claim one of a disputable character did not go to show that the suit was not a *bona fide* one. *Held* that there is no authority for saying that the principle applied in England to the granting of writs *ne exeat regno* should be applied in this country; that the Court can only look to the provisions of the Code of Civil Procedure, that when a person comes on business to this country, in which he has no property or domicile, and enters into a contract with a person to do work in connection with that business, and which must be done before he leaves the country, and it is known he intends to leave as soon as the work is completed, there is an implied understanding, if the work was done on his credit, that it should be paid for before he leaves. *Held*, also, that the case fell within the provisions of s. 447 of the Code, and that the defendant should furnish security for his appearance while the suit was pending within a week in terms of s. 479, such security to be for the amount of the claim. **Probode Chunder Mullick v Dowey. 14 Cal 695.**

Attachment-*Contd.*

2 Attachment before judgment—*Contd.*

209—Disposing of property to delay or obstruct execution—Civil Procedure Code, 1882, s. 483.

Before proceeding under s. 483 of the Civil Procedure Code to attach property, the Court should be thoroughly satisfied that the defendant is really disposing of his property with intent to obstruct or delay the execution of any decree that may be passed against him. **Shoshee Shekhoreswar Roy v Haro Gobind Bose 13 C L R 356.**

(18) Residence.

210–Civil Procedure Code, 1882, s. 648–Arrest before judgment.

Where an officer proceeding from Burma to England on leave resided a few days in Madras on the way,—*Held* that such residence was sufficient, for the purpose of s. 648 of the Code of Civil Procedure, to render him liable to arrest before judgment. **Everet v Frere. 8 Mad 205.**

Notes·—Ref. 11 Bom 541; 29 Mad 339=16 M L J 238=1 M L T 71; 14 Bom 541; 29 Bom 239.

(19) Suit for damages for attachment before judgment.

210A—S 95—Limited and incidental relief-Attachment before judgment-Proof of malice and absence of reasonable cause-Rule of English Law—Analogous to S 250 Cr Pro Code—Malice defined—Special damage defined—Credit impaired—Legal remedy.

In a suit for damages for attachment before judgment, the plaintiff should prove that the defendant had no reasonable and probable cause for applying and also malice in fact. S. 95 of the new Civil Procedure Code provides for compensation as a limited and incidental relief; and in cases of wrongful attachment, it gives an alternative remedy.

The rule in England is that actual malice must be proved, while this section allows a limited remedy without such proof.

S. 95 is analogous to S. 250 of the Crim. Pro. Code.

Attachment-*Contd.*

2 Attachment before judgment—*Contd.*

Malice may be defined to mean any improper or indirect motive, *i e*, a motive other than what should properly actuate the party. And no hatred or enmity is required.

Recklessness regarding the truth or otherwise of the allegations would also amount to malice.

Special damage is a misleading term and can be found out only in the light of the context in each case. It has three meanings—the particular damage resulting from the particular circumstances of the case: the actual and temporal loss caused where the damage done is the wrong and no actual right has been disturbed: and the particular loss of the individual in cases of nuisance, over and above the loss sustained by the public in general.

When a blow is struck at the credit of a person, the law should place in the hands of the injured person a means of righting himself (2 N W P 353: 4 Cal 583; 17 I A 17; 6 Bom L R 704; 29 Mad 208, Ref.; 8 Q B D 175; 11 Q B D 674; 2 Q B D 718; Ref.; 2 Q B D 524, Ref.; 32 Mad 170; 2 Q B D 106, Ref.) **Manjappa Chettiar v Ganapathi Goundan. 10 M L T 365=(1911) 2 M W N 414.**

210B—Attachment before judgment of property situate outside the Court's jurisdiction—Allowable under the new Code-C P C (Act V of 1908) Ss 46 and 138, O XXXVIII, r 5-C P C (Act XIV of 1882), Ss. 483, 648.

Though the property, referred to in clause (b) or Order XXXVIII, rule 5 of the new Civil Procedure Code, must be property within the local limits of the Court's jurisdiction, no such restriction is imposed with regard to the property mentioned in clause (a). The rule clearly permits the attachment before judgment of property situate either within or without the legal limits of the Court's jurisdiction.

The removal from the new rule of this restriction as to the locality in which property capable of being attached under it must be situate, which there was in the corresponding S. 483 of the old Code, has altered the law. **Somasundaram Chetty v Muthu Yeerappa Chetty. 10 Ind Cas 794.**

(20) Order for attachment before judgment in divorce proceedings.

211—Divorce proceedings-Attachment before judgment—O XXXVIII, rr 5. 6, C P C (1908)—Ss 7. 45, Act IV of 1869 (Divorce).

An order for attachment before judgment cannot be made in divorce proceedings There is much in the Code of Civil Procedure which deals with substantive law and not procedure; and O XXXVIII, rr 5 and 6 have no application in divorce proceedings. Attachment before judgment is a matter of relief and not of procedure. **Phillips v Phillips. 37 Cal 613.**

(21) Consequences and effect of attachment before judgment.

212—C P C O 21 rr 46,60; s.73; O.38, r.12 (1882 Ss.268, 270,295,490)-Attachment before judgment, effect of—Attachment—Consequences and effect of—Title of official assignee.

S. 490, C. P. C., provides that where an attachment before judgment is made and a decree is passed in plaintiff's favour, it is not necessary to re-attach the property in execution of the decree. An order of attachment does not operate so as to give the attaching creditor priority over the other creditors in the insolvency. An order of attachment of a debt under S. 268 merely restrains the debtor's creditor from paying to the debtor and restrains the debtor from receiving the same. Attachment merely prevents alienation, but does not confer title. An attachment of a debt becomes complete so as to prevent the title of the trustee in bankruptcy or the Official Assignee only on receipt of the debt. Even where an attachment of property is made and an order for sale is obtained by the creditor, the latter obtains no title to the property attached so as to prevent the same from vesting in the Official Assignee. 1 N W P 181 and 29 Cal 428 foll. Under S. 270 of Act VIII of 1859 an attaching creditor was entitled to priority as against subsequent creditors.

Krishnaswami Mudaliar v The Official Assignee. 13 M L J 278=26 Mad 673.

Notes:—Fol. 29 Bom 405=7 Bom L R 488. Dist: 30 Mad 413; Ref: 17 M L J 334; 19 M L J 401; 32 Mad 429.

(22) Attachment of property not in possession of defendant.

213—C P C S. 64=Ss. 483, 486.

A defendant's property, though not in his possession can under S. 486 read with S. 268 (c), be attached before judgment. **Kachubhai v Chhagan. 1888 P J 225.**

Attachment-*Contd.*

2 Attachment before judgment—*Concld.*

(23) Compensation for attachment before judgment on insufficient grounds.

213*A*—Small Cause Court—To award compensation for attachment before judgment on insufficient grounds—C. P. C. S. 491—Improper arrest. A Small Cause Court is competent to award compensation under S. 491, C. P. C., for procuring an attachment before judgment on insufficient grounds. *Obiter.*—It has not jurisdiction to award compensation in cases of improper arrest. **Ibrahim Rowthar v. Sangaram Shetty, 26 Mad 504.**

(24) Suit for compensation.

213*B*—Articles 29, 36 and 49 — Suit for compensation — Attachment before judgment—Article 36 Schedule II, Limitation Act, is a general article governing suits for compensation for torts to which no special article applies.

Article 29 provides for suits for compensation for wrongful seizure of moveable property under legal process. This article is quite general in its terms and was intended to apply to all cases where the alleged wrongful seizure was made under legal process; 27 Mad 346 approved. Article 47 has no application to a suit of this description. It applies to a case in which moveable property is wrongfully taken or detained by the defendant and not by the Court in execution of a legal process. (6 Bom L R 704 distinguished) (24 W R 298 Ref: and approved). The plaintiff's property was attached before judgment and the suit against the plaintiff was dismissd The plaintiff more than one year after the date of the attachment but within a year from that of the dismissal of the suit brought a suit for compensation. Held that the suit was governed by s. 29 and was barred by limitation. *Semble*:—that the wrong to the plaintiff was not a continuing wrong. it being complete as soon as his goods were seized. That the intention of the Legislature was not to make section 24 Limitation Act, applicable to such a case as indicated by articles 19 and 42 under which limitation is to be completed from the date of the cessation of the wrong. 23 Mad 621; 27 Mad 346; 24 W R 298 Fol: 6 Bom L R 704 Dist: **Ram Narain v Umrao Singh, 4 A L J 548=1907 A W N 194=29 All 615.**

Notes.—Ref: 10 C L J 226=14 C W N 96.

Attachment—Attachment of person *See* C. P. C., S. 55, (1882) 336. **83 P J 18.**

Attachment-*Contd.*

3 ATTACHMENT OF PERSON.

(1) Attachment against person and property simultaneously.

214—Civil Procedure Code, 1859, ss. 201, 207—Act XXIII of 1861, s 15—Discretion of Court.—

Under s. 201 and other sections cited of Act VIII of 1859, a judgment-creditor has uncontrolled option whether he will proceed in the first instance against the person or the property of his judgment-debtor; and by s. 15, Act XXIII of 1861, the Small Cause Court is bound to issue execution according to the nature of the application, if made in writing after the passing of the decree under s. 207, Act VIII of 1859. The Court may, at its discretion, refuse execution against the person and property at the same time or against the same person when under s. 13. Act XXIII of 1861 or under s. 19. Act X of 1865 application for immediate execution is made verbally at the time of passing the decree.

Davis v. Middleton, 8 W R 282.

Notes:—Con: 17 W R 165.

215—s. 254 C. P. C.—Decree against person and property—Execution.

In this case the decree-holder obtained a decree against the hypothecated property and against the defendants personally. *Held* that the decree-holder was entitled to enforce his decree either against the person or the property of the judgment-debtor. It was not necessary for the decree-holders, first to execute it against the hypothecated property and then, if any balance remained due, to proceed against the person of the judgment-debtor. **Johari Mal v. Sant Lal, 9 All 484=7 W N 101.**

Notes:—Ref: 10 All 35.

216—Absconding debtor.—

Where a defendant, against whose person an attachment in execution has been issued, absconded, a second attachment against his moveable property was granted, and the writ of attachment against the person was not recalled.

Gregory v. Hadjee Essuff Coonjee, 1 Ind Jur. N S, 244.

(2) Second application for attachment.

217—Discretion of Court.

Held, by Phear, J., that, under the Code of Civil Procedure, 1859, a Court was not bound to grant, as a matter of course, a second application

Attachment-*Contd.*

3 Attachment of person—*Contd.*

from a judgment-creditor for attachment, but ought always to require him to show why the steps previously taken did not lead to a full discharge of the debt, and ought not grant its process a second time unless satisfied that the failure was not attributable to the applicant's own fault.

Byjnath Pundit v. Kunhya Lall Pundit, 9 W R 527.

Notes:—Dist: 18 W R 193, Con: 17 W R 165; 22 W R 512.

218—Discretion of Court—Act VIII of 1859, s. 231.—In execution of a decree, a writ was issued against the defendant, who had not any property within the jurisdiction of the High Court. The first writ was made returnable in a month. Another writ, returnable in the same time, was issued, the first not being successful, but the defendants were not found. An application for a writ returnable in sum was refused. *Held*, on appeal, *per* Peacock, C. J, that, although the Judge has a discretion to refuse the writ under s. 231, Act VIII of 1859, yet the fact that the plaintiff had not used the utmost possible diligence was not sufficient ground on which the writ should be refused. *Per* Macpherson, J -The Court had a discretion under s. 231, and ought not to grant the writ where it is not satisfied that the parties have used every reasonable endeavour to execute former ones that have expired; as the former writs were returnable in so short a time, however, in this case the writ ought to be granted

Nittai Chandra Pal v. Thakur Das Biswas, 8 B L R, 258 note.

Kalee Chunder Paul v. Thakur Das Biswas, 12 W R, O C, 7.

(3) Attachment and discharge.

219—Further execution against debtor's property.—After a debtor has been arrested in execution of a decree and discharged at the request of the creditor, his personal property may be taken in execution under the same decree

Janoki Singh Roy v. Kaloo Mundul, B L R, Sup Vol, 889=9 W R 178.

(4) Non-satisfaction of decree against property of judgment-debtor.

220—Right to attach person

Where a judgment-creditor had obtained a writ of attachment against the property of his judgment-debtor, but the debtor had no property

Attachment-*Contd.*

3 Attachment of person—*Contd.*

to the knowledge of the creditor against which the attachment could be enforced.—*Held*, (reversing the decision of the Court below) that he was entitled to an order for execution of the decree by attachment of the person of the debtor. **Seton v Bijohn, 8 B L R, 255=17 W R 165**

(5) Option of proceeding againt person or property.

221.—Civil Procedure Code, 1877, 1882, sec. 254 (1859, sec. 201)—Execution of decree—Ex-parte decree.

Under s. 201 of Act VIII of 1859, a judgment-creditor has the option of enforcing his decree against the person or property of the judgment-debtor, and the fact that such decree is an *ex-parte* one makes no difference. **Raj Chunder Roy v Shama Soondari Debi. 4 Cal, 583.**

Notes:—Ref : 19 Bom 717=6 Bom L R 704.

(6) Arrest and discharge of debtor.

222—Re-arrest.—D M, a prisoner for debt, having been discharged for non-payment of subsistence-money, the execution-creditor applied for a rule *nisi* for his re-arrest, or for a new writ. *Held* that a prisoner, once discharged on non-payment of his subsistence money, cannot be re-arrested, nor can a new writ be issued against him for the former debt, and that the principle that no man shall be twice vexed on the same charge applies here. *Per Morgan, J.*—That there may be a distinction between the words "release" and " discharge " in Act VIII of 1859, and that the arrest of the person is not the full satisfaction here that it is under English law.

Dwarkalall Mitter. Bourke O C 109.

Notes—Con : 9 W R 178.

223.—Re-arrest—Distinction between arrest and imprisonment.

The Code of Civil Procedure expressly preserves a distiction between arrest and impresonment, and the immunity from further process is only generated by actual confinement. A second arrest, therefore, held to be legal.

Chingalraya Chetty v Subbiah 6 M H C R 84.

Notes.—Fol: 23 Cal 128.

Attachment-*Contd.*

3 Attachment of person—*Contd.*

(7) Warrant of arrest, power of detention under.

224.—Illegal detention.

The warrant of arrest in execution of decree empowers the Sheriff only to arrest the defendant in execution, and detain him for such reasonable time as is sufficient to allow of his being brought before the Court, and having an opportunity of applying for his discharge ; the detention of such prisoner by the Sheriff after such reasonable time, without further authority of law, is illegal. **Sumboo Chunder Halder. Durgapersaud Mitter. Rakhal Doss. Bourke O C 59.**

Notes:—Ap: 16 Cal 267. Ex: Bourke (Part 1) 96. Ref: 2 Bom 148.

(8) Imprisonment of, period of.

225.—Subsequent arrest in execution—Civil Procedure Code, Act XIV of 1882, section 481 and 342

The defendaut was arrested before judgment, and on the 5th February 1883 committed to jail under sec. 481 of the Civil Procedure Code. On the 6th March following a decree in the suit was passed against him. On the 28th July, the defendant being then still in jail under the order of the 5th February, the plaintiff took out a fresh warrant of arrest in execution of the decree, and sought to have the defendant further imprisoned for the full period of six months limited by s 342 of the Code. *Held* that the defendant could be re-committed to jail, in execution of the decree, only for such a period as, together with the period of imprisonment that had elapsed since the passing of the decree, would complete a period of six months, and that consequently he would be entitled to be liberated on the 5th September 1883. Imprisonment under sec 481 becomes, after decree, imprisonment in execution of the decree and the imprisonment suffered after that date consequently be taken into consideration in calculating the period of six months, which by s. 342 of the Code, is the limit allowed for an imprisonment in execution of a decree. **Ghanashamdas Goorsamull v Joharimull Kedarinath. 7 Bom 431**

(9) Imprisonment, several periods of.

226.—Right to discharge.

Attachment-*Contd.*

3 Attachment of person—*Contd.*

A judgment-debter, who has been imprisoned in execution of a decree, if the several periods of his imprisonment be added together, for more than the maximum period for which he can be legally kept in prison, is entitled to his release. **Khoda Buksh v Shukroollah 5 N W 220.**

(10) Order for arrest before judgment, form of.

227.—Civil Procedure Code, 1877, 1882, s 481 (1859, ss. 78 and 276)—Commitment in execution of decree.

An order for the arrest before judgment of a debtor made in the form directed by s. 78 is, after judgment has passed, a commitment in execution of a decree within the meaning of section 276. **Rampersaud Roy v Callachand Doss. Bourke, O C 423**

(11) Discharge of Judgment debtor on offer to place estate at disposal of Court.

228.—Act of bad faith subsequent to discharge—Civil Procedure Code, 1859, Ss 273, 275.

A Judgment-debter, having been arrrested in 1871, offered to place his estate at the disposal of the Court, and was examined on oath as to the particulars of the estate and discharged from custody. His estate was never taken possession of, and part of it was subsequently disposed of by him to a stranger. *Held* that he was not liable to be arrested again in execution of the decree. **Venkatakrishna Charya v Coelho. 6 Mad 170.**

Notes:—Not Fol: 1 Bom L R 463.

(12) Decree payable by instalments.

229—Execution by arrest and imprisonment—Civil Procedure Code (Act X of 1877), s. 341.

In the execution of a decree payable by instalments, the judgment-debtor cannot be arrested and imprisoned separately for default in the payment of each instalment. **Damodar Shaligram v Malhari. 7 Bom 106.**

(13) Simultaneous execution by arrest and attachment of property.

230—An appeal lies against refusal of Court to issue execution both against the person and

Attachment-*Contd.*

3 Attachment of person—*Contd.*

the property of judgment-debtor. *Held* that it was an error of direction not to take all steps possible against a fraudulent debtor. **Chena Pemaji v Ghelabhai Narandas.** **P J(1883) 26 = 7 Bom 301.**

(14) Re-arrest of judgment-debtor.

231.——Power of Court to arrest without petition.

It is not within the competence of a Judge to direct the re-arrest of a judgment-debtor without any petition or motion of the decree-holder to that effect. **Shib Ram Mundle v Roheemtoollah.** **15 W R 69.**

232.—Civil Procedure Code, 1886, s. 341—Non-payment of subsistence money—Discharge

The discharge of a judgment-debtor before imprisonment on account of the non-payment of the subsistence money for the debtor is no bar to the debtor being re-arrested. **Subba v Venkatta.** **8 Mad 21.**

Notes:—Fol: 23 Cal 128; (1904) W N 22; 26 All 317.

(15) Discharge of debtor.

233.—Civil Procedure Code, 1882, s. 336—Discharge of judgment-debtor arrested under decree of High Court—Right of discharge—Intention to be adjudicated insolvent.

A judgment-debtor, having been arrested in execution of a decree of the High Court in its Original Civil Jurisdiction and brought before the Court under the provisions of s. 336 of the Code of Civil Procedure, claimed to be discharged on the ground that he intended to apply to the Court to be declared an insolvent either under the provisions of Ch. XX of the Code or of 11 & 12 Vict., c. 21. *Held* that the judgment-debtor, on expressing his intention to file a petition and schedule under 11 & 12 Vict, c. 21, and complying with the conditions of s 336 of the Code of Civil Procedure, was entitled to be discharged. **Pinsent.** **8 Mad 276.**

234—Civil Procedure Code, 1882, ss.366,341, 344, 349—Judgment-debtor—Imprisonment.

Ss. 336 and 349 of the Code of Civil Procedure, 1882, are applicable to judgment-debtors under arrest, but not committed to jail. A judg-

Attachment-*Contd.*

3 Attachment of person—*Contd.*

ment-debtor committed to jail can only be discharged under s. 341. **Quarme** **8 Mad 503.**

Notes:—Fol: 12 Bom 46.

(16) Arrest of debtor in execution of decree.

235——"Arrest," Meaning of——Insolvent judgment-debtor—Civil Procedure Code (Act X of 1882) s. 349—"Arrest," "imprisonment," meaning of—Procedure where two methods of protection are open to the debtor.

A judgment-debtor arrested in execution of a decree for money, who has not, on his committal to jail, expressed his intention of applying to be declared an insolvent under Ch. XX of the Code of Civil Procedure, is nevertheless entitled during his imprisonment to make an application for that purpose; and the Court may, under s. 349, pending the hearing of such application, release him on his finding security to appear when called upon. The word "arrest" in s. 349 should be read as meaning "under detention" or "detained in custody." Where the Legislature has provided two methods by which a debtor can obtain protection from arrest or other serious consequences, and if one of those methods, in any particular case, turns out to be more favourable to the debtor than the other, the Courts will not deprive him of that advantage. **Hastie.** **11 Cal 451.**

Notes:—Diss: 12 Bom 46.

236.—C. P. Code, 1882–Ss. 341, 642 discharge re-arrest.

According to s. 341 C. P. Code, 1882, a judgment-debtor is not to be arrested a second time only when he was imprisoned under his first arrest not only because he was arrested.

Rajendro Narain Roy v Chunder Mohun Misser. **23 Cal 128.**

237.—Civil Procedure Code, s. 349—Court, Power of, to release judgment-debtor after he is imprisoned—"Arrest" and "imprisonment."

"Arrest," as used in s 349 of the Civil Procedure Code (Act XIV of 1882), does not include "imprisonment." Therefore the power conferred on the Court under that section to release a judgment-debtor arrested in execution of a decree on security being given by him ceases after

Attachment-*Contd.*

3 Attachment of person—*Contd.*

he has been imprisoned or put into jail. 11 Cal 451, dissented from. 8 Mad 503, followed.
Mahomed Husen v Radhi. 12 Bom 46

238.—Civil Procedure Code (1882) ss.336. 337 Act VI of 1888——Insolvency proceedings——Scheduled debts—Decree for a debt not in the Schedule—Execution and arrest.

A person has taken the benefit of Insolvency proceedings under the code, and who is not discharged, but has not inserted in his schedule a debt for which a decree is subsequently obtained, is not protected from arrest, simply because his property is in the hands of the receiver in insolvency. Such a person is liable to arrest under the circumstances provided for by the Civil Procedure Code, Amendment Act (VI of 1888)
Panna Lall v. Kanhaiya Lall 16 Cal 85.

(17) Warrant of arrest.

239.—Imprisonment in jail other than that named in warrant-Release-Civil Procedure Code (Act XIV of 1882), ss. 336, 337.

A Sheriff's officer, of his own motion, delivered over to the officer in charge of the Alipore Jail a judgment-debtor who had been duly committed to the Presidency Jail. *Held* that the imprisonment was unlawful; that the delivery over to the officer in charge of the Alipore Jail amounted to a release; and that the prisoner was entitled, therefore, to be discharged. **Shamsonessa Begum v Love. 11 Cal 527**

(18) Re-arrest of debtor under same decree.

240.—Release as recognizance——Surrender under recognizance-Recognizance, Expiry of—Arrest, Fresh application for——Civil Procedure Code (Act XIV of 1882), ss. 239, 241, 341, 349, 357-Writ of attachment——Criminal Procedure Code (Act X of 1882), s. 491.

A judgment-debtor once arrested and imprisoned in execution of a decree cannot, under the Civil Procedure Code, be again arrested under a a fresh writ of attachment on the same decree.
Secretary of State for India in Council v Judah. 12 Cal 652.

Notes:—Fol: 20 Cal 874. Disap: 26 Bom 652. Dist; 23 Cal 128.

Attachment-*Contd.*

3 Attachment of person—*Contd.*

241.—Civil Procedure Code 1882, s. 341——Arrest in execution.

The Court has no power to order the arrest of a judgment-debtor a second time under the same decree. The circumstances under which he obtains his release from prison are immaterial under the Civil Procedure Code. 12 Cal 652, followed.
Bolye Chand Dutt. 20 Cal 874.

Notes —Not Fol: 26 Bom 652. Dist: 23 Cal 128.

(19) Arrest of parda-nashin lady.

242-Execution of decree-Purdanashin woman —Arrest of purdanashin woman in execution of a decree-Zenana-Sheriff, Arrest by—Civil Procedure Code, Act X of 1877 sections 271, 336 and 640.

Purdanshin women are as much liable to arrest in execution of Civil process as any other persons, and it is not necessary that a special order of the Court should be made authorizing the sheriff to enter the zenana, when the process of the Court cannot be executed.

Under section 336 of the Civil Procedure Code if the sheriff can enter the house he may break into the zenana for the purpose of executing his writ there. **Kadumbinee Dossee v Koylash-Kaminee Dossee. 7 Cal 19=9 C L R 25.**

(20) Married woman.

243.—Imprisonment for debt.

Married women, against whom personal decrees for debt, have been made, are not exempt from arrest or imprisonment in execution of such decrees under the Code of Civil Procedure.
Lakshmana v Kullamma. 9 Mad 99.

(21) Discharge from arrest.

244.-Act VIII of 1859, Sec. 273-Discharge from arrest-Evasion of process.

Held, by Boulnois and Lindsay, JJ., that the mere evasion of process does not disentitle a judgment-debtor to his discharge from arrest under Section 273, Civil Procedure Code, if in fact at the time of applying for his discharge he is not possessed of any property or the means of paying the debt, and has not coupled evasion of process with concealment of property.

Held, per Campbell, J., that the Court has a discretion in granting a debtor's discharge under

Attachment-*Contd.*

3 Attachment of person—*Concld.*

Section 273, and may refuse such discharge if the debtor has thrown obstacles in the way of the creditor. **Framji Rustamji v Young. P R 49 of 1875.**

4. MODE OF ATTACHMENT & IRREGULARITIES IN ATTACHMENT.

(1) Attachment without sale.

245.-Sale in execution of decree.

Under the Code of Civil Procedure, property may be attached without view to immediate sale. **Saroda Prosad Mullick v Lutchmeput Singh Doogur. 10 B L R 214=17 W R 289 =14 Moor's I A 529.**

245A. C P C Ss. 60; S. 113, O.46 r 1 (1882 Ss. 266 and 617)—Attachment-Sale-Country liquor-Collector's permission-Abkari Act (Bom Act V of 1878) S. 16-Reference to High Court-Action by a third person not a party to the suit.

Country liquor is not exempt from attachment and sale in execution of a money-decree passed by Civil Court. It is saleable property, and is covered by the part of s,266 of the Code.

The Collector's permission is necessary to the sale of country liquor (s 16 of the Bombay Abkari Act) but it is not necessary to attachment so far as the attachment can be made without removal.

A reference to the High Court under s 617 C P C is not bad, merely because it arises out of the action taken by a third person not a party to the suit. **Purshottam Narayan Joglekar v Balvant Babaji Gurav. 10 Bom L R 13=3 M L T 135=32 Bom 157.**

(2) Sale without attachment.

246—Civil Procedure Code 1859 s 203.

Property must under Act VIII of 1859 be attached before being sold in execution of decree the words "attachment and sale" in s 203 being taken together and not read distributively.

Denonath Ruckit v Mutty Lall Paul I Hyde 158; 1 Ind Jur O S 125.

(3) Attachment of debts.

247—Written notice—Civil Procedure Code, 1859, s. 236.

Attachment-*Contd.*

4 Mode of attachment and irregularities in attachment *Contd.*

When the property to be attached consists of debts, a written notice of attachment is necessary under s. 236, Act VIII of 1859. Until the debtor receives such notice, he is bound to pay the amount of his debt to the creditor whose right to receive it has been declared by a decree of Court, and it is no part of the duty of the debtor to make enquiries whether his creditor is or is not entitled to receive the money. **Thakoor Das Sing v Luchmeeput Doogor 7 W R 10.**

(4) Proclamation of sale, issue of.

248—Civil Procedure Code, 1859, s. 285—Property not in jurisdiction.

Where an attachment is made under s. 285, Act VIII of 1859, the only further process required to bring the property to sale is the due issue of the proclamation of sale: the property need not be attached. If the property be not within the jurisdiction of the Court, whose duty it is to execute the decree, the course to be followed by the decree-holder is that prescribed in Ss. 285 and following. **Mookta Keshee Debee v Kunuck Monee Debee 7 W R 267.**

Notes—Ref: 9 W R 388.

(5) Attachment by Court which did not pass decree.

249—Civil Procedure Code, 1859, s. 285.

The attachment of immoveable property by a Court other than that which passed the decree before the decree had been sent to it for execution vitiates the sale subsequently made of that property, as not being made in strict observance of the procedure prescribed by s. 285 of Act VIII of 1859. **Shurutoolah Merdha v Gooroo Churn Dass 8 W R 310.**

Notes—Fol: 9 W R 1888.

(6) Sale of shares of zamindar hypothecated by lessee for arrears of rent.

250—Where the shares of a zamindari hypothecated by the lessee are to be sold to recover arrears of rent due to the Court of Wards, no attachment is necessary, and the Collector has no power to attach the property previous to sale. **Jogessur Sahoy v Gopal Lall 13 W R 173.**

Notes—Dist: 14 W R C R 275.

Attachment-*Contd.*

4 Mode of attachment and irregularities in attachment-*Contd.*

(7) Estates paying revenue to Government.

251—Civil Procedure Code, 1859, s. 213.

In attaching an estate paying revenue to Government, the attaching creditor must, in addition to the information required by the 1st clause of s. 213, Act VIII of 1859, in respect of ordinary immoveable property, give also the special information indicated in the latter clause of that section, that section being cumulative in respect of estates paying revenue to Government. **Ajoodhiya Doss v Sheo Pershun Singh 11 W R 175.**

252—Notice of attachment—Civil Procedure Code, 1859, s. 213.

The intention of s. 213, Act VIII of 1859, is that the description in a notice of attachment should be sufficient to identify the property ; and in the case of an estate paying revenue to Government, that there should be a specification of the revenue.. **Lack Ram v Mohesh Dass 12 W R 488.**

Dheraj Mahtab Chund v Burodanath Mundul. 18 W R 411.

Notes—Ref: 18 W R 411.

253—Notice of attachment—Civil Procedure Code 1859, s. 213.

Where a property was described as a lakhiraj tank with four banks, the boundaries of which were given, the identification was held to be fully made out. **Dheraj Mahtab Chund v Burodanath Mundul 18 W R 411.**

(8) Decree directing sale of certain property, and in case of non-satisfaction, of other property.

254—Right to attach and sell first property, Effect of failure to get satisfaction from second property on.

Where a decree directs the sale of A's property first, and then of B's, if the decree-holder is unable, from opposition, to sell A's property, and proceeds against B's, and cannot realize his decree therefrom, he has not lost his right to attach and sell A's property.

Stephenson v Unnoda Dossee. 6 W R Mis 18.

Notes—Fol: 17 W R 419. Dist: 8 W R 29; 80.

9 Attachment of money in hands of receiver.

255—Attachment made without sanction of Court—Civil Procedure Code 1882, S. 272—An attachment of money in the hands of the Receiver made without the leave or Sanction of the Court is improper and irregular and the Court will not recognize it. 16 Bom; 577, followed.

Mahommed Zohuruddeen v. Mahommed Noorooddeen. 21 Cal 85.

Notes:—Dist: 25 Cal 887. Ref: 27 Cal 269; 27 Bom 556; 7 Bom L R 547.

(10) Attachment of property in hands of manager.

256—Mortgaged property-Second attachment.

Where attached property is mortgaged by the judgment-debtor with the consent of all parties concerned, yet, so as to leave some proprietary interest in the judgment-debtor, any judgment-creditor coming after the appointment of the manager and the making of the said mortgage has a right notwithstanding to attach and sell what remains of the judgment-debtor's interest in the property. An application for such second attachment cannot properly be refused by a Court on the ground of the property being under the management of the District Court pursuant to s.243, even in the Judge's precept forbids such attachment.So far as the property sought to be attached is moveable,if in the hands of the judge or Judge's Court, it must be attached in the mode prescribed by the first part of Act VIII of 1859, s. 239, and a notice so sent to the Judge is an effectual attachment of such moveable property, although it is refused by the Judge, whose refusal to receive the notice cannot make that no attachment which would otherwise be a good attachment.

Teil & Co v Abdool Hye 19 W R 37.

Notes—Ref: 17 mad 501.

(11) Attachment and sale of mortgage bond.

257.—Civil Procedure Code, 1882, ss, 268, 274—Lien of purchaser on mortgaged property after attachment under s 268.

In execution of a decree obtained by them against J and M, the plaintiffs attached a decree obtained by J and M against D, and on the allegation that J and M, in order to avoid the consequence of this attachment, executed a benami conveyance of their interest under the attached decree to B and P, and afterwards with the same object took in adjustment and satisfaction

Attachment-*Contd.*

4 Mode of attachment and irregularities in attachment *Contd.*

of that decree two bonds in favour of R and I, respectively, by which immoveable property was pledged as collateral security, the plaintiffs attached these two bonds by prohibitory order under s 268 of the Civil Procedure Code, and purchased them at the sale in execution of their decree In a suit on the bonds against D, as the principal defendant with J, M, B, P, R, and I joined as parties,—*Held* that the plaintiffs were entitled to enforce the lien created by the bonds against the immoveable property specified in them, notwithstanding that no attachment had been made in accordance with the provisions of s 274 of the Code; a debt secured by a mortgage lien on immoveable property not being "immoveable property within the meaning of that section. **Debendra Kumar Mandel v Rup Lall Das 12 Calc 546.**

Notes:—Ap 18 Mad 437, 26 Bom 305. Fol. 20 Cal 805: 19 Bom 121: 29 Cal 1 F B

258.—Civil Procedure Code, S 274, cl (c)—Rights of purchaser at sale in execution.

A person purchased a mortgage bond, at a sale in execution of a decree, under which certain immoveable property was given as collateral security for an advance. *Held*, that, the fact that he has not attached under s 274 will not affect his right to have the collateral security enforced by the sale of properties mortgaged. **Kasinath Das v Sadasiv Patnaik 20 Calc 805**

Notes.—Ref: 26 Bom 305: 34 Cal 663. 11 C W N 680. Ap. 18 Mad 437; 5 Bom L R 892; 28 Bom 153.

259.—S 274·—Absence of attachment under-Irregularity—Right of purchaser of mortgage at an execution sale.

An attachment under S 274 is not necessary to make the sale of a mortgage bond carry the lien as well as the debt. The absence of such an attachment is a mere irregularity. 12 Cal 546 and 20 Cal 805, followed **Muniappa v Subramania 18 Mad 437=5 M L J 60**

Notes:—Ref: 8 M L J 1; 30 Mad 255; 17 M L J 201.

260.—Attachment—Execution—Mortgage-debt—Sale of mortgage-debt in execution of a decree against mortgagee—Sale carrying with it security without attaching mortgaged property - Civil Procedure Code Sec 274.

Attachment-*Contd.*

4 Mode of attachment and irregularities in attachment-*Contd.*

The sale of mortgage debt described as such in execution of a decree carries with it the security without attaching the mortgaged property under Sec 274 of the Civil Procedure Code. **Baldev Dhanrup Marvadi v Ramchandra Balvant Kulkarni P J 1893, 567= 19 Bom 121.**

Notes:—Ref: 26 Bom 305.

261.—S 266 C P C—Attachment—Interest of mortgagee out of possession.

Where the rights and interests under his mortgage of a mortgagee out of possession are attached in execution of a decree the procedure by which such attachment must be effected is that prescribed by s 268 of the Code of Civil Procedure. S 274 of the Code cannot be applied in such a case. **Karim-un-nissa v Phul Chand 15 All 134=13 W N 51.**

Notes:—Ref: 18 All 469; 26 Bom 305; 4 Bom L R 18.

262.—Attachment under wrong section—Effect.

Held, that the sale of the mortgagee's rights under a mortgage duly held and confirmed was effectual to pass the mortgagee's rights to the auction purchaser, even though the attachment subsequent to which such sale was held might have been made under a wrong section of the Code of Civil Procedure. 5 All 142: 5 All 86: 10 All 506 and 15 All 134 referred to. **Sheo Charan Lal v Sheo Sewak Singh 18 All 469=16 W N 154.**

Notes·—Ref· 23 All 25

263.—C P C O 21 rr. 4, 6, 54, (1882-S 268 and 274)—Sale—Mortgage debt—Attachment—Validity of Sale.

A sale of mortgage debt in pursuance of an attachment made under section 268 Civil Procedure Code is a legal and valid sale. 9 Cal 511; 12 Cal 5; 20 Cal 805: 5 All 142 P C., 15 All 134; 18 All 469 19 Bom 121; 9 Mad 5; 10 Mad 169; 17 Mad 437. ref. **Balawant Rao v Mt Ratnabai 14 C P L R 5.**

(11A) Attachment of property in possession of mortgagee.

263A.—Property in possession of mortgagee-Attachment to be effected by prohibitory order.—

Attachment-*Contd.*

4 Mode of attachment and irregularities in attachment-*Contd.*

An attachment of property in the possession of a mortgagee should be made by a prohibitory order and not by actual seizure. **Beharilal v Rattiram, 1 C P L R 85**

(12) Irregularity in attachment.

264—Beng. Reg. VII of 1825, s 7—Omission to require security.—

An attachment made under Bengal Regulation VII of 1825, without first requiring security as directed by s. 7 of that Regulation, was held to have been irregularly made, but the irregularity was not one which affected the jurisdiction of the Court or made the attachment void. **Khodajaninissa v. Stevens, 20 W R 433.**

265—Practice—Amendment of order—Inherent power of Courts in India—S 152, C.P.C., (1908) —Attachment—Wrongful seizure — Withdrawal by direction of law—Sheriff's right of poundage.

The Courts in India have the same inherent power, as the Courts in England, to amend or vary a perfected order, when they find that the judgment as drawn up does not correctly state, what the Court actually decided and intended, even if the matter does not fall within S. 152, C. P. C. (1908) (corresponding to O. XXVIII, r. II, English Supreme Court Rules).

Where there was no levy but only a seizure, and where the seizure was wrongful and withdrawn by direction of law, the sheriff receives no poundage. (1880) 30 Ch D 239, Ref: (1896) 1 Ch 673, Dist; (1878) 3 C P D 216; (1884) 13 Q B D 415 and (1899) 1 Q B 460, Fol: **Brijaratan v. Jayanarain, 37 Cal 649=7 Ind Cas 876.**

266—Civil Procedure Code, 1859, s. 239—Immaterial injury.—

An attachment of immoveable property is not voidable, merely because all the forms prescribed in s. 239, Code of Civil Procedure, have not been followed when the irregularities complained of are immaterial and not productive of any substantial injury to the person who objects to the proceedings. **Kooranee Dassi v. Bhubun Mohinee Dassi, 6 W R, Mis, 52.**

267—Attachment of more property than is necessary.

Where the decree-holder wantonly attached more property than was necessary for the discharge of his claim, the Court may order sequestration of only a portion of the property attached. **Pursotum Doss v Oodey Narain Mull, 1 Agra, Mis, 3**

Attachment-*Contd.*

4 Mode of attachment and irregularities in attachment *Contd.*

Notes—Con: 1 Agra 24. Not Fol: 2 All 565, Ref: 3 N W P 212.

268—Behari Lal and Makund Ram purchased from the decree holder a decree against the ancestor of certain persons who were joint owners of a *muafi* interest in the village of Dhak Shahid. Subsequently to this purchase a portion of the said *muafi* interest was sold; the plaintiff, in the suit, brought a claim for pre-emption, and obtained a decree on the 21st December, 1885, under which decree they obtained possession. During the pendency of the suit, *viz.*, on the 11th May, 1884, an attachment was obtained by Behari Lal and Makund Ram of "an 8 biswa *zemindari* share of *muaza* Dhak Shahid", the judgment-debtors having no *zemindari* in the village in question. The property which thus purported to have been attached was sold by auction on the 20th January, 1886, and purchased by the defendant who was formally put in possession. The plaintiffs then sued for a declaration of their proprietary right in the property. *Held*, that the plaintiff's title as pre-emptors must prevail. The attachment was invalid by reason of material misdescription of the property which it was sought to attach, and could not operate so as to throw back the defendant's title to a date prior to that of the plaintiff's decree; the plaintiffs moreover were absolute strangers to the proceedings in pursuance of which the attachment took place. **Hargu Lal Singh v Muhammad Raza Khan, 13 All 119=11 W N 16.**

269—Attachment of assets of a judgment-debtor outside the jurisdiction of the attaching Court—Practice—Procedure.

The plaintiff, having obtained a decree against the defendant in the Court at Bhusaval, sought to execute it by attaching a moiety of the defendant's pay. The defendant was a sorter in the Railway Mail Service, and travelled between Bhusaval and Nagpur, at which latter place he resided and received his pay. By an order of attachment issued, at the plaintiff's instance, by the Bhusaval Court to the defendant's disbursing officer at Nagpore, a moiety of pay having been withheld by that officer, the defendant applied to the Bhusaval Court to cancel the order, contending that it was illegal, as neither he nor his disbursing officer resided at Bhusaval. On reference to the High Court.—*Held*, that the order of attachment was *ultra vires*, as neither the defen-

Attachment *Contd.*

4 Mode of attachment and irregularities in attachment-*Contd*

dant nor his disbursing officer resided within the jurisdiction of the Bhusaval Court. The proper procedure was to send the decree of the Bhusaval Court for execution to Nagpore, where the disbursing officer resided and the defendant's pay was available for satisfaction of the decree.

Rango Jairam v. Balkrishna Vithal, 12 Bom 44.

Gopal v Lavet, 12 Bom 45, note.

Notes:—Ref: 28 Bom 198.

270—Attachment before judgment—Termination of attachment—Sale in execution—Material irregularity in publishing or conducting sale without attachment—Waiver — Civil Procedure Code, ss. 311, 483.

The plaintiff instituted a suit against the defendant for recovery of money, and previous to judgment, that is, on the 8th January 1885, applied for, and on the 11th obtained, orders for attachment of several houses and premises belonging to defendant,and such attachment was made The suit was dismissed, but eventually on appeal it was decreed, but the attachment was never withdrawn. Plaintiff then applied for execution of his decree, and his application was granted by an order directing that the property of the judgment-debtor should be notified for sale on the 1st February 1887, and accordingly, on the 21st December 1880, a sale notification was issued.

Judgment-debtor twice applied for postponement of sale, but his applications were refused, and the sale took place on the date fixed. The judgment-debtor then objected to the confirmation of the sale, urging that the property sold was never attached in execution of the decree, and the attachment previous to judgment was infructuous, because afterwards the claim was dismissed by the Court of first instance, that there had been several other irregularities in publishing and conducting the sale; and that, owing to the irregularities, property had been sold at a grossly inadequate price, causing substantial injury. The Subordinate Judge, overruling the objections, confirmed the sale. On appeal by the judgment-debtor.—*Held*, following 5 All 86, that a regularly perfected attachment is an essential preliminary to sales in execution of decrees for money and where there has been no such attachment, any sale that may have taken place is not simply voidable, but *de facto* void, and may be set aside

Attachment-*Contd.*

4 Mode of attachment and irregularities in attachment-*Contd.*

without any inquiry as to substantial injury being sustained by the judgment-debtor for want of a valid attachment; and that an attachment before judgment, like a temporary injunction, becomes *functus officio* as soon as the suit terminates. Further, that the phrase "a material irregularity in publishing or conducting" in the first paragraph of s. 311 of the Code of Civil Procedure should be liberally construed, and that absence of attachment of property at the time of sale thereof is "a material irregularity", attachment being the first step which a Court in executing a simple money decree has to take to assert its authority to bring property to compulsory sale.

Ram Chand v. Pitam Mal, 10 All 506.

Notes:—Ref: 12 All 440 F B; 18 All 469; 21 All 311; 5 C L J 687.

271—Civil Procedure Code, Ss. 268, 272—Official Trustee—Public officer — Attachment of life-interest.

The defendant who is a widow is entitled under a past nuptial settlement to which she, her late husband & the official trustee were parties,to a life-interest in property held by the Official Trustee. The decree-holder having obtained an order under S. 272 of the Code of Civil Procedure applies to have the defendant's interest in property in hands of the official trustee sold in satisfaction of his decree. On the date of this order, there were no funds in the hands of the Official Trustee available for attachment under S. 268. The decree-holder is therefore desirous of selling the life-interest of the defendant. *Held*, the judgment-debtor's interest in her property was not validly attached by the notice given, to the Official Trustee under S. 272. *Semble*—The Official Trustee is a public officer within the meaning of that term defined in S. 2 of the Civil Procedure Code.

Abdul Lateef v Doutre 12 Mad 250.

272—Attachment of equity of redemption—Civil Procedure Code (1882), ss. 266 and 274—Transfer of property Act (IV of 1882) s. 60.

The equity of redemption of the mortgagor is immoveable property, and is, as such, liable to be attached and sold in execution of a decree under s. 266 of the Civil Procedure Code Act (XIV of 1882). Its attachment can be effected under s. 274 of the Code by an order pro-

Attachment-*Contd.*

4 Mode of attachment and irregularities in attachment-*Contd.*

hibiting the judgment debtor from dealing with it in any way and all persons from receiving it such order being proclaimed and notified as therein directed. **Parashram Harilal v Govind Ganesh Porgaumkar.** **21 Bom 226**

Notes—Rel: 26 Bom 30 . Ref. 11 Bom L R 26; 35 Bom 311.

273—Attachment of money in hands of Receiver—Attachment made without sanction of Court - Civil Procedure Code 1882, s 272.

An attachment of money in the hands of the Receiver made without the leave or sanction of the Court is improper and irregular and the Court will not recognize it. 16 Bom 517 followed.

Mahommed Zohuruddeen v Mahommed Noorooddeen. **21 Cal 85.**

Notes—dist, 25 Cal 887 , Ref: 21 Cal 269 , 27 Bom 556. 7 B L R 547,

274—Attachment for arrears of rent—Notice of attachment before portion of arrears became due.

Where property was attached for arrears of rent,—*Held* that the attachment was not vitiated by the circumstance that notice of the attachment was given before a portion of the arrears claimed had become due. **Kamala Nayak v Ranga Rau.** **1 M H C R 24.**

Notes—Diss: 30 Mad 410 , 17 M L J 258.

275—Death of judgment debtor —Survivorship—Attachment

In execution of a money decree an order was issued under s. 274 of the Code of Civil Procedure for the attachment of property which was the joint ancestral estate of the judgment debtor and his father. A copy of this order was not fixed up in the office of the Collector of the district in which the land was situate, as required by s. 274. The sale was ordered and a day fixed for sale, but in consequence of postponement, made at the judgment-debtor's request, no sale took place. In the meantime the judgment debtor died and the decree holder applied for execution against the father as representative of the judgment-debtor whose interest had survived to him *Held*, that the decree-holder had, by the proceedings taken in execution during the son's lifetime obtained rights over his interest which could not be defeated by his death before sale. (L R 6 Ind App 108 followed) *Held* also that, though the defect in the manner in which the attachment was made might render the attachment ineffectual for the purpose of avoiding alienations made, the attachment was effectual against the judgment-debtor and the defect did not afford a ground for declaring the execution proceedings ineffectual. **Rai Balkrishen v Rai Sita Ram.** **7 All 731=5 W N 210.**

Notes—Ap 11 All 302. Ref: 8 All 495 ; 11 C W N 163 , 5 C L J 80,

(13) Necessity of the existence of the decree at the time of attachment in execution.

275A—Attachment in execution, necessity of the existence of the decree at the time of.

At the time when an attachment was made in execution of an *ex-parte* decree, and even when the order for attachment was made, the said decree was not in existence, the same having been set aside prior to the attachment.

Held, neither the attachment nor the order for it could have any force or validity; nor could the fact, that the decree had been transferred for execution to another Court, give the said attachment any additional validity. The attachment was null and void not having been based on any decree in existence at the time of such attachment. Also, the fact that a renewed decree was subsequently passed in terms of the decree which was set aside, could not render the attachment valid, the renewal not having the effect of restoring original decree. **Chettiatill Muhamed v Kunhi Koru** **29 Mad 175**

(14) Validity of attachment.

276—Civil Procedure Code, 1882, Sections 274, 276—Validity of attachment.

On the 8th October 1888 the decree-holder applied for execution of his decree by attachment and sale of the whole of the judgment-debtor's immoveable property and the report of the attaching officer was that attachment had been effected on the 22nd October 1888 by beat of drum on the spot and by affixing a notice, under Section 274 of the Civil Procedure Code, on the house of the judgment-debtor, situate on the spot. It did not, however, appear from the report that a copy of the notice was affixed in the court-house or

Attachment-*Contd.*

4 Mode of attachment and irregularities in attachment—*Contd.*

in the office of the Collector of the District, and no evidence was adduced on this point. The plaintiff purchased the land in dispute from the said judgment-debtor on the 18th March 1891, and it was contended on his behalf that, in order to render the sale to him invalid, the decree-holder was bound to prove that all the conditions of Section 274 had been duly complied with. It was proved that there had been litigation about the attachment before plaintiff's purchase, and that the latter's sale-deed was executed at Lahore, and not at Amritsar, where it would ordinarily have been executed.

Held, having regard to the circumstances of the case, that plaintiff had notice *aliunde*, of the attachment, and that there was no reason to hold that the condition of Section 274 had not been complied with, or, in any case, that the attachment was not valid as against plaintiff.

The rule laid down in 1 B L R (S N). 20 and 11 All 58, should not be strictly applied in this Province. **Sunder Singh v Jiwan Ram 83 P R 1898**

(15) Inadequacy of the statement of value in a sale proclamation.

277—C P C O. 21 rr. 54, 90 (1882 S. 274, 311)-Service, if should be in every part of the property —Value statement of, if material—"Property".

The statement in the sale proclamation of a value which proves to be inadequate is an irregularity but not a material irregularity. Such statements are made without much consideration, and it is well known that purchasers do not take serious notice of any statement in the sale proclamation as to the value of the property to be sold. S. 274 C. P C, does not require that the sale proclaimation should be served in each of the villages comprised in the property when sold. The word "property" in that section evidently refers to each "lot" to be sold separately from the rest. Though it is a sound rule to follow, *viz*, to serve a separate proclamation in each of the villages embraced in the same process when they are at such a distance from one another that there is no moral certainty of communnication to persons on or interested in the one of what is publicly done on the other, the fact that the processes were not served in each does not necessarily constitute an infringement of the provisions of s. 274 of the Civil Procedure Code. 11 Cal 74 ref. to; 12 Bom. 368 commented upon.

Moulvi Abdul Kashem v Benore Lal Dhone 12 C W N 757.

(16) Property belonging to a third person not a party to the decree.

278—Ss. 274 and 276 and 4th Schedule, form No 141-Sale of attached property during the continuance of the attachment-Property belonging to a third person not a party to the decree.

Sections 274 and 276, and Form No. 141 of the 4th Schedule of the Code only refer to property undoubtedly belonging to the judgment-debtor. If the property attached does not belong to the judgment-debtor, the decree-holder has no claim enforceable against it, and there is nothing to prevent the rightful owner from selling it.

Bura Mal v Ghulam Nabi. 139 P R 1893.

(17) Attachment of allowance.

279.—C P C O. 21, r. 46, s. 73 (1882 Ss. 206, 295)—Execution—Attachment-Rateable distribution. *Held*, (1) that the direction of the Court to the disburser to pay the allowance into Court did not amount to an attachment of the allowance under S. 268 of Act XIV of 1882.

(2) that as the execution application was finally struck off, there was no right to rateable distribution of assets realised at the instance of other creditors. 4 Mad 383, Fol.

Seeni Asan Usan v Karuphan Chetty. 5 Ind Cas 145.

(18) Effect of order of attachment not being affixed in the Court house.

280—C P C O 21 rr 46, 51; S 64 (1882—Ss. 268, 274, 276)—'Shall be fixed'—Attachment of mortgage-debt—Copy of order not affixed in Court-house—Illegality.

A mortgage debt was attached but no copy of the attachment order was affixed in the Court-house as required by S 268 C P C. *Held*, that the plaintiff who took an assignment of the mortgage bond four days after the order of attachment acquired a valid title, the attachment being ineffectual. **Satya Charan Mukherji v. Madhub Chunder Karmokar. 9 C W N 693.**

Attachment-*Contd.*

4 Mode of attachment and irregularities in attachment—*Contd.*

(19) Objection to attachment of mortgaged property.

280A—Execution of decree—Attachment—Mortgage of attached property—Civ Pro Code, 1882 s 276-Objection to validity of attachment—Burden of proof.

An objection was made to the sale of certain property in execution of a decree to the effect that the property sought to be sold had been mortgaged to the objector and he had also purchased from the mortgagor his remaining interest in the property The decree-holder replied that the objector's mortgage has been made while the property was under attachment, and was, therefore, void as against him by reason of s 276 of the Code of Civil Procedure The Court executing the decree raised for the objector the question whether the attachment relied upon by the decree-holder had been properly effected. *Held* that it was for the objector to establish that what was *prima facie* a legal attachment was in fact not so. An order under s 274 of the Code having been drawn up, it was to be presumed, until the contrary was shown that the requirements of the law had been complied with in effecting the attachment. **Pirthi Nath v Sri Kishan Lal A W N 1899, 127.**

(20) Attachment of decree after sale but before confirmation.

280B—C P C S 65 O.21 r 94 (1882 S 316) Right of attaching creditor to have sale confirmed.

Where a person who had obtained a decree, purchased immoveable property at an auction sale held in execution of the same but before the sale was confirmed and satisfaction of the decree entered in the record the decree was attached by a judgment-creditor of the decree-holder.

Held, that the effect of the attachment was to place the attaching creditor in the position of the decree holder so as to entitle him to have the sale confirmed under S 316 of the Code, and to take out a certificate of sale. **Coharia Rudrani Koer v Ram Pertap Mull 11 C W N 158**

Notes—Ref 7 C L J 1.

(21) Proceeding in execution without fresh attachment.

280C—Decree for mesne profits against father-attachment—Execution proceeding struck off whilst attachment continued—Validity - Fresh proceeding in execution without attachment—Sale order—Death of judgment-debtor before sale—Sons and grandsons if bound. When an execution proceeding is struck off it does not necessarily put an end to the attachment.

It is competent for the Court to make an order striking off an execution-proceeding and at the same time continuing the attachment.

When an executing Court in striking off an execution proceeding ordered the attachment to subsist for three months and before that period expired the decree-holder made a fresh application for execution and the Court ordered sale proclamation to issue in respect of properties attached in the previous proceeding, but the proclamation could not be served on the judgment-debtor, a member of a joint Mitakshara Hindu family, owing to his death.

Held - That there being a subsisting attachment followed by an order for sale made in the life time of the judgment-debtor the decree-holder was entitled to proceed with the sale and realise his decree. (9 C W N 601=32 I A 102; 1 C L J 381, relied on; 18 All 49 Diss. 6 I A 88 Fol; 17 I A 194 Diss; 12 All 440 Ref.) **Peary Lal Sinha v Chandi Charan Sinha 11 C W N 163=5 C L J 80**

Notes.—Ref: 11 C W N 593 F B; 5 C L J 491 F B; 17 M L J 334; 34 Cal 642 F B; 30 Mad 413.

(5) PRIORITY OF ATTACHMENT.

(1) Question of priority of attachment.

281—Attachment under decree of High Court of property already attached under decree of Small Cause Court—Claim to attached property, by what Court to be decided—Civil Procedure Code (1882), s 272.

In execution of a decree obtained in the High Court the plaintiffs, on the 22nd of March 1895, attached certain property of the defendant, which however, had been already attached on the 22nd of February 1895 by one R who had obtained a decree against defendant in the Court of Small Causes The plaintiffs' attachment was therefore effected under s 272 of the Civil Procedure Code (Act XIV of 1882) by a notice addressed by the

Attachment-*Contd.*

5 Priority of attachment—*Contd.*

Prothonotary of the High Court to the Registrar of the Small Cause Court. The claimant was mortgagee in possession and the defendants were his tenants. On the 26th February he had lodged a claim in the Small Cause Court to the said property as mortgagee in possession, and on the 25th March 1895 a consent order was passed by the Chief Judge of that Court directing that R's attachment should stand subject to the claimant's claim. On the 22nd April 1895 the claimant applied to the Chief Judge of the Small Cause Court to issue a notice to the plaintiffs in this suit under s 272 of the Civil Procedure Code to determine the question of priority of claim to the attached property between him and the plaintiffs. His application was refused, the Chief Judge being of opinion that he could not interfere in a High Court suit. The claimant then filed his claim in the High Court, and took out this summons to remove the plaintiffs' attachment *Held* that, under s 272 of the Civil Procedure Code the Small Cause Court was the only Court to decide the question of priority between the claimant and the plaintiffs. **Jeynarayan Meghraj v Ismail Kurima** **19 Bom 710.**

282—Rival decree-holders—Priority.

Two judgment-creditors attached the property of their judgment-debtor on the same day: there was an interval of four hours between the two attachments. *Held* that the first attachment must be satisfied out of the proceeds of the sale, and that the attaching creditors were not entitled to share the proceeds *pro rata*.

Nanack Chund. **P R 45 of 1872.**

283—A obtained the attachment of certain property before judgment, under Section 81, Civil Procedure Code. Subsequently B attached the same property in execution of decree. Lastly A obtained a decree. Both parties claimed priority of payment from the sale proceeds of the attached property, under Section 270, Civil Procedure Code. *Held*, that B was entitled to be first satisfied; priority being obtained under Section 270 according to date of attachment *after* judgment, and the date of attachment before judgment not affecting the matter. **Kesree Chund v. Poorun Chund.** **P R 68 of 1868**

284—Attachment—Priority—Removal of attachment by prior decree holder.

Attachment-*Contd.*

5 Priority of attachment—*Contd.*

G agreed with K to take by instalments the amount of a decree held by him against the estate of K's father, deceased, on certain terms specified in a petition filed by the parties, which provided that a house, which appertained to the estate and had been attached by G, in execution of his decree, should remain hypothecated and attached in the decree. The Court executing the decree ordered the attachment to be withdrawn on the day the petition was filed. R subsequently obtained a money decree against K and attached the house in execution. G having caused a fresh attachment to issue, a dispute arose as to whether the house should be sold in execution of G's decree or of R's, which was decided against G by an order dated the 19th of March 1873, G purchased the house at the auction sale, and the sale-proceeds were made over to R as being the first attaching creditor by an order dated the 12th of August 1873. G sued R, claiming to recover the sale price from him by avoidance of the above mentioned orders by establishment of his own superior right. The suit was properly dismissed. It was held that the lien created by the first attachment had been extinguished by the order removing the attachment, and could not be pleaded as giving the plaintiff a right superior to that possessed by the defendant, and the Court was not prepared to say that the order removing the attachment was wrong. The fact that the house was hypothecated by the petition could not support the claim. The plaintiff having chosen to purchase the house himself with his lien upon it, his lien ceased to be of any use to him. **Gur Sahai v Ram Dial.** **7 N W P 91.**

284A—Two separate attachments after Judgment—Priority—Civ. Pro. 1859, s. 270.

Where two separate attachments after judgment in execution of decree are placed on property at the same time, the proceeds of the sale of such attached property should be distributed between the parties in proportion to the amount of their respective decrees; and the attachment obtained by one of the parties before judgment does not operate to confer on him a right to priority over the other in the distribution of the sale proceeds under this section **Bukht Ram v Musst Baddamo.** **2 N W 368**

284B—Receiver—Partition suit—Mortgage by receiver under order of court—Attachment by creditors of coparcener prior to mortgage—Prior-

Attachment-*Contd.*

5 Priority of attachment—*Concld.*

ity—In a partition suit, a receiver was appointed and an order was made citing him to borrow money on mortgage of the joint estate. Subsequent to the order but before the date of the mortgage, the money decree-holders of two of the co-parceners attached their shares in the joint estate and claimed priority over the mortgages executed by the Receiver. *Held*—That the attaching creditors were not entitled to priority. The same will be the case even if the order directing the receiver to mortgage were subsequent to the mortgage. The attaching creditors are subject to all the liabilities and obligations of the joint members of the family, arising in the course of the partition suits. **Herumbo Nath Banerjee v Satish Chandra Mukerjee. 33 Cal 1175.**

285—Attachment—Priority.

The first attachment of property in execution of a decree, whether made by a Civil or a Revenue Court, must prevail over any subsequent attachment by a different Court.

Adjoodhya Sahoo v Shaik Baichoo. 2 N W 259.

6 ALIENATION DURING ATTACHMENT.

(1) Effect on alienation of setting aside exparte decree.

286—Civil Procedure Code, s. 240—Validity of attachment—Ex-parte decree.

The effect of granting an application under s. 119 of Act VIII of 1859 is to declare that there has not been yet a valid decree in the suit, and thereby any attachment that has issued in execution of the decree which has been set aside becomes invalid. A obtained a decree *ex-parte* against B. Property belonging to B was attached in execution. While under attachment, B sold the property to C. Afterwards B applied for and obtained an order, under s. 119 of Act VIII of 1859, to set aside A's decree and for new trial. *Held* that C's purchase was not null and void under s. 240 of Act VIII of 1859. **Lala Jagat Narayan v Tulsiram 1 B L R A C 71. Juggut Narain v Toolsee Ram. 10 W R 99.**

(2) Incumbrance pending attachment.

287—Right of purchaser at sale at instance of second attaching creditor.

Attachment-*Contd.*

6 Alienation during attachment - *Contd.*

The purchaser of the right, title, and interest of a judgment-debtor in certain immoveable property at an auction-sale which took place at the instance of a second attaching creditor was held to take the property subject to an incumbrance created by the judgment-debtor pending the first, but prior to the second, attachment, although the first attaching creditor was first paid out of the proceeds of the sale. *Quære*—Whether the sale ought not to have been under the first attachment as against which the incumbrance would have been void. **Guru Prasad Sahu v Binda Bibi. 9 B L R 180= 18 W R 279.**

(3) Bonafide private alienation.

288—Act VIII of 1859, s. 240—*Held*, (Markby, J dissenting) that a private *bona fide* alienation for value of property attached under Act VIII of 1859, made during the continuance of the attachment, is, by s. 240 of that Act, null and void only as against the attaching creditor or persons who may acquire rights under or through the attachment, and not as against the whole world.

Anando Lall Dass v Radhamohan Shaw. 2 B L R F B 49; 11 W R O C 1.

Same case affirmed in the Privy Council.

Anund Lol Dass v Jullodhur Shaw. 10 B L R 134: 17 W R 313: 14 Moore's I A 543.

Ram Charan Lal v Jhatu Sahu. 12 B L R 413 note: 14 W R 25.

Balmokund v Ramhit Dass. 13 W R 134

Notes—See 11 W R O 1.

289—C P C O 21 rr.55,63 (1882 Ss. 278, 283)—Execution of decree—Attachment—Objection allowed—Suit by decree-holder decreed—Previous attachment whether subsisting—Lien of attaching creditor—Rights of purchaser during attachment. *Held*, that the lien of an attaching creditor over the property attached dated from the attachment and was not destroyed or affected by an order of release which was in effect set aside by a subsequent decree in a regular suit.

Semble—A person purchasing property at a time when it was subject to an attachment order of a Civil Court, could hold no better or higher position than his vendor. 21 W R 435; 23 Cal

Attachment-*Contd.*

6 Alienation during attachment—*Contd.*

829; 33 Cal 1158, 10 Bom 400; 17 A W N 124 Ref. and Fol.

Ali Ahmad Khan v Bansidhar.
6 A L J 434=31 All 367=1 Ind Cas 951

290—An alienation which does not in any way interfere with the rights secured by his decree to the attaching creditor, is not affected by s. 276, Code of Civil Procedure, 17 W N 37; and 14 M I A 543 referred to. **Abdul Rashid v Gappoo Lal. 20 All 421= 18 W N 98.**

291—C P C S. 64; O 21, r 83 (1882 ss. 276, 305)—Sale of property pending and attachment—All claims enforceable under the attachment—Sanction of the Court to the sale.

Prima facie a sale-deed executed by one person in favour of another operates to convey to that other the interest of the executant in the property the deed purports to pass. But to prevent frauds on decree-holders it is provided by s 276 of the Civil Procedure Code, that "when an attachment has been made by acutal seizure or by written order duly intimated and made known in the manner afore-said, any private alienation of the property attached, whether by sale, gift, mortgage or otherwise .... during the continuance of the attachment, shall be void as against all claims enforceable under the attachment."

Section 305 of the Civil Procedure Code is an enabling section, and qualifies the prohibition contained in s. 276. On compliance with the conditions of that section, a private alienation, notwithstanding s.276, becomes, absolute even against all claims enforceable under the attachment.

Shivlingappa v Chanbasappa.
8 Bom L R 16=1 M L T 46=30 Bom 337.

292—T P A S. 52—Lis-pendens Sales in invitum—Attachment in execution of money decree—Effect of—Sale for arrears of revenue—Revenue Sale Law, S. 54.

The doctrine of lispendens is applicable to sales in invitum. The doctrine is applicable to proceedings to realise the mortgage-money after a decree for sale of the property—But where a property not mortgaged is attached in execution of a money-decree, the doctrine of *lis pendens* does not apply to the sale of that property. Where a property was attached in execution of a money-

Attachment *Contd.*

6 Alienation during attachment—*Contd.*

decree and in the cause of the execution proceedings was sold for arrears of revenue. *Held* that the attachment did not create any title or charge on the property and did not constitute an incumbrance within the meaning of s 54 of Act XI of 1859; 29 Cal 438=6 C W N 577; 25 Cal 179 (1897) Ref to; 5 C L J 80; 11 C W N 163 (1903) Dist. *Held* further that a sale for arrears of Government revenue cannot be regarded as an alienation made by the proprietor so as to make the doctrine of *lis pendens* applicable. **Mahadeo Saransahoo v. Thakur Prosad Singh. 14 C W N 677= 6 Ind Cas 40=11 C L J 528**

293—Alienation during attachment—Civil Procedure Code (Act XIV of 1882), ss. 483, 484, 485, 486, 487, 488, 489, 490, 276.

Any private alienation of a property attached before judgment, during the continuance of the attachment, is void as against all claims enforceable under the attachment. The effect of an attachment of a property under the Civil Procedure Code, whether made before or after decree, is the same. provided that in the former case a decree is made for the plaintiff at whose instance the attachment takes place. O C 139, referred to.

Ganu Singh v Jang Lal. 26 Cal 531.

(4) Effect of removal attachment.

294—Execution struck off from laches of decree-holder.

Certain property was attached in execution of a decree, and while the attachment was in force, pottahs were granted to certain persons by the judgment-debtors. Twelve years after the attachment, no further steps having been taken in the matter, the execution case was struck off the file, and the property was afterwards mortgaged by the judgment-debtors to R. Subsequently, a fresh attachment was issued at the instance of the heirs of the former attaching creditor, under which the property was put up for sale subject to R's mortgage, and R herself became the purchaser. In a suit by *R* to set aside the pottahs granted during the continuance of the first attachment,—*Held* that the prohibition against alienation of property under attachment avoids such alienation only as against the execution-creditor or persons entitled to claim under him. A conveyance executed by the judgment-debtor after an attachment has been removed, and before a fresh attachment is issued, is valid, though the second attachment is

Attachment-*Contd.*

6 Alienation during attachment—*Contd.*

under the same execution as the first. *Quere*—Whether an alienation of property under attachment void as against the execution-creditor becomes valid by relation when the attachment is removed. *Semble*—It may be presumed that an execution long neglected, and finally struck off, has ceased to be operative. and in that case a judgment-creditor's title will only date from any subsequent attachment which he may obtain.

Puddomonee Dossee v Roy Muthoora Nath. Chowdhry 12 B L R 411. 20 W R, 133.

Goonjessur Koonwar v Luchmee Narain. Singh 20 W R 418.

Atonginy Dossee v Chowdhry Junmunjoy Mullick. 25 W R 513

295—Presumption of abandonment of attachment.

A deed of alienation of certain property made pending an attachment of the property was held not to become valid by reason of the removal of the attachment. It does not follow, because subsequent applications for attachment are made by a decree-holder, that the original one is abandoned. **Dhiraj Mahatab Chand Bahadur v Surnomoyee Dossee.** 12 B L R 414 note: 15 W R 222.

296—Civil Procedure Code (1882), s. 273—Dismissal for an application for execution—Attachment of a decree—Execution of attached decree.

On 19th March 1887 an order was made cancelling an application for execution of a decree in original suit of 1885 on ground that no further steps had been taken and no previous notice was given to the execution creditor before dismissal order was made. Nevertheless the decree-holder proceeded to execute it, brought the land in question to sale and the present defendant became a bona-fide purchaser at Court sale of the said land. **Rangasami Chetti v Periasami Mudali.** 17 Mad 58.

Notes:—Ref: 19 Mad 219

297—Termination of attachment by abandonment.

The plaintiff had an attachment against certain property. Owing to his not filing a necessary affidavit, the execution petition was struck off. Subsequently he applied for the sale of the property, and the Court directed a fresh attachment

Attachment-*Contd.*

6 Alienation during attachment—*Contd.*

to issue. It was held that these facts did not amount to an abandonment of the first attachment by the plaintiff. **Srinivasa Sastrial v Sami Rau.** 17 Mad 180.

298—Attachment.

If at the date of the assignment of a decree the judgment-debtor's property is already under attachment in execution of such decree, it is not necessary for the assignee of the decree to apply for a fresh attachment. When either the decree-holder or his assignee applies to have attachment under the decree of property which has been previously attached under the decree, it lies upon the decree holder or the assignee of the decree, as the case may be, if the question is raised, to show that the second application was unnecessary by reason of the first attachment being still subsisting. Failing such evidence a Court may presume that the prior attachment had ceased before the application for a second attachment was made. 12 B L R 411 referred to. **Hafiz Suleman v Sheikh Abdullah.** 16 All 133. =14 W N 13.

Notes:—Ref: 23 All 114.

299—Circumstances showing expiry of attachment.

An attachment, which had, at one time, prohibited alienation of the property.and on which the plaintiffs relied as having rendered the mortgage invalid, was held under the circumstances to have been no longer in operation at the time when the mortgage was executed, and the mortgage was upheld. **Mahomed Mozuffer Hossein v Kishori Mohun Roy** 22 Calc 909. =22 I A 129.

Notes:—Ref: 24 Cal 62 F B; 33 Cal 425=3 C L J 205; 7 C L J 644; 35 Cal 877, 10 C L J 150.

300.—Order releasing property from attachment—Subsequent decree establishing attaching creditor's right to attached property—Mortgage of attached property between release and subsequent decree—Code of Civil Procedure (1882), ss. 276, 280, and 283.

A decree-holder attached the property of certain of the defendants, who then obtained an order of release under s. 280 of the Code of Civil Procedure, and subsequently mortgaged the property. The attaching creditor thereupon sued

Attachment-*Contd.*

6 Alienation during attachment - *Contd.*

for and obtained, under sec. 283 of the Code, a declaration that the mortgaged property was nevertheless liable to be sold under this attachment. A few days after obtaining such decree, he again attached the judgment-debtor's property. The mortgagees then sued on their mortgage, and obtained a decree for sale. The sale in execution of the attaching creditor's decree and that ordered by the decree in favour of the mortgagees were both advertised for the same day. The plaintiff purchased at the sale under the attaching creditor's decree, and then sued for a declaration that the property was not liable to be sold in execution of the mortgage-decree on the ground that the judgment creditor's attachment was restored by the decree under s. 283 of the Code, and that the mortgage executed by the judgment-debtors was invalid as against the plaintiff, the purchaser at the execution sale. *Held* (affirming the decisions of the Subordinate Judge and the District Judge) that the plaintiff was entitled to the decree sought. 21 W R 435. applied. **Bonomali Rai v Prosunno Narain Chowdhry.** **23 Cal 829.**

Notes.—Ref : 33 Cal 1158=10 C W N 978. Ref : 6 A L J 434. Fol: 31 All 367.

301.—Alienation after attachment—Striking execution proceedings off the file—Civil Pro. 1895, Section 240.

Where certain immoveable property having been attached, the execution-case was subsequently struck off the file, and the judgment-debtor applied again for attachment of the same property, held, looking to the particular circumstances of the case, that a private alienation of the property after the date of such application but before attachment was not void under the provisions of this section. **Zaib-un-Nissa v Jairam Gir.** **1 All 616.**

(5) Alienation under irregular attachment.

302.- Civil Procedure Code, 1859, Ss 249, 240 —Private alienation after attachment.

Certain land was attached in the execution of a decree in the manner required by s. 235 of Act VIII of 1859, but a copy of the order of attachment was not, as required by s. 239 of that Act, fixed up in a conspicuous part or in any part at all of the Court-house of the Court executing the decree, nor was it sent or fixed up in the office of the Collector of the district in which the land was situated. Subsequently to the attachment of the land, the judgment-debtor privately alienated it by sale. *Held* that, as the attachment had not been made known as prescribed by law, the provisions of s 240 of Act VIII of 1859 did not apply, and the sale was not null and void. (1 B L R. S N 20 : 10 W R, 264, followed.

Nur Ahmad v Altaf Ali. **2 All 58.**

Notes :—Ref 1 C L J 565.

(6) Alienation under attachment to satisfy future default

303.—Decree for money payable by instalments—Act VIII of 1859, ss. 240, 243, 245

A obtained a decree against B for a sum payable by instalments. B made default in payment of an instalment, and A attached certain immoveable property belonging to B. While under attachment, B sold the property to C, and out of the proceeds paid into Court the full amount of the debt then due and for which the property had been attached. A took out the money, but applied for and obtained an order from the Munsif that the property should remain under attachment, in order to satisfy any future sum which should fall due under the decree and in payment of which B should make default. B failed to pay a further instalment when due, and A obtained an order for sale of the property. A himself became the purchaser, and was put in possession by the Court, notwithstanding the claim of C, who had been in possession ever since his purchase. In a suit by C to recover possession.—*Held* the Court had no power to make the order continuing the attachment, the right of attachment being only for sums actually due, and the whole amount for which execution issued being satisfied out of the proceeds, the alienation of the property to C was not void as against A.

Ramdhan Mitter v Kalidas Nath Dutt. **4 B L R A C 20=12 W R 457.**

(7) Alienation under attachment not properly executed.

304.—Suit for money paid to stay foreclosure —Act VIII of 1859 section. 240—Mortgage—Lien.

Attachment-*Contd.*

6 Alienation during attachment—*Contd.*

In execution of a decree, A, judgment-creditor, obtained an order for the attachment of certain property of B, the judgment-debtor, but it was not executed as required by Act VIII of 1859. The property was, however, advertised for sale, and B obtained an order staying the sale on a petition alleging that A had agreed to give him time on condition that the attachment should remain good, and declaring that he (B) would not alienate the property until the whole of the decree was satisfied. Subsequently B mortgaged a portion of this property to C. A assigned his decree to D, upon whose application the property was attached and sold, and E became the purchaser. C having taken steps to foreclose the mortgage, E. to prevent such foreclosure, paid the amount into Court. *Held* that E could not maintain a suit against C to recover the amount so paid by him. The mortgage by B was not an alienation null and void under s. 240, Act VIII of 1859. B's petition did not create a charge upon the property in favour of A.

Rameswar Singh v Ramtanu Ghose. 4 B L R A C 24.

Rutnessur Sing v Ram Tanoo Ghose. 19 W R 491.

(8) Alienation made under agreement for sattsfaction.

305—Sanction of Court—Civil Procedure Code, 1859, s. 240.

The plaintiff sued to recover certain land which had been hypothecated to him in 1843, and subsequently sold to him in 1868, while under attachment in execution of a decree in a suit brought by the plaintiff to establish his hypothecatory claim. The third defendant claimed under a mortgage prior in date to the hypothecation to the plaintiff, and under a sale prior in date to the sale to the plaintiff, made to the third defendant whilst the land was under attachment in execution of the decree to the plaintiff, *Held* that the sale to the third defendant, which was made not under any agreement with the plaintiff for the satisfaction of the decree through the Court, was invalid by reason of s. 240 of the Civil Procedure Code; but that the alienation to the plaintiff, the decree-holder, during the attachment to satisfy the decree, which was duly sanctioned by the approval of the Court which issued the process of attachment, was valid. **Annavunadavan v Iyasawmy Pillay. 6 M H C R 65.**

Notes:—Dist: 7 Cal 107 P C.

305.A—Transfer for value–Civ. Pro.1859, s 240

An alienation of property attached in execution of a decree, made for the *bona fide* purpose of satisfying the decree, in respect of which the attachment has been made, and where the consideration for the alienation is applied to, and is found to be sufficient for, the satisfaction of the decree, is not invalid under this section.

Purmeshur Rai v Hidayat ul-lah 1 N W P 114.

(9) Sale by consent of judgment creditor.

306.—Subsequent withdrawal of attachment

Where a judgment-debtor raised a sum of money by a sale of part of the attached property and devoted some part of that money to a payment on account to the judgment creditor, and the judgment-creditor thereupon withdrew from the execution and from the attachment of the property.– Held that the attachment would not invalidate the sale. **Prannath Mitter v Sumbhoo Chunder Nath. 7 W R 430.**

Notes.—Fol: 1 N W P 114. Ref: 1 N W P 125.

(10) Mortgage pending attachment.

307—Civil Procedure Code, 1859, s 240.

Held by Loch and E Jackson, JJ that a mortgage of any kind made after attachment is such an alienation as is contemplated by s 240 Act VIII of 1859, and is null and void. **Munnoo Lall v Reet Bhungun Singh 9 W R 544**

Notes.—Dist: 1 N W P 114.

308—A decree-holder in execution of a decree for money attached certain immoveable property of his judgment-debtor. Owing however, to want of prosecution of the execution proceedings, his application for execution was struck off, and with that the attachment was removed. The judgment-debtor subsequently mortgaged the property which had been attached to a third party who having obtained a decree on his mortgage, brought the property to sale and purchased it himself. Pending the mortgagee's suit the judgment-debtor made a usufructuary mortgag

Attachment-*Contd.*

6 Alienation during attachment—*Contd.*

of the same property in favor of the decree-holder. *Held* on a suit for recovery of possession brought by the usufructuary mortgagee decree holder who had been ousted by the simple mortgagee, that the rights of the decree-holder under his usufructuary mortgage were subject to the defendant's rights under his prior simple mortgage, and this even though the attachment had subsisted, his claim under the usufructuary mortgage not being a claim enforceable under the decree within the meaning of s 276, Code of Civil Procedure. **Narain Das v Sheoambar Ahir. 17 W N 37**

309—Alienation—Zar-i peshgi lease.

Held that a *zar-i peshgi* lease and an ordinary agricultural lease made by a judgment-debtor of property under attachment were alienations which were void by reason of the prohibition contained in s 276 of the Code of Civil Procedure **Debi Prasad v Baldeo 18 All 123=16 W N 13**

Notes.—Ref: 20 All 349.

(10 A) Effect of compromise in reviving attachment withdrawn.

309—Mortgage by benamidar —Estoppel of real owner and representative—attachment in execution—Effect of compromise in reviving attachment with drawn.

Where the benamidar of certain property exercising acts of ownership mortgages it to a *bona fide* mortgagee for consideration without notice, neither the true owner nor his judgment-creditor purchasing the property in execution of a decree subject to the rights of the mortgagee, can question the rights of such mortgagee. Where property under attachment in execution of a decree against a deceased judgment-debtor was released on the application of the representative and during the pendency of an appeal from the order of release, the representative mortgaged the property to a third person, the validity of the mortgage cannot be affected by a compromise entered into by the parties to the appeal which was recorded by the appellate Court, and whereby the representative made herself and all her property liable and the attachment was deemed to be continued. Such a compromise cannot operate as a revival of the attachment so as to invalidate the mortgage. **Mir Mahomed Hossein v Kishori Mohan Roy. (1895) 5 M L J 101=22 Cal 909=22 I A 129 (P C)**

C. C 127

Attachment *Contd.*

6 Alienation during attachment—*Contd.*

(11) Requirements of attachment not complied with.

310—Civil Procedure Code 1859, s 240.

Before an attachment can be relied on, under s 240 Code of Civil Procedure, for the purpose of invalidating any subsequent alienation, it must be shown to have been duly made by a written order issued and published viz the prohibitory notice prescribed by law. **Dwarkanath Biswas v Ram Chunder Roy 13 W R 136.**

Notes—Ref: 1 C L J 565.

311—Civil Procedure Code 1859 ss 235, 239 and 240.

Held that the alienation of property cannot be declared void under the provisions of s 240, Act VIII of 1859, where no attachment order was issued or notified in the manner prescribed by ss. 235 and 239 of the said enactment. Where there was no attachment after the manner prescribed in Act VIII of 1859, but the property was advertised for sale, and the judgment-debtor encumbered the property with lien—*Held*, that the decree-holder could sell the property, but subject to liens which were not otherwise proved to be collusive. **Sahoo Chund v Geetum Singh. 2 Agra 206.**

(12) C P C (1859) S 240, (1882 S 276), objects of.

312—Civil Procedure Code 1859, ss 240, 270 and 271.

A private alienation of property while under attachment is null and void only as regards the attaching creditor and those who claim under or through the attachment. 10 B L R 134;17 W R 313 followed. Act VIII of 1859, s 240, is for the benefit of an attaching creditor (subsequent to and in defence of whose attachment the private alienation thereby declared void has been made), and of those claiming under or through him and not for the benefit of puisne attaching creditors, whose attachment is laid later than such private alienation. **Balaji Ramchandra v Gayanan Babaji 11 B H C R 159.**

Notes.—Ref: 16 Bom 91.

(13) Effect of good attachment on alienation.

313—Voidable alienation.

An alienation of property while under attach-

Attachment-*Contd.*

6 Alienation during attachment—*Contd.*

ment is not absolutely void for all purposes and as to all persons, but voidable only, and capable of confirmation. **Mahomed Ali v Gokul Chund** I N W 19, Ed 1873, 18.

e-g, as in case of the dedree being set aside.

Juggut Narain v Toolsee Ram 10 W R 99; 1 B L R A C 71.

314—"Enforceable under the atachment."

Held that an alienation during a subsisting attachment is void only as against any claim enforceable under the attachment. **Ram Prasad v Salik Ram Singh.** 2 W N 210.

315—S. 64 (1882 s. 276)—Attachment, effect of—'Claims enforceable under the attachment.'

A sale of property under attachment is not void, but voidable at the option of the attaching creditor alone if he wishes to proceed against the property. **Kaman Nair v Sat Narain.** 2 A L J 265.

316—Voidable alienation—Civil Procedure Code, 1859, s. 240.

An alienation of property attached in execution of a decree, made for the *bona fide* purpose of satisfying the decree in respect of which the attachment has been made, and where the consideration for the alienation is applied to, and is found to be sufficient for, the satisfaction of the decree, is not invalid under s. 240 of the Code of Civil Procedure. **Purmeshur Rai v Hidayutoollah. Mehpal Rai v Hidayutoollah.** 1 N W 60, Ed 1873, 114.

(14) Alienation after satisfaction but before romoval of attachment.

317—Civil Procedure Code, 1859, s. 240.

A judgment-debtor satisfied a decree under which attachment of his property had been made. He reported the satisfaction to the Court, and on the following day he executed a mortgage of his property. The day after the execution of the mortgage the attachment was removed by the Court. Held that the mortgage, if *bona fide*, was not null and void under s. 240 of the Code of Civil Procedure. **Buldee Singh v Kanaha.** 1 N W 71, Ed 1873, 125.

318—Alienation after attachment—attachment, withdrawal of.

The implied withdrawal of an order of attachment, even though such order was not formally withdrawn, but was understood to be withdrawn by the decree-holder, bars any objection against the validity of an alienation of the attached property by mortgage or otherwise. **Jagannath v Ghasee Ram.** 1 N W P 30.

(15) Private alienation, meaning of.

319—Civil Procedure Code, 1859, s. 240—Insolvent Act, s 7—Vesting order.

The expression "private alienation," in s. 240 of the Code of Civil Procedure, does not refer to an alienation effected by a vesting order of the Insolvent Court under s. 7 of the Indian Insolvent Act; such an alienation is rather an alienation by operation of law than one by the judgment-debtor. **Sarkies v Bundhoo Baee** 1 N W Part 6 p 81, Ed 1873, 172.

320—S. 64 (1882 s. 276)—Private alienation—Attachment—Mortgage—Sale under the powers of a mortgage-deed.

A sale under the powers of a mortgage-deed cannot be held to be a private alienation within the meaning of s. 276 of the Civil Procedure Code as an alienation of the attachment in pursuance of a power conferred before the attachment does not come within the section. **The Delhi and London Bank v S J Tellary & Co.** 3 Bom L R 892.

320A—Attachment of immoveable property—"Private alienation"—Civ. Pro. Code. 1877, s. 276.

Where, after attachment of immoveable property in execution of a decree, the matter in execution of a decree, the matter in dispute between the judgment-debtor and the appellant was referred to arbitration and a deeree, passed in accordance with the award, ordered the judgment-debtor to execute a conveyance of the property to the appellant, *held*, *Per Straight*, J.—The conveyance to the appellant could not be regarded as a "private alienation" as these words mean a voluntary sale, gift or mortgage in contravention of the order of attachment, and not the enforced execution of a conveyance in obedience to a decree. *Per Spankie* J—The conveyance to the appellant is not an involuntary one, since it has arisen out of the voluntary exercise of the will of the parties who have given their consent to abide by the award of the referee, **Durban Ali v Ashraf Ali** A W N 1881, 75.

Attachment-*Contd.*

6 Alienation during attachment—*Contd.*

(16) Illegal alienation.

321—Civil Procedure Code, 1859, s 240.

Any alienation of property after attachment is illegal under s. 240, Act VIII of 1859.

Jadubanund Roy v Bejoy Gobind Chowdry 7 W R 511.

Moorul Singh v Mohun Kooer 9 W R 167.

Monohur Lall v Juggomohun Lall. 9 W R 307.

(17) Prior lease for attached property.

322—Where landed property is attached in execution of a decree, the party attaching is bound by a lease obtained for it prior to his attachment.

Fegredo v Mahomed Mudessur. 15 W R 75.

Notes—Ref: 5 Bom 393.

(18) Alienation after one decree and before another.

323—Civil Procedure Code, 1859, s. 240.

Although, under the provisions of s. 240 of Act VIII of 1859, a private alienation by sale of property after attachment can be impugned by the holder of the decree in execution of which it was attached, if obstructive of the execution, yet such alienation cannot be impugned by the holder of the decree, under those provisions, because it obstructs the execution of another decree obtained by him subsequently to the date of the alienation.

Mahbuban v Reheemun. 6 N W 217.

324—Alienation with decree-holder's consent.

Held that a private alienation of property under attachment but with the decree-holder's consent cannot be impeached by the decree-holder.

Fakir Sahu v Ganesh Prasad. 6 W N 176.

(19) Alienation with knowledge and consent of creditor attaching.

325.—Civil Procedure Code, 1859. sec. 240.

While certain immoveable property was under attachment, the judgment-debter mortgaged it for value to the Mussoorie Saving Bank, with the knowledge of the attaching creditor, the Dehli Bank, which acquiesced in, and benefited by, the mortgage. The property was subsequently released from attachment, but was again attached, and was brought to sale in execution of the decree held by the Dehli Bank, and purchased by the defendants. The Musoorie Saving Bank sued the auction purchasers, claiming the right to bring the property to sale on the ground of its being under mortgage to the Bank prior to its purchase by the defendants. It was held that under the circumstances the defendants must take the consequences of having purchased the property without having satisfied themselves as to its condition. Had it not been for the conduct of the Dehli Bank, however, the rule that a private *bona fide* alienation for value of property attached under Act VIII of 1859 is, by virtue of section, 240 of the Act, null and void only as against the attaching creditor or persons who may acquire rights under or through the attachment, would have saved the defendants, and it would have done so, notwithstanding that the sale of the property in suit took place in pursuance of a second attachment.

Dhurrum Dass v Musoorie Saving Bank. 6 N W 296.

326.—Section 273—Attachment—Kanom executed during attachment——Decree-holders other than the attaching creditor—Validity of kanom.

Where an attaching decree-holder has been paid and the attachment raised, a kanom executed during the attachment cannot be questioned by other simple money decree-holders who have not applied for execution, on the mere ground of a possibility of their becoming entitled to rateable distribution if the sale had not been averted by the payment of the debt for which the property was attached.

Semble:—The case may be different if the other decree-holders have applied for execution at the date of payment so that the attachment had subsisted for the benefit not only of the attaching creditor but of the other creditors as well.

Kunhi Moosa v Akath Makki. 28 Mad 478=10 M L J 98.

Notes:—Fol: 28 Mad 380=15 M L J 202.

(20) Title acquired by private purchaser.

327.—Decree—Attachment—Sale in Execution of decree—Private sale of property attached in execution—Encumbrance created after attachment—Act VIII of 1859, Section 240.

Attachment-*Contd.*

6 Alienation during attachment—*Contd.*

In 1828 S obtained a decree against B for Rs. 82,000 with interest at 12 per cent, until realization, and in execution thereof certain property of B was sold and purchased by S and others. On the 10th November 1857, B obtained a decree setting aside the sale and declaring his right to be restored to possession with mesne profits. In 1860 that decree was affirmed. Meanwhile, in 1858, A obtained a decree against B for Rs. 67,000, and in execution of that decree B's right to mesne profits under the decree of 10th November 1857 was attached in May 1863 and, on the 26th May, 1865, was ordered to be sold. No proceedings were taken in execution by A or his representative to sale the decree for mesne profits, but in 1866 A's representative entered into a private arrangement by which B sold the whole of the mesne profits due under the decree against S, in lieu of the amount due under the decree of 1858. In the meantime, on the 14th September 1865, an order was made by consent in certain proceedings, to which A's representative was not a party, in execution of the decree of 1828 directing the decrees of 1828, and 1857, to be set off the one against the other, and that each should bear simple interest. *Held*, reversing the decree of High Court, that the sale in 1866, being a private sale, was not tantamount to, and had not the same effect as, a sale in execution of a decree, and that under that sale A's representative by purchase acquired no greater interest than B had in the decree, and that consequently he was bound by the order of the 14th September 1865. Under a private sale the purchaser derives title through the vendor, and cannot acquire a better title than that of the vendor. Under a sale in execution of a decree the purchaser notwithstanding he acqires merely the right title and interest of the judgment debtor acquires that title by operation of law adversely to the judgment debtor and freed from all alienations and encumorances effected by him subsequently to the attachment of the property sold in execution.

Dinendronath Sanyal v Ramkumar Ghose. Tarachandra Bhuttacharji v Baikantnath Sanyal. 7 Cal 107=10 C L R 281= 8 I A 65.

Notes:—Fol: 20 Cal 236. Expl 10 C L J 150.

328.—Attachment of son's interest—Alienation by father—Hindu Law.

Attachment-*Contd.*

6 Alienation during attachment—*Contd.*

Where the right, title and interest of a Hindu son in joint ancestral property has been attached in execution of a decree against him and its private alienation by him prohibited by an order of the Court under Section 276 of the Civ. Pro. Code. 1882, his father is deprived of the power of alienation of that interest in satisfaction of his own debts. **Subraya v Nagappa. 10 Bom L R 1206=33 Bom 266= 2 Ind Cas 268.**

(21) Renewal of mortgage already existing.

329.—A renewal of a mortgage already existing on the property prior to attachment, which does not enhance the charge, is not an alienation within the meaning of s. 276 of the Code of Civil Procedure. **Mahadevappa v Srinivasa Rau, 4 Mad 417.**

Notes:—Fol: 10 C L J 33. Ref: 13 C W N 797.

(22) Alienation under attachment making material error in description of property.

330.—Application was made for the attachment in execution of a decree of a *muafi*-holding belonging to the judgment-debtor. The numbers and areas given in such application as the numbers and areas of the land comprised in such holding were the numbers and areas of certain revenue paying lands, and were not the numbers and areas of any lands held as *muafi* by the judgment debtor. The order of attachment described the property as described in the application for attachment. The judgment-debtor having alienated by sale a *muafi* holding belonging to him, the decree-holders sued to have such alienation set aside as void under the provisions of s 276 of Act X of 1877. *Held* that, having regard to the description given in the application for attachment and the order of attachment, it could not be said that the *muafi*-holding alienated by the judgment debtor was under attachment at the time of the alienation, and its alienation was therefore not void under s. 276 of Act X of 1877. *Held* also that the material misdescription of the property in this case in the order of attachment protected the alienees who were *bona fide* purchasers from having the

Attachment-*Contd.*

6 Alienation during attachment-*Contd.*

alienation set aside as void under s. 276, as the attachment could not under the circumstances be held to have been "duly intimated and known" as required by that section. **Gumani v Balram Pandey. 3 All 698=1 W N 59.**

Notes:—Ap 7 All 702.

(23) Conveyance under award directing it.

331.—Private alienation—Award.

By agreement between L and Q, the parties to a suit, the matters in difference between them were referred to arbitration. An award was made directing that L should transfer certain property to Q by way of sale. Between the day the award was made and the day a decree was made in accordance with the award such property was attached in execution of a decree against L. After the attachment. L, in compliance with the decree made in accordance with the award, executed a conveyance of such property to Q. *Held* by the Full Bench (affirming the decision of Straight, J., and reversing that of Spankie, J.), that such conveyance was not a "private alienation" in the sense of s. 276 of Act X of 1877, and was therefore not void under that section as against a claim enforceable under such attachment. **Durban Ali v Ashraf Ali. 1 W N 75=4 All 219 F B.**

(24) Expiry of attachment. effect of, on alienation.

332.—Civil Procedure Code, s. 276.

A private alienation of property under attachment is void, under s. 276 of the Civil Procedure Code, "as against all claims enforceable under the attachment" only. Where, therefore, property attached in execution of a decree was alienated, and was after such alienation again attached, the first attachment having expired, and was brought to sale in pursuance of the second attachment, and the purchaser sued for possession of the property claiming on the ground that the alienation of the property was void under the provisions of s. 276,—*Held* that, as no claim was enforced or was enforceable under the first attachment, under which the property was alienated, but the purchaser was claiming under the second attachment, such alienation could not be assailed under the provision of s. 276.

Gobind Singh v. Zalim Singh. 6 All 33.

Notes:—Ap. 7 All 702. Dist: 15 All 112.

Attachment-*Contd.*

6 Alienation during attachment-*Contd.*

(25) Alienation after imperfect attachment of immoveable property.

333.—A judgment debtor whose property had been attached in execution of a money decree, sold the property and out of the price paid into Court the amount of the decree, and prayed that the attachment might be removed. While the attachment was subsisting and prior to the sale, the holders of other money decrees against the same judgment-debtor preferred applications, purporting to be made under s. 295 of the Code of Civil Procedure, and praying that the proceeds of the sale of the property might be rateably divided between themselves and the attaching creditor. The Court refused to remove the attachment until these creditors had been paid. It was found that the sale by the judgment debtor was a *bona fide* transaction entered into for valuable consideration. *Held* that, inasmuch as no order for attachment of the property was passed in favour of decree-holders in manner provided by s 274 of the Code of Civil procedure, their claims were not entitled to the protection conferred by s 276 against private alienations of property under attachment; that these claims were not enforceable under the attachment which was made; that the sale by the judgment-debtor was valid; and that execution of the decrees could not take place.

Per Mahmood, J.—That s. 276 of the Code of Civil Procedure being a restriction of private rights of alienation should be strictly construed, that before property can be subjected to such restriction, there must be a perfected attachment, that the order passed under s 295 did not amount to such attachment and that, even assuming them to amount to such attachment, they, not having been duly intimated and notified, could not make the prohibition of s. 276 applicable to the case. (5 All 86); (14 Moo. I A..543); (4 B L R A C 24); (10 W R 264); (6 All 33) and (3 All 698) referred to. Also *per* Mahmood, J.:—While s 295 of the Code gives a special right to judgment-creditors as distinguished from simple creditors, it is an essential condition precident to the exercise of that right there should be a sale in execution, and that its result should appear in assets realized by the sale, and therefore until the sale takes place, no such right can be enforced. (8 W R 501) referred to.

Ganga Din v Khushali. 7 All 702= 5 W N 179.

Attachment-*Contd.*

6 Alienation during attachment-*Contd.*

(26) Claim to rateable distribution under s. 295.

334.—Civil Procedure Code (1882) s. 295 Rateable distribution.

A claim under s. 295 of C. P. C. is not enforceable as an attachment against which an assignment is rendered void by s. 276. 7 All 702 followed. **Durga Churn Roy Chowdhry v Monmohini Dasi. 15 Cal 771.**

Notes:—Ref: 16 Bom 91. Fol: 25 All 431.

335.—Ss. 64, 73 (1882 ss. 276, 295)—"Shall be void as against all claims enforceable under the attachment."—Claims of a creditor who has merely applied for rateable distribution.

The words "shall be void as against all claims enforceable under the attachment" in section 276 C P C cannot include the claims of a person who has not caused the property of the judgment debtor to be attached, but has simply asked for a rateable share of the assets but include only the claim of the person who has obtained the attachment. Consequently where the attaching creditor's claim is satisfied by the purchaser will be valid as against all who have not attached but have merely applied to the Court for rateable distribution. 7 All 702, 15 Cal 771 followed. 16 Bom 91 not followed. **Manohar Das v Ram Autar Pande 1903 A W N 92=25 All 431.**

Notes:—Ref: 28 Mad 380=15 M L J 202.

336.—Execution-proceedings—Property attached by one creditor—Another creditor's claim under S. 295, C. P. C, 1882—Latter creditor obtaining order for rateable share of assets in sale proceeds of property attached by former—Withdrawal of attachment, private alienation after—Right of assignee—Transfer for good and valuable consideration in favour of one creditor—Obvious effect of such transfer to delay claim of less active creditor—S. 274 C. P. C.

On the application by a judgment-creditor for execution of his decree and for attachment of the judgment debtor's property, the property which was immoveable, was duly attached under S. 274, C. P. C; subsequent to this, another decree-holder holding a decree against the same judgment-debtor, filed an application for execution and in this application he set out the facts that the former judgment-creditor had already applied for execution of his decree and had succeeded in having the property attached. He, therefore, prayed that the said property might be held to be attached also in respect of his application of execution, and that he might be permitted to share rateably in the proceeds of the sale of the property (S. 295 of the Code). *Held* that, when the decree, in execution of which the property was attached was satisfied and there had been a withdrawal of the attachment, the latter decree-holder, obtaining an order in accordance with his prayer for a rateable share in the assets in the proceeds of sale of property attached by the former creditor had no right to claim the benefit of the attachment.

Where after the removal of such attachment, such property was assigned to a certain person *held*, that the assignee had a good title as against the latter decree-holder.

An alienation obtained by one creditor for a genuine consideration which is not inadequate, is not necessarily void, because its obvious effect will be to defeat or delay the claim of a less vigilant creditor. (7 All 702, 15 Cal 771, 25 All 431, 28 Mad 380, 6 P R 1901; 21 P R 1875; 25 Bom 302, Ref.) **Lahori Mal v Gangaram. 91 P R 1908=148 P W R 1908.**

(27) Sale of tenant's interest by landlord pending attachment by Civil Court.

337.—A tenant's interest in certain land was attached in execution of a decree for money by a creditor. The landlord attached the same land for arrears of rent, brought it to sale and purchased it himself in accordance with the provisions of the Rent Recovery Act. The creditor subsequently purchased the interest of the tenant, which was sold in execution of his decree. The landlord brought a suit to have the sale to the creditor set aside and declared invalid.—*Held*, that the landlord's purchase was subject to the creditor's attachment. **Subramanya v Rajaram. 8 Mad 573.**

Notes:—Fol 16 Mad 479.

338.—Attachment of holding before judgment—Surrender of holding during attachment—Surrender invalid if holding transferable-C. P. C. (Act V of 1908), S. 64.

Attachment-*Contd.*

6 Alienation during attachment – *Contd.*

In a suit for money, a holding of the defendant was attached before judgment. During the continuance of the attachment, the defendant surrendered the holding, and the landlord settled it with another person. The plaintiff obtained a decree and in execution purchased the holding.

Held, that, if the holding was transferable, a surrender of it after attachment could not, in view of the provisions of S.64 of the Code of 1908, affect the position of the decree-holder purchaser or create in the landlord and his new tenant any preferential right. **Indra Narain v Nut Behary Jana. 8 Ind Cas 76**

(28) Attachment for arrears of revenue—subsequent attachment in execution of decree.

339—Madras Abkari Act (Madras Act I of 1866) S. 28.

Certain land was attached for arrears of revenue under Madras Abkari Act and afterwards the same was attached in execution of a money-decree against the defaulter and it was purchased by the defendant at a Court sale. The Collector of the District objected to the latter sale unsuccessfully. Afterwards he brought a suit in the name of the Secretary of State for India for declaration that the land was liable for arrears of Revenue for which it was attached.

Held, that the plaintiff had a right to get the declaration asked for. **Sarangapana v Secretary of State for India. 16 Mad 479**

(29) Sale of property by private contract

340—S. 64 (1882 sec. 276),—Attachment of immoveable property-Sale of the property by private contract—Effect of the attachment, rights of the purchaser.

A private alienation of the property after attachment is void.

Where a transfer was a mere in performance of a direction of the Court and is strictly based on an agreement of the parties, it will not be deemed a private alienation but in the absence of such a direction the mere act of the parties resulting in a transfer cannot render the alienation other than private.

Where the contract is anterior to the attachment the sale in pursuance thereof subsequent to attachment will not be void. (4 All 219 Ref; 8 I

Attachment-*Contd.*

6 Alienation during attachment *Contd*

A65 Ref: 14 L J Ch 8; 7th Ed vol 11 p 1030 Ref;). **Gutta Bepineedu v Gutta Venkayya. 8 M L T 197**

(30) Attachment preventing merely alienation but not conferring any title.

341—Ss. 64, 73 (1882 ss 276, 295) Act for the Relief of Insolvent Debtors (11 and 12 Vic., ch. 21), S. 7—Vesting order, effect of—Prior attachment.

A judgment-creditor has no priority over the Official Assignee in respect of property attached by him, previous to the passing of the vesting order. (25 Cal 202) approved; (5 C W N 761; 28 Cal 419) overruled; (5 B L R 691; 14 W R 33 F B; 10 Cal 150) distinguished

An attachment does not confer any title, it merely prevents alienation. (25 Cal 179 referred to.) **Frederick Peacock v Madan Gopal. 6 C W N 577=29 Cal 428 F B.**

Notes.—Fol: 29 Bom 105=7 Bom L R 488. Ref: 26 Mad 673=13 M L J 278; 7 O C 314; 5 P W R 1909=6 P L R 1909; 5 C L J 80=11 C W N 1o3. Dist: 30 Mad 413=17 M L J 334=2 M L J 365.

(31) Effect of S. 64 (1908) C P C on alienation by judgment-debtors.

342—S. 64 (1882 s. 276)–When not applicable—Prior mortgages—Discharge by mortgagor from money raised on a fresh mortgage-Execution sale—Priority of mortgage to sale—Intention—Charge, extinguishment of:

S. 276, C P C, does not render all alienation by the judgment-debtor void so as to confer a benefit on the judgment-creditor which he never had at the time of the attachment and which it was not intended he should have subsequent thereto, but only those which prejudicially affect the judgment-creditor. An attachment of property over which there is a mortgage subsisting affects only the equity of redemption. A payment of the mortgage by a person claiming under the judgment-debtor or by the latter on behalf of the other with the intention of keeping alive the old mortgage does not enure for the benefit of the execution-creditor just as a further advance or a subsequent mortgage in renewal of the prior mortgage will not affect him prejudicially under s,

Attachment-*Contd.*

6 Alienation during attachment-*Contd.*

276, C P C. When an owner of an estate pays charges on the estate for which he is not personally liable, the question whether such payment operates as an extinguishment of such charges or otherwise, depends upon the intention of the parties. An intention to keep alive the prior charges will be presumed when it is for the benefit of the person paying. Payment by a judgment-debtor of his own charges pending attachment for the benefit of a person who had advanced the money and under an agreement with him operates to keep alive such charges for the benefit of the person who had so advanced. Where a judgment-creditor while the attachment on the equity of redemption was pending mortgaged his estate to pay off prior charges created before the attachment and out of the mortgage amount paid off such charges and got a re-conveyance from the holders of the prior charges and the re-delivery of the title-deeds together with the documents creating the charges and delivered all such to the mortgagee in pursuance of an agreement with the latter who was to have the first charge on the property represented to be unincumbered: *Held*, that the judgment-creditor could not claim to have the benefit of this payment and a purchaser with notice of those facts in the execution sale could only take a title subject to the mortgage.

Dinobundhu Shaw-Chowdhury v Jagmaya Dasi. 4 Bom L R 238=12 M L J 73=6 C W N 209=29 Cal 154=29 I A 9 P C

Notes:—Fol: 29 Mad 37; 1 C L J 531; 2 C L J 302; 938. Ref: 36 Cal 193=5 C L J 611, 33 Cal 1133=10 C W N 1010=4 C L J 121; 1 M L T 133; 7 C L J 1; 10 C L J 150; Fol: 8 C W N 690.

(32) Consent of heirs to bequest by a Mahomedan, whether amounting to alienation.

343—S. 64 (1882 s. 276)—Bequest—Heirs—Consent—Alienation—Civil Procedure Code (Act XIV of 1882), Sec. 276.

To validate a bequest by a Mahomedan, of more than one third of his property, to a stranger, the consent of the heirs required thereto by the Mahomedan Law, need not be express; it may be signified by conduct showing fixed and unequivocal intention.

Such a consent, even if given after the property is attached in execution of a decree against the heirs, does not amount to an alienation within the meaning of section 276 of the Civil Procedure Code. **Daulatram v Abdul Kayum. 4 Bom L R 132=26 Bom 497.**

(33) Transfer of property before attachment.

344—S. 64 (1882 s. 276)—Attachment—Transfer of property before attachment.

The alienation of property by a judgment-debtor, after an application for its attachment is granted, but before it is attached, is not invalid. (11 All 58 and 7 All 703, Fol). **Jowahir Lal v Jalal Din. 137 P L R 1905.**

(34) Release of easement after attachment.

345—S. 64 (1882 s. 276)—Easement-Release of, after attachment.

If an easement enjoyed by the dominant tenement is expressly released after the latter is attached under a decree, it is an alienation on a portion of that property within the meaning of s. 276, C P C., and the transaction will be void.

Krishna Dhone Mitter v Nandaranee Dassee. 12 C W N 969=35 Cal 889.

(35) Alienation of property after attachment.

346.—C P C S. 64 (1882 s 276)—Alienation of propepty after attachment.

Where a party prosecuting a decree is compelled to take out another execution, his title should be presumed to date from the second attachment. A mortgage prior to that date is not void under s. 276 **Kishen Lal v Charat Singh. 23 All 114.**

(36) Rights acquired under transfer from the judgment debtor not prevailing against attachment.

347.—C P C S. 64 (1882) s. 276.

Plaintiff derived his title to certain property both from the judgment-debtor and from the judgment creditor. But he released his rights derived from the latter reserving the former's.

It was held that the transfer by the judgment-creditor impliedly warranted that he had a good title to the property, and that the plaintiff, having accepted a title on the footing that the title

Attachment-*Contd.*

6 Alienation during attachment-*Contd.*

under the execution-proceedings was good, was consequently estopped from disputing such title.

It was also held that, under the provisions of S. 276, Civ. Pro. Code, the plaintiff acquired no rights under the transfer from the judgment-debtor which could prevail against the attachment, and that his reservation of those rights gave him no title as against the parties who claimed by sale from the judgment-creditor. **Marvadi Appala Narasiah v Sri Rajali Vyricherja. 3 M L T 295.**

(37) Effect on attachment. of agreement to sell followed by alienation by registered document.

348.—C P C S. 64 (1882 s.276)—Attachment-Previous oral agreement to sell—Effect of—Subsequent alienation by registered document—Validity of.

Where A orally agreed to sell a piece of land (worth Rs. 100) to B, but executed a registered deed to convey the land *after* the same was attached in execution of a decree *held*, (1) that, the mere contract for sale does not create any interest of charge on such property under S. 54, Tr. P. Act, (2) that the subsequent alienation under registered deed was void as against the claim enforceable under the attachment, under s. 276, C. P. C. **Sit Pi v Ma San. 5 L B R 6=2 Ind Cas 350**

(38) Effect of copy of order of attachment not affixed in Court-house.

349.—C P C O. 21, rr. 46, 54; S. 64 (1882—Ss. 268, 274, 276)—'Shall be fixed'—Attachment of mortgage debt—Copy of order not affixed in Court-house—Illegality.

A mortgage-debt was attached, but no copy of the attachment order was affixed in the Court-house as required by S. 268, C. P. C. *Held*, that the plaintiff who took an assignment of the mortgage bond four days after the order of attachment acquired a valid title, the attachment being ineffectual. **Satya Charan Mukerji v. Madhub Chunder Karmokar. 9 C W N 693.**

(39) Alienation by judgment-debtor before order of attachment intimated to heir.

350—C. P. C S. 64 (1882 S. 276)-Validity

C. C. 128

Attachment-*Contd.*

6 Alienation during attachment-*Contd.*

of alienation judgment-debtor order of attachment is served upon him.

The property of the judgment-debtor was attached; but, before the order of attachment had been intimated to the judgment-debtor he alienated the same to the plaintiff.

Held, the alienation was not void under S. 276 C P C which was not complied with. **Toto mal son of Tilokchand v Raising son of Manghermal. 1 Sind L R 176.**

(40) Debt transferred prior to but paid subsequent to prohibitory order.

351.—Where in execution of a decree against K, a prohibitory order was served on the 29th August 1888 on the defendant K's debtor enjoining him not to pay to K, a certain sum due to him; but in pursuance of an agreement come to between K, his creditors and defendant on the 18th August to the effect that the latter should pay the amount due from him to K,to K's creditors, the defendant on the 6th of September 1888 paid out the same sum, *held* that the payment was rightly made and the plaintiff who purchased the interest of K, in the disputed amount at a Court sale on 14th December 1888 got no title thereby. **Ganesh v Mess Secretary, Royal Artillery, Kirkee. 1893 P J 204.**

(41) Sale in contravention of an order of injunction.

352.—Sale by debtor—Creditor—Injunction—alienation of property void sale.

Sale by a debtor, who owes money to several creditors and has received an injunction restraining him from alienating his property to one of his creditors who has knowledge of the injunction, to the prejudice of others, is void. (9 All 497 referred to with approval) **Agarchandsa & Padamchandsa v Chajjolal Kalo 12 C P L R 109.**

(42) Alienation before attachment.

352A—Attachment-Alienation brfore attachment—Allegation of fraud.

A transfer of immoveable property made before attachment of that property, for a valid and subsisting debt, must be held good as against a person who has purchased it in execution-sale. If

Attachment-*Contd.*

6 Alienation during attachment-*Contd.*

fraud is alleged it is on the person alleging it to prove it. **Faridunnissa v Aladad Khan. A W N 1881, 77.**

(43) Alienation of decree after attachment proceedings being struck off.

352 B—Attachment of decree—Notice of attachment not served on judgment-debtor-Attachment proceedings struck off—Alienation of decree —Validity.

Where a decree of a Revenue Court in favour of the judgment-debtor was attached by the decree -holder, but the notice of attachment was not served on the judgment-debtor, and the decree-holder taking no further steps, the case was struck off the file, a subsequent alienation of the decree by the judgment debtor would not be invalid.

Rao Karan Singh v Baqar Ali Khan. A W N 1881,158.

Attachment—Alienation during attachment **See** Administration. **52 P L R 1908**

Attachment—Alienation during attachment **See** Right of suit. **7 M L T 143.**

(7) ATTACHMENT PENDING APPEAL.

(1) Attachment before judgment.

353.—Continuation of attachment.

A plaintiff before judgment attached defendant's property, but the suit was dismissed by the High Court on appeal. He filed an appeal to the Privy Council, and on his application the High Court held that it could not continue the attachment over the defendant's property pending the appeal of the plaintiff to the Privy Council, nor could it call on the defendant respondent to give security for the value of the property attached before being allowed to remove it.

Ditta Harakman Sing. 8 B L R F B 45.
Ditta Haruckman Singh v Modhoosudun Pyne 12 W R F B 16.

(2) Sale without re-attachment

354.—Sale set aside—Re-attachment.

Certain immoveable property of A (the judgment-debtor) was attached and sold in execution of a decree held by B. The execution sale was confirmed and the execution proceedings struck off, but the attachment was expressly maintained. On appeal by A, the sale was set aside. B then applied for a re-sale of the properties and

Attachment-*Contd.*

7 Attachment pending Appeal *Concld*

fresh proclamations were issued and the properties were re-sold. *Held* that this second sale could not be attacked on the ground that the properties had not been re-attached as the former attachment had been expressly maintained by the Court and was subsisting. **Ata Husain v The Bank of Upper India. 1 W N 5.**

(8) LIABILITY FOR WRONGFUL ATTACHMENT.

(1) Claim to attach property.

355—Civil Procedure Code, ss. 278, 283, 483 —Attachment before judgment — Liability of creditor who caused attachment of goods not belonging to the debtor — Damages after sale — Difference between English and Indian law on the subject.—

Orders for attachment in security under s.483 of the Civil Procedure Code being issued on the *ex-parte* application of the creditor, who is bound to specify the property which he desires to have attached and its estimated value, it follows that the attachment is the direct act of the creditor for which he is immediately responsible. Should the goods be proved not to belong to the debtor, the litigation and delay, and also any depreciation of the goods by an intermediate fall in the market, between attachment and sale, are the natural and necessary consequences of the creditor's unlawful act. The plaintiff, having taken, without success, the summary proceeding under s. 278, to get the release of goods attached under s. 487, in a suit to which he was not a party, afterwards, in a suit brought by him in accordance with s. 283, established his right of property in the goods. *Held*, that, in order to entitle him to the full indemnity for the wrongful attachment he was not bound to allege and prove that the defendants had resisted his previous application under s. 278 maliciously, or without probable cause; and that the goods having been sold under the Court's order, the difference in market-value of the goods at the time of their attachment (November 1883) and their price when they were sold (June 1884), the selling prices having fallen intermediately, must be added to the damages. *Held*, also that, without bringing under review the judgment under s 278, the effect of the judgment in the suit brought in accordance with s. 283 was to supersede the or-

Attachment-*Contd.*

8 Liability for wrongful attachment-*Contd.*

der under s. 278, and to render it inconclusive. The procedure on attachment not being the same in India as in England, where a judgment-creditor is not responsible for the consequence of a sale, under a judicial order, of goods taken in execution in satisfaction of his debt, that proposition does not hold good under the Indian procedure; and 1 H & C 621; 9 Jur, N S 53; 32 L J Exch 142, is inapplicable to the latter.

Kissorimohun Roy v. Harsukh Das, 17 Cal 436=17 I A 17.

Notes:— Ref: 27 Mad 343; 6 Bom L R 704.

(2) Liability of decree-holder for improper attachment.

355*A*—Caveat-emptor, Applicability of—Attaching creditors, responsibility of—Decree-holder, liability of, for improper attachment—Warranty of title of judgment-debtor—Revision by High Court—Small Cause Courts Act, S. 25.

Per Lindsay, A. J. C.—The rule of *caveat-emptor* has no application in India in the case of ordinary sales of goods by private contract.

In India the attachment is made at the risk of the attaching creditor and he is responsible for any results which can be traced to an unlawful attachment carried out upon application made by him. In the case of sale in execution in India, although there is no warranty given by the Court or by the officer entrusted with the duty of carrying out the sale, there is a warranty by the decree-holder that the property does belong to the judgment-debtor. The property is sold as the property of the judgment-debtor on the representation to that effect made to the Court by the decree-holder who is taking out execution.

A stranger whose property is sold behind his back without any authority does not need to have the sale set aside.

Where the decree-holder pointed a carriage as the property of the judgment-debtor and the property was thereupon attached and sold and purchased by the plaintiff's predecessor-in title, but subsequently a suit brought by a third person claiming the carriage as his own was decreed and the purchaser lost the carriage, *held*, that the plaintiff was entitled to recover the purchase money from the decree-holder. *Per Piggott, J. C.*—It is no doubt advisable that the High Court should in exceptional cases assert a general power of revision in suits tried by Small Cause Courts, where the decision arrived at appears to be capricious or perverse or arrived at in defiance of well-known principles of law. But it is not at all an adequate ground for interference under S. 25, Provincial Small Cause Courts Act, that the presiding Judge of the Small Cause Court had before him for determination a doubtful issue of law, and that his decision on the said issue, though honestly arrived at and upon a reasonable and fair consideration of the law applicable to the point and the authorities thereon, is one which this Court might not have been prepared to affirm if the matter had come before it in a second appeal. **Brij Mohan Lal v. Musammat Munni Bibi, 14 O C 343.**

(3) Suit for damages for execution of legal process without reasonable and probable cause.

355*B*—Damages, suit for—Legal process, execution of—Unintentional interference with person or property—Attachment of land—Nominal damages—Withdrawal of suit on payment of costs—Costs, where to be paid.

It is an actionable wrong to issue execution maliciously and without reasonable and probable cause against the property of a judgment-debtor; for example, to seize his goods under a writ of *fieri facias* after the judgment-debt has been paid.

The institution of an ordinary civil action, however unfounded, vexatious and malicious it may be, is not a good cause action, unless there has been arrest of person or seizure of property.

The plaintiff, if entitled to damages, can succeed, not on the ground of malicious abuse of legal process, but on the ground that the defendant has committed an act of trespass.

Mistake, however honest or inevitable, is no defence for him who intentionally interferes with the person or property of another.

Where the defendant obtained an attachment of the property of the plaintiff under an erroneous impression that he had a decree capable of execution, he is liable to be sued by the plaintiff for damages in trespass.

Attachment-*Contd.*

8 Liability for wrongful attachment-*Contd.*

If a litigant executes any form of legal process which is invalid for want of jurisdiction, he commits an act in the nature of trespass to person or property; he is liable therefore in an action of trespass; it is not necessary to prove malice or want of reasonable or probable cause.

A litigant, who effects an arrest or seizes property, must justify the trespass by pleading a valid execution of legal process, and any irregularity or error which has the effect of making the process totally invalid will deprive him of all jurisdiction.

No action lies against any person for issuing execution or otherwise acting in pursuance of a valid judgment or order of a Court of Justice, even though it is erroneous and even though it is afterwards reversed or set aside for error.

Whether there is reasonable and probable cause is a mixed question of fact and law.

Where land is attached, the standing crop also is *prima facie* attached.

As soon as the attachment was effected, the plaintiff might and ought to have intimated to the Court that, if the decree-holder intended to attach, not merely the land, but also the crop, steps had to be taken for the protection of the perishable property. If he had not asked for the direction of the Court and did not make any the slightest effort for the protection of the property, the loss resulting to him was not the inevitable consequence of the attachment effected by the defendant.

Nominal damages are not necessarily small damages. They are allowed in recognition of the fact that there is an infraction of a legal right, which, though it gives the plaintiff no right to any real damages at all, yet gives him a right to the verdict or judgment.

Where the order of the appellate Court was that, unless the plaintiff paid to the defendant the costs of the litigation within a certain time after the arrival of the record in the subordinate Court, the appeal would stand dismissed with costs, payment into Court to the credit of the defendant would be sufficient compliance with the direction of the appellate Court. (12 W R 391 Ref.) **Bishun Singh v A W N Wyatt.**

14 C L J 515.

Attachment-*Contd.*

8 Liability for wrongful attachment-*Contd.*

(4) Malice not necessary for damages.

355C.—Attachment wrongful—Tort—By Government servant—No cause of action against Government.

When an act *prima facie* wrongful is committed, and actual damages are thereby sustained, no malice need be proved to recover damages. Where the tort is committed by the servant of Government carelessly, there is no cause of action against the Government. **Ramaswami Ayengar v Raja Muthuswami Aiyer**

(1912) 1 M W N 42.

(5) Bona fide mistake, no defence to a charge of wrongful attachment.

355D.—Damages-Wrongful attachment-Bona fide mistake, no defence.

In a case of wrongful attachment, the decree-holder who moves the Court is responsible for what follows and must make good any loss suffered by the person whose goods have been wrongfully seized. He is a trespasser and a wrong-doer and is responsible for all damages, however innocently and mistakenly he may have acted. (3 Bom 74; 17 I A 17: 17 Cal 436 Ref:)

Murugappa Chetty v Karanath

12 Ind Cas 26.

(6) Liability for loss sustained through wrongful attachment.

356.—Attachment of certain property by plaintiff in satisfaction of her decree was found by the Court executing the decree to be wrongful, the attached property not belonging to judgment-debtor, and plaintiff was adjudged to be liable to the owner for the loss sustained. *Held*, on plaintiff's suit that the order adjudging the liability passed in the Miscellaneous Department was illegal, and should be set aside. The question of the legal liability of several parties to the owner for the loss sustained can only be determined in a suit brought by the owners for recovery of property or value thereof, and not in the present suit, in which they are not plaintiffs.

Elizabeth Wright v Seeta Ram

2 Agra Rep A C 105,

Attachment-*Contd.*

8 Liability for wrongful attachment-*Contd.*

(7) Liability of officer of Court for wrongful seizure of property

356A.—Execution of Decree—Liability of the judgment-creditor and the officer of the Court executing a decree, for wrongful seizure of property not belonging to the judgment debtor, considered discussed. **Vana Jagannathji v Hata Dilaji P J (1874) 136=11 Bom 46.**

(8) Liability of decree-holder for property stolen during attachment wrongfully levied.

357.—Attachment-Wrongful attachment-Property stolen during attachment—Liability of the decree-holder—Cause of action—Damages.—

Certain crops were wroungfully attached at the instance of a decree-holder. During the subsistence of the attachment, the crops were stolen: *Held*, that the decree-holder, who had obtained the wrongful attachment was responsible for the value of the crops: *Held*, further, that a complete cause of action for the recovery of the attached property accrued in favour of the plaintiff at the date of the wrongful attachment, and it was not impaired by any subsequent occurrence for which the plaintiff was not responsible. 3 Bom 74 Fol: 17 Cal 436 17 I A 17 Ref: **Bishambar Das v Goddar 6 Ind Cas 789.**

(9) Liability for attaching stranger's goods

358.—The liability of judgment-creditor, his attorney or agent and the officer of the Court, for attaching the goods of a stranger in execution, explained. **Chajju Mall v Karm Chund P R 20 of 1877.**

(10) Order on application for attachment on insufficient grounds.

359-C P C O38 r 6 (1882 S 485)-Suit for damages—Attachment under S.483,insufficient grounds-Special and general damages—Whether malice need be proved—Memo of objections withdrawn. *Held*, that an order under section 483, Civil Procedure Code passed on an application made on insufficient grounds, must necessarily cause damage to the credit and reputation of the party against whom the order is passed and general as well as special damages are recoverable in a suit at his instance.

Quære;—Whether malice need be proved in a suit for compensation for attachment under S. 483 C P C made on insufficient grounds.

Held also, that the Court has jurisdiction to pass orders with regard to the memorandum of objections, where no stamp is paid on the same and the memorandum is not moved. (11 R B D 674 Appl:) **Palni Kumarasami Pillai v S U Udayar Nadan, 4 M L T 303=18 M L J 490 =32 Mad 170=2 Ind Cas 345.**

(11) Responsibility for consequences of misuse of legal process,

360.—Misuse of legal process-Responsibility for the consequences of that misuse.

A decree-holder proceeded under s 268, Civil Procedure Code, instead of under s 273, and caused the sale of certain property which entailed an unnecessary loss to the judgment-debtor. *Held*, that a judgment-creditor, who improperly puts the law in motion, is liable for any loss to the judgment-debtor that may thereby ensue. **Khuda Yar Khan v Manzuri Begam. S C 112.**

(12) Mode of calculation of damages in a suit for damages for wrongful attachment.

361.—Suit for damages-Stay of sale pending attachment—Question of damages-Contract Act (IX of 1872), S 73.

In a suit for damages arising out of a wrongful attachment, the usual rule is to award an amount which will be as near as can be estimated to that by which the plaintiff is the worse for the defendant's wrong-doing, provided that the harm suffered by the plaintiff is a natural and probable consequence of the defendant's wrong doing. The principle of the rule is the same as of S 73 of the Contract Act.

A Court need not have much compassion for the trespasser and is bound to be exact in assessing damages.

The fact that a plaintiff causes a sale in execution to be stayed pending the attachment would not in any way affect his right to damages for wrongful attachment. (3 Bom 74 Ref). **K Mamu Naina v Raman Chetty 8 Ind Cas 1206.**

Attachment-*Contd.*

8 Liability for wrongful attachment-*Contd.*

(13) Compensation for wrongful seizure.

361A.—Articles 29, 36 and 49 - Suit for compensation—Attachment before judgment.

Article 36 Schedule II, Limitation Act is a general article governing suits for compensation for torts to which no special article applies. Article 29 provides for suits for compensation for wrongful seizure of moveable property under legal process. This article is quite general in its terms and was intended to apply to all cases where the alleged wrongful seizure was made under legal process; 27 Mad 346 approved. Article 49 has no application to a suit of this description. It applies to a case in which moveable property is wrongfully taken or detained by the defendant and not by the Court in execution of a legal process. (6 Bom L R 704 distinguished) (24 W R 298 Ref. and approved). The plaintiff's property was attached before judgment and the suit against the plaintiff was dismissed. The plaintiff more than one year after the date of the attachment but within a year from that of dismissal of the suit, brought a suit for compensation. Held that the suit was governed by s.29 and was barred by limitation. *Semble*:-that the wrong to the plaintiff was not a continuing wrong, it being complete as soon as his goods were seized. That the intention of the Legislature was not to make section 23 Limitation Act, applicable to such a case as indicated by articles 19 and 42 under which limitation is to be completed from the date of the cessation of the wrong. 23 Mad 621; 27 Mad 346; 24 W R 298 Fol: 6 Bom L R 704 Dist: **Ram Narain v Umrao Singh 4 A L J 548 = 1907 A W N 194 = 29 All 615.**

Notes: - Ref: 10 C L J 226; 14 C W N 96.

361B—Arts 29, 42—Suit for compensation for wrongful attachment or seizure :

Where the defendant caused a warrant of attachment to issue and the warrant was executed by affixing the Court seal to the outer door of the warehouse without breaking open the door and taking the physical possession of the jaggery inside : *Held* that the attachment amounted to actual seizure within the meaning of S. 269, C. P. C, and that a suit for damages is governed by Art. 29 and not by Art 42.

Nultanchand Kanyalal v Bank of Madras. 27 Mad 346.

Attachment-*Contd.*

8 Liability for wrongful attachment-*Concld.*

361C—Cause of action—Attachment of the same property by three judgment-creditors in three separate decrees—Suit for damages for wrongful attachment—Separate cause of action —Parties.

The same property was attached separately at the instance of A, B and C, under three separate applications and sold and the sale-proceeds distributed among them. The plaintiff sued for damages for wrongful attachment, and made A, who was the first to attach, the only defendant. The defendant contended that B and C were necessary parties, and as the suit against them was barred at the time when they were brought on record, it was barred against him also.

Held, that there were separate causes of action against A, B and C, and it was not necessary to join B and C, as parties to enable the Court to award the relief prayed for in the plaint. (27 Cal 493, Dist.; 28 Bom 11. Ref.) **C T M R M Meyappa Chetty v Maung Po Hnyin, 12 Ind Cas 866.**

9 STRIKING OFF EXECUTION PROCEEDINGS, EFFECT OF, ON ATTACHMENT.

(1) Effect of striking off execution proceedings, how it affects attachment.

362—The striking an execution proceeding off the file is an act which may admit of different interpretations according to the circumstances under which it is done, and no general rule can be laid down which would govern all cases of that kind; but having regard to the circumstances of the present case, *viz.*, that the Court below had no opportunity of considering the circumstances under which the several execution proceedings were dismissed, it could not be held that there was no subsisting attachment, and that the order of the Court was bad in law.

Bhagwan Ramanuj Das v Khetter Moni Dassi. 1 C W N 617

Notes:—Ref: 33 Cal 487 = 3 C L J 293 ; 1 C L J 626 ; 3 C W N 581.

362A—S. 276—Attachment—Order dismissing application for execution—Effect upon maintenance of attachment.

Attachment-*Contd.*

9 Striking off execution proceedings effect of, on attachment—*Contd.*

Where property is once attached in execution of a decree, an order merely dismissing an application for execution, which order does not contain specific words withdrawing the attachment and which is not an order declaring the decree incapable of execution, will not have the effect of raising the attachment, and if in appeal such order is set aside, the decree-holder will be in the same position as he was before and entitled to the full benefit of the attachment. (19 All 482, Fol., 12 B L R Dist.) **Imtiaz Ali v Bishambar Das. 8 A L J 619.**

362B-C P C O. XXI, rr. 57 and 66--"Default," meaning of—Attachment—Power of the Court to continue attachment after dismissing an application for execution—Court's error of Law, parties if must suffer for—Acquiescence.

Omission to issue or serve a notice under O. XXI, r. 66, C. P. C. upon the judgment-debtor is a "default" within the meaning of O XXI, r.57. There is no reason for giving a restricted meaning to the word "default" in O. XXI r. 57 and confining it to default in appearance, in the payment of process fees, or in the production of documents

The words of O XXI, r. 57, being explicit and imperative, upon the dismissal of an application for execution for default, attachment cases, even though the Court and the parties intended that the attachment should subsist. **Namuna Bibi v Roshan Mea. 15 C W N 428.**

363—Execution petitions struck off—Effect of an attachment—Jurisdiction of Court:

Even if an execution proceeding is struck off, it does not necessarily destroy the attachment, and it may be open to the decree-holder to revive the execution proceeding and continue it from the point where it had previously stopped, 18 All 49 doubted. 1 C L J 381, P. C. ref to. Even if it were otherwise where the order keeping the attachment alive was made in the presence of the judgment-debtor and without objection from him he cannot afterwards object to it. 7 All 131 ref. to. **Peari Lal Singh v Chandi Charan Singh. 5 C L J 80=11 C W N 163**

See also 33 Cal 666

(2) Revival of attachment on reversal of sale in execution of decree.

364—An attachment, once legally made, is

Attachment-*Contd.*

9 Striking off execution proceedings, effect of, on attachment—*Contd.*

revived upon the reversal of the sale in execution. **Gunno Singh v Muddun Mohun Singh. W R 1864, 26.**

Mohesh Narain Sing v Kishnanund Misser 2 Ind Jur O S, 1 : 5 W R P C; 7 Marsh, 592: 9 Moore's I A., 324.

(3) Striking off case for neglect to pay talabana fees.

365—An attachment cannot subsist when the suit has been struck off for neglect to pay in the talabana for the service of necessary sale processes. **Purbhoo Doss v Goma Bhujun Singh. 5 W R Mis 4**

Notes:—Ref: 8 W R 415; 12 W R 142.

(4) Extinguishment of attachment.

366—Act VIII of 1859, s. 270—Execution of decree—Striking off execution case—Money-decree.

A obtained a decree against C for possession and mesne profits, but no specific amount of mesne profits was then assessed. In 1864, A, in execution of his decree attached land belonging to C, but the execution case was struck off the file in 1865. After several ineffectual proceedings, A re-attached the property in March 1869. In execution of a decree againt C, B had in February 1869 attached the same property. The property was sold under A's attachment in May 1869, and on the application of A, the Subordinate Judge on the strength of A's attachment in 1864, gave priority to A's claim over that of B. The balance of the sale-proceeds, after satisfaction of A's decree, was only sufficient to cover a small portion of the decree obtained by B. In a suit by B against A, under s. 270, Act VIII of 1859, to recover the amount of her claim which remained unsatisfied,—*Held* that the attachment of A in 1864 on the strength of which A's claim was considered by the Subordinate Judge to have priority over that of B, was not sufficient and valid attachment under s. 270. The attachment contemplated by that section means an attachment after a final money-decree. *Held*, also, that the striking off of the execution case of A in 1865 caused an extinguishment of the effect of

Attachment-*Contd.*

9 Striking off execution proceedings, effect of, on attachment—*Contd.*

the attachment of 1864. **Binda Bibee v Lalla Gopeenath. 14 B L R 323 : 21 W R 66**

367.—Striking off execution case.

The stricking off of an execution proceeding affects only the files of the Court and the application for sale, and does not interfere with the continuance of any attachment under the decree, which is executed. **Nadir Hossain v Pearoo Thovildarinee. 14 B L R 425 note: 19 W R 255. Jugobundhoo Sein v Bhugwan Chunder Doss. 17 W R 15.**

367A-Execution of decree—Attachment-Removal of—Application for execution, effect of strking off—Sale after attachment void—Code of Civil Procedure s 276. *Held*, that the mere fact of an application for execution having been struck off the file does not necessarily imply that the attachment has been removed, nor can such removal be inferred from the mere fact that the decree-holder erroneously applies for a fresh attachment. It is only where the execution case is struck off after a complete termination of the case and the execution proceedings are put an end to, that such an inference can be drawn. *Held* further that this is a matter which must be determined according to circumstances of each case and that under the circumstances of the present case the attachment had not been with-drawn. (1 All 616; 20 W R 133: 12 W R 260; 21 W R 66 Ref) **Ram Das, minor under the guardianship of Ram Bharose v Ram Tahal Das 8 O C 152.**

368—Subsisting attachment.

Where property has once been attached in execution of a decree, the mere dismissal of an application for execution which does not contain specific words withdrawing the attachment and which is not an order declaring the decree incapable of execution. will not have the effect of raising the attachment, and if in appeal such order is set aside, the decree-holder will be in the same position as he was before and entitled to the full benefit of the attachment. (N W. P, H C Rep Vol 5 p 72); (14 B L R 425) (12 W R 142) referred to. **The Bank of Upper India v Sheo Prasad 19 All 482=17 W N 124.**

Notes—Ref 9 C L J 239.

Attachment-*Contd.*

9 Striking off execution proceedings, effect of, on attachment—*Contd.*

369—Execution petition subsequently dismissed—Effect of dismissal on attachment.

An attachment made after notice to the judgment debtor is not discharged by the mere fact of the application for execution being subsequently dismissed for default of prosecution.

Venkatagiri Aiyar v Sadagopachariar 14 M L J 359.

(5) Continuation of attachment.

370—If property is once attached, the attachment will subsist, if not expressly abandoned by the party, at whose suit it was issued, until an order is issued for its withdrawal, even although no further steps are taken on the attachment within a reasonable period. A mere striking of the execution case off the file by the Court, of its own motion without notice to or consent of parties, will not invalidate an attachment.

Jhatu Sahu v Ramcharan Lal 3 B L R Ap 68; 11 W R, 517. Ramcharan Lall v Jhatu Sahu 12 B L R 413 note; 14 W R 25.

370A—Attachment of immoveable property on execution of decree—Sale—Nothing realised in the sale—Question whether attachment is in force or not—Question of law or fact—Ajmere Court's Regulation 1 of 1877 ss 21, 17.

Where, under s. 21 of the Ajmere Court's Regulation I of 1877, a reference was made to the High Court in the following terms *viz.*—"Whether an attachment ceases when nothing can be realised by a sale, or remains in force till the property is for nally released by the Court which caused the attachment to take effect,"—the High Court in reply to the reference, observed that the question referred was one not properly coming within the scope of S. 17 of the Regulation not being a question of law or usage having the force of law, but a question of fact to be decided by a consideration of the circumstances of the case. **Sham Lal v Hamid A W N (1885) 57.**

370B—Code of Civil Procedure (Act XIV 1882) Sec 244—Striking off of execution proceedings—Attachment, continuance of—Sale proclamation, issue of, during the lifetime of judgment-debtor.

Even if an execution proceeding is struck off, it does not necessarily destroy the attachment, and it may be open to the decree-holder to revi-

Attachment-*Contd.*

9 Striking off execution proceedings, effect of, on attachment—*Contd.*

ve the execution proceeding and continue it from the point where it had previously stopped.

An order striking off the execution proceeding and at the same time maintaining the attachment for a limited time passed in the presence of the judgment-debtor without any exception on his behalf, even if irregular and whether or not it might have been sufficient for the purpose of avoiding an intermediate alienation in favour of a *bona fide* purchaser cannot be questioned by the judgment-debtor and the attachment continues to be effectual as against him.

Even if there had been no attachment or a defective attachment but a valid order for sale had been made during the lifetime of the judgment debtor the effect will be as that of an attachment followed by an order for sale.

Peari Lal siugh v Chandi Charan Singh 5 C L J 80=11 C W N 163

371—Striking off execution case—Release from attachment.

The striking off of a case from the file while pending in execution does not release a property from attachment. **Golam Yaheya v Shama Sundori Kuari 3 B L R Ap 134: 12 W R 142**

Contra **Khadem Hossein Khan v Kalee Pershad Singh 8 W R 49.**

(6) Attachment before and after decree.

372—Striking off execution sale proceedings.

Held that attachment issued after suit supersedes the attachment order obtained during the pendency of the suit, and that the former was taken off the property when the sale proceedings were struck off the file. **Ram Jewan v Ram Lall 2 Agra 190.**

(7) Implied withdrawal of attachment.

373—The implied withdrawal of an order of attachment even though such order was not formally withdrawn, but was understood to be withdrawn by the decree-holder, bars objection against the validity of alienation of the attached property by mortgage or otherwise. **Jugun Nath v Ghaseeram 1 N W 32 Ed 1873, 30**

(8) Case struck off for Convenience of Court.

374—Stay of execution for fixed period.

Attachment-*Contd.*

9 Striking off execution proceedings, effect of, on attachment—*Contd.*

Execution cases in which a sale or other proceedings are stayad for a fixed period at the request of the debtor, and with the consent of the decree-holder, should not be struck off till that period had expired, and if struck off for the convenience of the Court by an order which provides for the continuance of the attachment, sale may follow within the said period without a fresh attachment. **Chumun Lall Chowdhry v Domun Lall. 9 W R 205.**

375.—Stay of execution for fixed period.—Certain property having been attached and advertised for sale in execution of a money-decree, the decree-holder asked the Court to stay further proceedings for six weeks, as the debtor had made part payment, praying that the attachment might be considered to be still in force. The execution case was accordingly removed from the file. *Held* that the order striking the case off the file for the convenience of the Court did not put an end to the attachment. *Held* (Jackson J., dissenting) that the attachment continued in force notwithstanding a year's delay on the part of the judgment-creditor in applying again for execution. **DaCosta v Kalee Pershad Singh. 12 W R 260.**

(9) Order striking off attachment pending appeal.

376.—An order striking off an attachment pending an appeal does not release the property from attachment. **Shew Narain Singh v Miller. 17 W R 234.**

Notes:—Fol 17 W R 234.

(9A) Effect on attachment of decree being set aside on appeal.

376A.—Setting aside of decree on appeal—Release of attachment under decree.

The setting aside of a decree on appeal and ordering a re-trial of the suit operates *ipso facto* as a release of any attachment made in pursuance of the decree. (10 W R 99 Ref.)

Raja Gokuldass v Karansee. 9 C P L R 120.

(10) Re-attachment.

377.-Abandonment of attachment.-*Semble*:-A re-attachment of property after decree does

Attachment-*Contd.*

9 Striking off execution proceedings, effect of, on attachment—*Contd.*

not imply an abandonment of an attachment obtained before decree. **Ramkrishna Dass Surrowji v Surfunnissa Begum. 6 Cal, 129.**

(11) Stay of execution keeping attachment in force.

378.—Limitation Act, IX of 1871, Section 1—Applicatinn for execution of decree—Order erroneously allowing application barred by limitation—Decree in suits before 1st April 1873—Striking off execution proceedings.

Although an application made for execution of a decree was barred by limitation yet, if an order be made granting a subsequent application for execution of the same decree by a Court having complete jurisdiction to try and determine whether the application was barred by limitation and that order be not reversed in appeal, the order must be treated as valid.

An application for the execution of a decree is an application in the suit in which the decree was obtained, and as regards suits instituted before the first of April 1873, all applications in suits being by Section 10 cl X of 1871 included from the operation of that Act, nothing in Section 2, Section 4 or Schedule II of that Act extends to an application for execution of a decree in a suit instituted before the 1st April 1873.

When an execution sale stayed upon the application of the judgment-debter upon condition that the subsiding attachment shall remain in force, the striking off the execution proceedings from the file of the Court does not affect the rights of the decree-holder. **Mungul Pershad Dichit v Grija Kant Lahiri. 8 Cal 51=11 C L R 113. =8 I A 123.**

Notes:—Ap : 3 Bom L R 416 ; 8 All 492 ; 13 All 564 ; 6 Bom 586 ; 7 All 282. Fol 24 All 282 ; 31 Cal 822 ; 9 Cal 446 ; 11 Cal 376 ; 15 Cal 177 ; 23 Cal 374 ; 25 Cal 789; 19 Mad 54; 24 Mad 669; 683; 11 ML J 432; 5 Bom 673 F B; 6 Bom 54 ; 15 Bom 28. Expl: 14 C W N 114. Rel : 2 C L J 584; 8 C W N 672 ; 24 All 282 ; 4 C L J 573. Dist: 9 Cal 644 ; 13 Cal 257; 27 Cal 210; 28 Cal 122; 5 C W N 80; 13 Mad 347 ; 7 Bom 316 ; 15 Bom 242; 19 Bom 675 ; 22 Bom 83 ; 10 All 51; 10 C W N 209=3 C L J 240 ; 35 Cal 1050= 8 C L J 193 ; 11 C W N 236. Ex: 7 Bom 459. Con: 10 Cal 748 ; 9 C W N 956=2 C L J 384 ; 11 Cal 55 ; 13 Cal 86. Ref : 9 Cal 65; 10 Cal 196 P C ; 16 Cal 267 F B ; 457; 465 ; 20 Cal 551 ; 18 Mad 482 ; 7 Bom 341 F B , 8 Bom 340; 9 Bom 328 ; 11 Bom 537 ; 14 Bom 206; 516; 15 Bom 438 ; 16 Bom 731; 6 All 269 P C , 12 All 581 ; 15 All 84 F B; 16 All 389 ; 443 ; 31 Cal 822 ; 1 C L J 500 ; 2 C L J 499 ; 34 Cal 13 ; 6 C L J 462 ; 30 Mad 255 ; 17 M L J 201 ; 13 C W N 1197 ; 10 C L J 420.

Attachment-*Contd.*

9 Striking off execution proceedings, effect of, on attachment—*Contd.*

378A.—Proceeding struck off—Effect of, on attachment :—

When an execution proceeding is struck off, it does not necessarily put an end to the attachment. It is complete for the Court to make an order striking off an execution proceeding and at the same time confirming the attachment. 18 All 49 diss from. 32 I A 102 relied on.

Peary Lal Singh v Chandi Charan Sinha. 11 C WN 163.

See also 33 Cal 666.

(12) Order postponing sale and striking case off the file.

379.—Effect of, on attachment.—

When property has been attached in execution of decree, and the parties applied that the sale might be postponed, the Court executing the decree ordered the sale to be postponed, and the "case to be struck off the file", *Held* by the majority of the Court—the Chief Justice and Roberts, Turner, and Spankie, JJ. (Ross and Pearson, JJ, dissenting)—that, in as much as there was no order passed directing the removal of the attachment, but on the contrary it appeared that it was the intention of the Court and of the parties that the attachment should continue, the direction that the case should be struck off the file of pending cases did not operate to remove the attachment. **Ahmud Hossein Khan v Mahomed Azeem Khan. 1 N W 5 : Ed 1873, 48=Agra F B, Ed 1874, 175.**

Attachment-*Contd.*

9 Striking off execution proceedings, effect of, on attachment-*Contd.*

(13) Case struck off file of pending cases

380.—Effect of, on attachment.

A case of execution of decree, in which an attachment had been taken out, was struck off the file of pending cases by the order of the Court executing the decree. The plaintiff never asked for or consented to the withdrawal of the attachment, nor did the Court by any formal order withdraw the attachment. *Held* that the attachment was not terminated by the order which struck the case off the file of pending cases.

Mookheshur Rai v Ramphul Sahoo. 5 N W 70.

381.—Effect of on attachment.

The attachment of property by a judgment-creditor ceases on his execution case being struck off the file, and he is remitted to his former position of a simple judgment-creditor, and must begin *de novo* and re-attach the property before a sale at his instance can take place.

Luchmeeput v Lekraj Roy. 8 W R 415.

(14) Attachment without direction that money should be held subject to further order.

382.—Dismissal of suit—Effect of, on attachment—Civil Procedure Code, 1859 s. 237.

Where an attachment of money in the hands of a Deputy Collector was made by a Civil Court, without any such direction as is enjoined by s. 237, Civil Procedure Code, that the money should be held subject to the further order of the Court, it was held that the attachment ceased to be binding when once the suit was dismissed.

Luchmeeput Singh Doogur v Humphry. 14 W R 101.

Notes.—Ref: 5 Bom 393

(15) Release of property from attachment.

383.—Civil Procedure Code, 1859, s. 246—Effect of decree in suit to establish right.

Certain property having been released from attachment on a claim made under Act VIII of 1859, s. 246, the attaching creditor brought a suit and obtained a decree establishing his right of attachment. *Held* that the effect of the decree was to set aside the order of release and to restore

Attachment-*Contd.*

9 Striking off execution proceedings, effect of, on attachment-*Contd.*

the state of things which it had disturbed.

Mahomed Warris v Pitambur Sen. 21 W R 435.

Notes.—Fol; 23 Cal 829; 10 Bom 400; 31 All 367. Ref: 6 A L J 434.

(16) Stay of execution on security pending appeal.

384.—Alienation pending attachment—Striking off execution case on inability to give security.

While an appeal from a decree was pending before the Privy Council, the decree-holder (M) applied for execution, and attached the property of judgment-debtor B who thereupon obtained an order of the High Court for stay of sale until security could be furnished. The decree-holder having failed to furnish adequate security, the execution case was struck off. The appeal to the Privy Council having been dismissed, the decree-holder revived execution proceedings, adding costs and interest to her original claim. Upon this a third party intervened, and objected to the attachment on the ground that he had obtained a mokurari pottah of the properties from B's representative. The objection having been allowed under Act VIII of 1859, s. 246, M brought a suit to have the mokurari declared to be invalid and fictitious. *Held*, that plaintiff was not required to cause M's admitted proprietary right to be sold before she could maintain her suit. *Held* that the act of the Court in striking off the execution proceeding because of the inability of the decree-holder to furnish the required security was only for the convenience of business, and it left intact all the proceedings which had been taken up to that stage; nor did the decree-holder abandon the attachment, which was therefore subsisting when the mokurari pottah was granted. Accordingly the alienation of the property by the pottah was invalid and inoperative. **Soondur Singh v Buhooria Alum Bashee. 24 W R 36.**

(17) Sale at instance of one attaching decree-holder during the pendency of other attachments.

385.—Priority of attaching creditors—Rival decree-holders—Civil Procedure Code (Act VIII of 1859), ss. 240, 243, and 270, and Act XIV of 1882, ss. 284 and 295

Attachment-*Contd.*

9 Striking off execution proceedings, effect of, on attachment *Concld.*

When a property is sold in execution of a decree, it cannot be sold again at the instance of another decree-holder who may have attached it before the attachment effected by the decree-holder under whose decree it is not actually sold; and when a judicial sale takes place, all previous attachments effected upon the property sold fall to the ground. **Kashy Nath Roy Chowdhry v Surbanand Shaha. 12 Calc 317.**

Notes.—Appl: 6 C W N 57. Ref: 16 Bom 91; 22 Bom 88; 6 C L J 130. Rel: 34 Cal 836.

(18) Stay of execution and striking off case "for the present."

386—Duration of attachment—Effect of mortgage made after "striking off" of execution proceedings.

An application for execution of a simple money-decree having been made on the 6th December 1873, and fresh attachment made thereon in terms of an arrangement between the judgment-debtor and the decree-holder, the proceedings were, on the 31st December 1873, stayed for a month, and the execution case was by an order "struck off for the present," the judgment-debtor undertaking not to alienate certain property in the meantime. Nothing was done by the decree-holder until the 30the November 1874, when a fresh application for attachment and sale was made. On the 2nd February 1874, the judgment-debtor had mortgaged the property in question. *Held* that on that date there was no subsisting attachment, and that from that time the mortgage lien attached to the property.

Gunga Gotti Pal v Ram Sunder Dutt. 8 C L R 157.

10 GENERAL CASES.

(1) Attachment effecting no transfer of property.

387—Effect of.

An attachment effects no transfer of ownership. It is rather a prohibition of transfer, since it is a process preparatory to sale by which intermediate transfers or charges are prevented and the title to the property kept in *statu quo*. **Shivlal v Mulaji. 1 Bom L R 154.**

(2) Liability for sale consequent on wrongful attachment.

387A—Wrongful attachment and sale—

Attachment-*Contd*

10 General Cases—*Contd.*

Invasion of right-Attachment—Effect on owner's title-Sale—Owner's title passes by.

Where the attachment itself is wrong, the sale of properties so attached is a fresh and greater invasion of the rights of the lawful owner.

The person injured might have sued but is not bound to sue.

The attachment gives the creditor only certain rights The title to the properties continues, even if his objection to the attachment be disallowed.

The sale passes the title. It affects the owner's title differently and to a greater degree than an attachment. 31 All 10 Ref: 18 M L J 590 Ref: **Anantharazu Garu v Narayanarazu Garu. (1911) 2 M W N 531.**

(3) Sale before attachment valid, if bona fide and for good consideration.

387B.—Attachment—Suit to establish right to attach property—Sale before attachment valid, if bona fide and for good consideration—Fraud—Burden of proof—Buddhist Law—Sale of his share by co-sharer—One co-heir acting on behalf of all.

There is nothing to prevent an owner from selling or any one from purchasing property before it is attached, provided the transaction is *bona fide* and for good consideration. The burden of proving fraud rests on the creditor who impeaches the sale.

A sharer has an absolute right to dispose of his own share, even while the property is undivided subject to the right of pre emption by co-heirs.

It is common to find one or more co-heirs acting on behalf of the general body of co-heirs. **Subramanian Chetty v Maung Shwe The 11 Ind Cas 781.**

(4) Effect of revival of execution proceedings on attachment.

387C.—C P C O. 21, rr.57,58—Execution proceedings-Effect of reversal-Application dismissed for default—Review—Private sale of property—Attachment, object of.

A revival of execution proceeding does not operate as a revival of the attachment so as to prejudice the rights of strangers who have in the interval acquired a title to the property.

Attachment-*Contd.*

10 General Cases—*Contd.*

The reversal of judicial orders leaves unaffected the rights of strangers, *bona fide* purchasers, whether under execution sale or under private sale, who have acquired title on the assumption that such orders were valid in the law.

The true object of attachment is to place the property in the custody of the Court so as to make it available for the realisation of the fruits of the decree. If, by reason of dismissal of the suit or of the default of the decree-holder, the Court dissolves the attachment, the property ceases to be in the custody of the Court. Upon reversal of the decree or upon cancellation of the order of dismissal for default, the decree-holder may ask the Court to take the property back into its custody, but in the absence of statutory provision to the contrary, the Court cannot do so with retrospective effect, so as to prejudice a title that may have been acquired in the interval by a stranger, when the property was admittedly not in the custody of the Court. 11 C L J 254; 37 Cal 107. **Patringa Koer v Madhavanand Ram. 14 C L J 476.**

(5) Effect of order disallowing objection to attachment.

387D—Foreclosure proceedings taken under the Regulation, validity of—Notice issued under the Regulation, procedure necessary to be observed in the issue of—Duty of Civil Court–Redemption, suit for—objection to attachment -Dismissal for want of prosecution, effect of—Regular suit necessary to set aside the order.

A person, who relies upon the foreclosure of a mortgage under Regulation XVII of 1806, must prove that each step required by that Regulation was properly performed. Where, therefore, it is proved that the notice issued to the mortgagors did not contain the signature of the presiding officer, the mere fact that the order passed stated "as the service has been duly effected let the application be consigned to the records," was no proof that the prescribed procedure had been followed. In the absence of proof of such procedure, the foreclosure cannot be deemed to have been complete.

The action of the Civil Court in issuing and serving notice is purely ministerial, and it is only when a mortgagee seeks for possession of property that the Court is called upon to decide judicially whether the prescribed procedure has been followed.

Attachment-*Contd.*

10 General Cases—*Contd.*

When an objection to an attachment had been thrown out on the ground that the objector failed to deposit the necessary process-fee, the order disallowing the objection is conclusive against the party against whom it has been passed, if no regular suit has been brought within a year to get the said order set aside 11 O C 180 Foll. **Dharma v Madar Singh. 12 Ind Cas 345.**

(6) Effect of attachment which is defective on alienation.

388—*Held* that where property had not been attached in the manner required by law, e. g., where a copy of the order of attachment was not fixed upon the Court-house or in the Collector's office, its sale to a third person could not be affected by such attachment. 2 All., 58 followed. **Birmh Deo v Gopal Nath 1 W N 65.**

389—Effect of.

Attachment only prevents alienation, and does not confer title. 25 Cal 179 Fol. **Byramji v Chunilal. 27 Bom 266.**

(7) Order of attachment made under a wrong section.

390—S. 282 C. P. C.—Order under s 282 after one under s. 244.

In this case the Court of first instance made an order under s. 244 of the Code of Civ. Pro. which was confirmed in appeal. The case came again before the first Court and this time it made an order under s. 282 of the Code of Civil Procedure. *Held* that the order was *ultra vires* and illegal and must be set aside. **Bunyad Ali v Jagar Nath 5 W N 270.**

Attachment—s. 283 C. P. C.-Orders falling within section—Order under s. 244. See s. 244.

(8) Setting aside of sale in execution of decree not affecting other attachments.

391—Sale in pursuance of one—Sale set aside under S. 310 A—Revival of other attachments—Waiver:

Where a sale held in execution of decree is set aside under S. 310 A by payment to the decree-holder who brought the property to sale, the attachment made at the instance of other decree-holders is not thereby cancelled. **Mohamedsha Khan Sahib v Srinivasulu. 13 M L J 221.**

Attachment-*Contd.*

10 General Cases—*Contd.*

(9) Order for attachment of money previously obtained by order of another Court.

392.—Subordinate Judge—Attachment under Chapter XXXIV of the Civil Procedure Code (Act XIV of 1882)—Money—Chose in action.

The applicant obtained a money-decree in the Sub-Judge's Court at Mahad against opponent No. 2, and in execution of it obtained an order for attachment from the Mahad Court against certain money payable to opponent No. 2 in the hands of the Mamlatdar of Mahad. The Mamlatdar refused to hand over the money to applicant, on the ground that the money were already attached by an order of the Subordinate Judge of Alibag. The applicant contended that the Alibag Court had no jurisdiction to attach the money:

Held, that the Alibag Court had jurisdiction, since the property was a chose in action due from the Collector, who, like the judgment-debtor, resided within the jurisdiction of the Alibag Court.

Ravji v. Narain, 3 Bom L R 462.

(10) Duty of Court to inquire into the nature of objections taken to attachment.

393.—Objections to—Inquiry into.

Where objection is taken by mortgagee to attachment by decree-holder, the Court should inquire into the nature of those objections

Chhaganlal v Moti. 2 Bom L R 476.

(11) Attachment in execution of decree.

294.—Limitation Act (XV of 1877), S.11, Art 179—Limitation—Application for execution.

Where on an attachment in execution of a decree upon notice under sec. 248 C. P. C., the judgment-debtor pleaded limitation, but after certain adjournments at the instance of the decree-holder neither party appeared at the hearing and orders were made refusing the application for execution and dismissing the judgment-debtor's objection for default.

Held, that the aforesaid order does not preclude the judgment-debtor from urging when subsequently another application for execution is made, that the previous application was barred by limitation. **Bhola Nath v Profulla Nath 5 C W N 80=28 Cal 122**

Notes:—Dist: 8 Cal 51; Rel: 15 All 198; Ref: 11 Cal 301.

(12) Attachment, effect of.

395.—Effect of.

Attachment-*Contd.*

10 General Cases—*Contd.*

The attachment of any property does not *per se* create any interest in the attaching creditor but merely gives him the right to take further proceedings which might enable him to recover the amount of his judgment-claim.

Jitmal v Ramchand. 7 Bom L R 488=29 Bom 405.

(13) Appointment of manager for property other than that attached.

396.—Section 243, Act VIII of 1859—Appointment of manager for other property than that attached.

Held by Boulnois and Melvill, JJ., (Lindsay, J, dissenting), that a Civil Court executing a decree can appoint a manager under Section 243 of Act VIII of 1859 only for the property that has been actually attached upon the judgment-creditor's application, and not for other property of the judgment-debtor, as the Code merely contemplates attachment, seizure and sale, and not a *quasi*-insolvency proceeding,—a winding up of the debtor's estate and liquidation of his liabilities. **Fatteh Singh v Ganga Pershad. P R 53 of 1874.**

(14) Attachment of decree by one of the judgment-debtors in execution of his own decree.

397—C P C O. 21 rr. 16, 53 (1882 ss 232, 273)—Decree against several persons—Attachment of decree by one of the judgment-debtors in execution of his own decree—Attachment does not vest ownership——Attached decree capable of execution against co-judgment debtors—Code of Civil Procedure (Act XIV of 1882) ss. 232, 273—Distinction between attachment and assignment of decree.

The rule that, when a decree is assigned, one of several judgment-debtors cannot take out execution, is founded on the ground that, by purchasing the decree, the assignee of it has discharged it and the decree no longer subsists, and his only right is to claim contribution from the other judgment-debtors. In the case of a decree which has been attached, the person, who has caused it to be attached, has not acquired the ownership of the decree, and the person who attaches it is competent to do what the original decree-holder may have done. Hence, where a person attaches a decree against himself and several others, in execution of a decree obtained by him against his decree-holder, *held* he is competent to take

Attachment-*Contd.*

10 General Cases—*Contd.*

out execution of the attached decree against co-judgment-debtors. **Kalyan Singh v Damber Singh.** **6 A L J 564=2 Ind Cas 626.**

(15) Effect of attachment of decree.

398.—C P C O.21 r. 53 (1882 s.273)—Limitation Act, Sch. 11, Art 179, Cl. (2)—Attachment of decree—Effect of—Decree-holder's right to apply for execution—Application in accordance with law.

S. 273 of the Civil Procedure Code does not render the decree attached under it permanently incapable of execution and does not destroy the decree holder's interest in the decree attached. It merely operates as a stay of execution unless and until the events mentioned therein take place and delays the realisation of the decree by the decree-holder. An application for the execution of a decree by the decree-holder when his decree has been attached and while the attachment is yet subsisting is one in accordance with law and keeps the decree alive and a subsequent application made within 3 years of such last mentioned application is not barred by Art. 179 Cl. (2) Limitation Act. **Petumma v Idivi Beari.** **13 M L J 265.**

(16) Breaking outer doors for the purpose of attaching moveable property.

399.—Breaking outer doors.

For the purpose of attaching moveable property in execution of decree, the officer of the Court may break open the outer door of the person's house against whose property the attachment is issued.

Query, as to breaking an outer door to effect an arrest. **Mussammat Chaoli v Dina Nath.** **P R 72 of 1876.**

(17) Injunction to remove prohibitory orders.

400.—Sections 268 and 344—351 and 355—Application to be declared an insolvent—Prohibitory order—Insolvent—Injunction to remove prohibitory orders.

There is nothing in Chapter XX of the Code of Civil Procedure which authorizes a Court to which an application under section 344 has been made to stay the execution of decree in another Court against the applicant's property before the applicant is declared an insolvent and a receiver is appointed. **Mohan Lal v Mr. J Potts.** **5 C P L R 112.**

(18) Attachment of mortgaged bullocks, whether necessary before sale.

401.—Ss. 269, 320.

Where the plaintiff had obtained a decree against defendant both being agriculturists, on a mortgage of a house and two bullocks, *held*, that an attachment of the mortgaged bullocks was not necessary before sale, that the said bullocks could be sold notwithstanding sec. 266, that the Civil Court should sell the bullocks and not the Collector, but that after the sale of the bullocks, the decree against immoveable property should be transferred to the Collector to be dealt with under section 320. **Bapuji v Mahadu.** **1892 P J 111.**

(19) Attachment of live-stock.

402.—Section 269—Security—Depositary—Safe custody of live stock—Attachment-Realization of security by summary process in execution.

The security given by a depositary for the safe custody of live-stock which has been attached (Civil Circular. l. 31) cannot be realized by summary process in execution. (12 C P L R 149 dissented from.) 15 Cal 497; 22 Cal 25; 12 Bom 411; 17 All 99; 13 Mad 1; 19 All 247 referred to. **Jiwraj Hazarimal v Fakir Maniram.** **13 C P L R 104.**

(20) Submission to prohibitory order through mistake of fact

403-C P C O. 21 r.46 (1882 S. 268)-Prohibitory order—Submission to—Mistake of fact-Subsequent refusal to remit

Where an officer submitted to a prohibitory order under S. 268 and held in deposit the amount that fell due to the judgment-debtor under a mistake of fact as to the Court from which the order emanated and afterwards found that the Court which issued the prohibitory order, was not competent to do so, he will be justified in subsequently refusing to remit the money to the Court which issued the illegal order. **Abdul Gafur v Albyn.** **7 C W N 821=30 Cal 713.**

Notes:—Fol: 5 Bom L R 803=28 Bom 198,

Attachment-*Contd.*

10 General Cases—*Contd.*

(21) Effect of absence of order of attachment on plaintiff's right to rateable distribution.

404.—C P C O.21 r· 46; S. 73 (1882 S.268, 295) -Attachment-Injunction ordered Execution application struck off, whether pending-Claim for rateable distribution.

The plaintiff applied in April, 1900 for attachment of the 1st Defendant's right to receive a monthly allowance and for an injunction directing the disburser of the allowance to pay it into Court as it fell due. The sub-Judge did not attach the right, but ordered on 23rd April 1900 notice as regards the injunction and on the 4th May, 1900, the order was made absolute. On the 18th July payment not having been made, the plaintiff's execution application was struck off.

Held, that the order of 4th May cannot be taken as an order effecting an attachment under S. 262, C. P. C., and that as the last order closed the plaintiff's execution proceedings there was no execution application pending and therefore the plaintiffs had no right to claim rateable distribution under section 295, Civil Procedure Code. (1 Mad 383, Ref). **T. Ranganatha Tawker v T. Seetharama Chetty. 7 M L T 110=5 Ind Cas 820.**

(22) Right of attaching creditor to attached property.

405.—Attachment of crops by decree-holder —Removal of same by a claimant whose claim was rejected—Right of decree-holder to sue for damages-Right of attaching decree-holder to attached property—Section 244 I. P. C.

Crops attached in execution were removed by defendants after a claim by them had been rejected in a suit for damages.

Held that the decree-holder has acquired a legal right by the attachment to have the attached property kept in *custodi legis* and to have the whole of the attached property applied in satisfaction of the debt if no other creditor came forward and in any case to have a rateable proportion so applied. That an interference with this right is an actionable wrong sufficient to support an action for damages. That the amount of damages cannot exceed the value of the crops attached. That section 244 of C. P. C. is no bar to the suit. **Sankarabinga Reddy v Kandasamy Thevan 2 M L T 365 =17 M L J 334=30 Mad 413.**

Attachment-*Contd.*

10 General Cases—*Contd.*

(23) Attachment, effect of.

406.—Attaching creditor—Right to sue for a declaration that another attaching creditor has no right to attach—Attachment, effect of.

The plaintiff attached the property in dispute in execution of a simple money-decree. Another judgment-creditor of the same judgment-debtor attached the same property. The plaintiff brought a suit for a declaration that the property was not saleable in execution of the decree of the second judgment-debtor. It was found that the decree was not tainted by fraud. *Held*, that the plaintiffs had no cause of action, as the second decree was a decree by a competent Court and was not tainted with fraud. (25 Bom 337 Ref). Attachment prevents only voluntary alienation attempted or proposed. It does not give a *locus standi* to a person attaching property in execution of a simple-money decree to dispute a decree of a competent Court. 25 Cal 179 Ref.

Lachmi Dayal v Hardanni Lal. 25 All 347 =A W N 1903.61.

(24) Deposit for a specific purpose.

407.—Money kept in deposit for a specific purpose—Liability to attachment and sale in execution.

A mortgagor placed in deposit with the mortgagee a portion of the mortgage-amount in trust to be expended by the latter on the occasion of the marriage of the former's daughter. A creditor of the mortgagor attached and sold, in execution of a decree obtained against the mortgagor, the deposit amount, and himself having become the purchaser now sued the mortgagee for recovery of the amount. *Held* that such suit must fail since it was kept by the mortgagor with the mortgagee in trust for a specific purpose of meeting the expenses of his daughter's marriage in the discharge of parental duty. **Mehr Chand v Gokal Mal. 7 P L R 1905.**

408.—Right of suit-Attachment of—Wrongful removal of attached property by stranger—Right of suit of attaching creditor,

Attachment-*Contd.*

10 General Cases—*Concld.*

A judgment—creditor who attaches the property belonging to his judgment-debtor does not derive any greater interest in the property by reason of the attachment than he had in it before the attachment: and he has no right of suit against a person who has wrongfully removed the attached property. His proper remedy is to move the Court executing the decree. 27 All 378 Ref: 6 Cal 663 Comp. **Karuppan Chetti v Kandasami Thewan. 17 M L T 84= 30 Mad 207. (on appeal 30 Mad 413).**

Attachment.

See (1) Appeal, Execution of decree
(2) Small Cause Court mofussil

--Before judgment.

See (1) Attachment
(2) Attachment before judgment

-before judgment of fund in hands of third party.

See Attachment-Attachment before judgment

--by creditor of judgment-debtor's surplus sale proceeds.

See Attachment-subjects of attachment

--consequence and effect of.

See Attachment-Mode of attachment &c.

—in Execution.

See Onus of Proof.

—made without sanction of Court

See Attachment—Liability for wrongful attachment.

Attachment not prohibitory of suit by creditor against debtor

See Attachment—Mode of attachment &c.

--of allowance payable through post office

See Attachment—Subjects of attachment.

--of ancestral estate.

See Attachment—Subjects of attachment.

--of assets of judgment debtor outside the jurisdiction of attaching Court

See Attachment-before judgment.

Attachment-*Contd.*

--of assigned villages granted to a Hindu widow in lieu of maintenance

See Attachment—Subjects of attachment.

-of compulsory deposits of Railway servants.

See (1) Provident Funds Act
(2) Subjects of attachment

--of debt.

See (1) Payment into Court
(2) C P. C. O. 21 r. 46

--of debt before judgment.

See Attachment—subjects of attachment

--of debt by third party.

See Attachment—subjects of attachment

--of debt due to judgment debtor.

See Attachment—subjects of attachment

--of debt of which the amount is unascertained.

See Attachment—subjects of attachment

--of decree.

See Attachment—subjects of attachment

--of decree for money.

See Attachment—subjects of attachment

--of equity of redumption.

See Attachment—subjects of attachment

--of estate.

See Attachment—subjects of attachment

- of family property in execution against father alone.

See Attachment—subjects of attachment

--of firm's property in execution of decree against insolvent partner.

See Attachment—subjects of attachment

--of future estate.

See Attachment—subjects of attachment

--of immoveable property.

See Attachment—subjects of attachment

Attachment *Concld.*

-of immoveable property in execution of decrees of two Courts of some grade.

See Attachment—subjects of attachment

--of Inam under Act XI, 1887.

See Attachment—subjects of attachment

--of letters in Post Office.

See Attachment—subjects of attachment

—of share of partner in partnership business.

See Attachment—subjects of attachment

--of standing crops.

See Attachment—subjects of attachment

--suit to set aside.

See Right of suit

--of Talukdari Village for arrears of land revenue.

See Sale for arrears of revenue

--of tenure in execution of decree for arrears of rent by a fractional co-sharer.

See (1) Sale for arrears of rent
(2) Attachment—subjects of attachment

--termination of

See Attachment

--of unascertained interest in a partnership firm.

See Attachment—subjects of attachment

--under decree of High Court of property already attached under decree of Small Causes Court.

See Attachment—subjects of attachment

Attainder, Law of.

See English Law.

Attempt by one Co-sharer to mortgage his undivided share on his account.

See (1) Hindu Law—Joint family.
(2) Alienation.
(3) Co-sharer.

Attempted adoption of sister's, son Brahman

See Hindu Law—Adoption.

Attempted family settlement in perpetuity

See Mahomedan Law.

Attempt to attach surplus after fulfilment of trust.

See Attachment—Subjects of attachment.

Attempt to establish trust for claimants as to parts of Talukdari estate.

See Oudh Estates Act.

Attempt to sell mortgaged property in execution of money decree for rent.

See (1) Mortgage—sale of mortgaged property.
(2) Sale in Execution of decree-Mortgaged property.

Attestation,

See (1) Cases under Deed—Attestation.
(2) Deed—Execution.
(3) Stamp Act S. 3, Cl. 4.
(4) Cases under Will—Attestation.

—Want of

See (1) Evidence Act, S. 68.
(2) Estoppel.

1—Proxy Papers—required to be attested by a witness—Attesting witness also the notary—effect of:

Where to enable a share-holder to vote by proxy the articles of association of a company required that it should be attested, the fact that the attesting witness is also the notary does not invalidate the attestation. **Bombay Burma Trading Corporation. 27 Bom 113 =4 Bom L R 953.**

2—Attestation, meaning of.

Attestation means that what is said to be attested happened in the presence of the attestating witness:—See T P A S. 59. **Dinamoyee Debi v Bon Behari Kapur. 7 C W N 160.**

Notes:—Ref: 33 Cal 861=4 C L J 41=31 Mad 215.

3—Attestation, what is.

"To attest is to bear witness to a fact and it is not necessary that the witness attesting

Attestation-*Contd.*

document should sign his name personally. 9 M N W 404; 9 Q B D 13?; 4 E B 459 Ref to.

Sasi Bhusan Lal v Chandan Peshake.
4 C L J 41=33 Cal 861.

4—Scribe of body of document not expressly signing as attesting witness—Whether can be regarded as an attesting witness.

A scribe of a document, who writes his name as the writer of the document, cannot on that account pose as an attesting witness even if he did see the deed signed by the executant or even if he wrote the signature to the deed for the illiterate executant and wrote his name also as the actual writer of the executant's signature. 6 N L R 152. Fol. **Saroopchand v Tularam.**
8 N L R 17.

5—S 59—Mortgage-deed—Attestation-Attesting witness interested in the money advanced though not a party to the deed-Valid attestation.

A person, who is interested in the money advanced under a deed of mortgage, but who is not himself a party to the deed, can validly attest the deed. **Balu v Gopal** **13 Bom L R 944.**

6—Mortgage-Attestation by only one witness—No proof required when mortgage is admitted by the other side—Evidence Act (1 of 1872), S. 58—Effect of not impeaching the informality of the mortgage in the first Court at the first hearing.

Where the defendants in their written statements admitted that they had executed a deed of mortgage on account of an old debt due by them, and that subsequently it was arranged that a third person who was not a party to the mortgage should pay the debt and redeem the land :

Held, that this was a clear admission that the relation of mortgagor and mortgagee was established between the defendants and the plaintiffs, and that, therefore, the production of the mortgage-deed was unnecessary under the provisions of S. 58 of the Evidence Act.

The validity of the mortgage cannot be questioned in such a case, even if the deed is attested by one witness only.

A Court can take no account of the informality of a transaction which was not put in issue. U B R (1897-1901), p. 379, Foll.

Maung Kan v Maung Myat Thaing.
11 Ind. Cas. 850.

Attestation-*Contd.*

7—Estoppel—Attestation—Burden of proof.

A party to a document cannot avail himself of attestation as creating an estoppel against an attesting witness, unless it is shown that he was deceived by such action on the part of the person attesting. The burden of proving such deception would lie on the person pleading such estoppel. **Maung Tha Maung v Maung Shwe The.** **12 Ind. Cas. 891.**

8—Attestation, estoppel by:—Mere attestation of a deed does not necessarily import an assent to all the recitals contained therein. 3 C. W. N. 207 ref. to. **Imam Ali v Baij Nath Ram Sahu**
10 C W N at 559=33 Cal 613.
=3 C L J 576.

Notes.—Ref: 10 C L J 490, 36 Cal 675=9 C L J 523;6 C L J 141; 14 C W N 165; Appr. 11 C W N 350 F B; 35 Cal 519 F B; 5 C L J 242 F B; 10 C L J 150, Dist 7 C L J 274; 6 C L J 46. Not Fol: (1908) W N 226.

9—S. 59—Zurpeshgi Patta—Attestation—document executed by purdanashin lady.

Where it appeared, from the evidence of the attesting witnesses to a *Zurpeshgi patta*, executed by a purdanashin lady, that the witnesses were present in the room where the lady singed the document, but that she was behind a purda or screen at the time when she actually affixed her signature.

Held—per Brett J. that, having regard to the custom of this country, there was a sufficient compliance with the provision of S 59 of the Transfer of Property Act. 27 Cal 190. 4 C L J 41; 16 Cal 19 Ref.

Held, on appeal under the Letters Patent (Rampini C J and Mitra J.)—that there was nothing to show that the attesting witnesses did not see the lady sign the deed, and that moreover, the Court could not interfere at this stage with the concurrent findings of three Courts on a question of fact. **Harmongal Narain Singh v Ganaur Singh 13 C W N 40=3 Ind Cas 309.**

Notes:—Ref: 14 C W N 165.

10——Deed— Execution of deed— Absence of attestation-Signature by the writer of the deed—Signature by Registrar under S. 63-A of the Dekhan Agriculturists' Relief Act (XVII of 1879)

Attestation-*Concld.*

not valid attestations. A deed of mortgage bore at its conclusion the signature of the writer of the deed and also the signature of the Sub-Registrar under S. 63-A of the Dekhan Agriculturists' Relief Act, 1879. It was not separately attested by two witnesses as required by S. 59 of the Transfer of Property Act, 1882.

Held, that neither the one nor the other signature can be treated as an attestation: and the deed, therefore, was not validly executed.

An attesting witness is a witness who has seen the deed executed and who signs it as a witness. (10 C and F. 340 Fol:)

Ranu Shivji Barate v Laxmanrao Krishna. 10 Bom L R 943=33 Bom 44= 1 Ind Cas 464.

Attestation—Joint Hindu family—Of sale-deed by father—Son's right of pre-emption—Pre-emption—Loss of right to pre-empt by waiver, etc., **10 C 252.**

Attestation and Proof of wills.

See Hindu Law—Wills.

Attestation of deed, effect of.

See Deed—Attestation.

Attestation of document by the Court or its officers.

See (1) Stamp Act.
(2) Deed.

Attestation of will by two Witnesses.

See Will attestation.

Attesting witness.

See Attestation.

Attesting witness.—An attesting witness is he who has seen deed executed and who signs it as a witness. **Ranu v Laxmanrao 10 Bom L R 943.**

Attorney.

See (1) Cases under attorney and Client.
(2) Cases under Costs—Special Cases—Attorney and Client.
(3) Counsel.
(4) Evidence Act Ss. 68--72.
(5) Letters Patent, High Court cl. 10

Attorney *Contd.*

(6) Privileged Communication.
(7) Taxation of Bill of Costs.
(8) Witness—Civil Cases—Person competent or not to be Witness.
(9) Guardian—Liability of guardian—Change of pending suit.

See Costs-Special Cases-Attorney and client.

—Improper conduct of—

See Receiver.

—Lien of, for costs

See Cases under (1) Costs—Special—Cases—Attorney and Client.
(2) Set-off—General Cases.

1—Striking off the roll—Misconduct.

Where an attorney knowingly prepares a conveyance containining untrue recitals of the transaction between the parties thereto, and attests the deed and a receipt for consideration-money, which to his knowledge, was never paid, or intended to be paid, the production of such a document to the Court is sufficient ground for calling upon the attorney for an explanation of his conduct. But if such explanation be given, supported by evidence to the effect that there was no fraudulent intent, and if no fraudulent use of the deed has in fact been made or attempted, nor any injury caused thereby, it is not sufficient ground for striking the attorney off the rolls of the Court-*Semble*-The High Court in Calcutta is not authorized in striking an attorney off the rolls when such a step would not be sanctioned by the practice of the Courts in England. **Stewart. 1 B L R P C 55=10 W R P C 43.**

2—Attorneyship examination-Board of Examiners, discretion of—Mandamus—Jurisdiction of the Court to interfere—Letters Patent, 1865, cls. 9 & 10—Specific Relief Act (I of 1877), S. 45—Rules of the High Court, No 111 to 118 and 122.

Semble, the Court has no jurisdiction to interfere with the discretion of the Board of Examiners and cannot, where there is a discretion imposed on any body, issue a writ of mandamus to compel that body to exercise that discretion in any particular way but can only compel the exercise of that jurisdiction in a manner fair, candid and unprejudiced and not arbitratry, capricious or

Attorney-*Contd.*

biassed, much less warped by resentment or personal dislike.

Per Woodroffe, J.-The Court cannot dispense with the production of the certificate mentioned in rule No. 116 of the Original Side of the High Court.

The Court will not interfere with the conscientious exercise by the examiners of the discretion which the Court has confided in them.

Purna Chandra Dutt.
12 C W N 873=4 M L T 157=35 Cal 915.

3—Negligence—Allowing clerk to file false affidavit.

Where an attorney had been guilty of negligence in allowing his clerke to act in his absence and file a false affidavit and adopted it without enquiring into its character, he was suspended from practising in the High Court in its original jurisdiction for one year. but he was at liberty to practise as vakeel on the appellate side. It had not been proved that the clerk was acting as an attorney without a license, or had a share in the profits. Had this been so, the attorney would have been struck off the rolls. **Poornoo Chandra Mookerjee. Bourke O C 377.**

4—Practice—Attorney, Change of, application by next friend of an infant for—Grant of such application as a matter of course—Appeal from an order refusing change—Appeal hearing of.

A next friend of an infant is entitled to an order for change of attorney on the same terms as any other litigant *sui juris*. It is not necessary for him to show that such change is for the benefit to the infant, though the Court will interfere and remove the next friend if it appears that in the matter of such an application he was acting in a manner detrimental to the interests of the infant. So long as he continues to be the next friend, he is entitled to appoint and change his own solictor. **Dinendra Nath Dutt v T H Wilson & Co. 5 C W N 434=28 Cal 264.**

5—Non-publication of the name of an attorney when charges are brought against him—Practice.—

The practice of not publishing the name of the attorney until the charges brought against him are proved was approved of and followed.
Attorney, 23 Cal 576

Notes.—Ref: 8 C W N 519.

6—Execution of document by attorney—Power of attorney to several persons — Name of principal signed by one attorney—Document attested by the other attorneys.

A executed a power of attorney by which, for the purpose of paying off certain debts payable by him, he authorized B, C and D " to borrow money to the extent of the amount which is payable by me. to sign for me, to execute a document on my behalf, to hypothecate my property and to get the document registered". Subsequently a mortgage bond was executed which was signed by B on behalf of A, and attested by C and D amongst others. The bond was executed and registered with the consent of B, C and D.

Held, that it was not necessary that the three agents should have signed the name of A.

Held, further, that, although, when an authority is given to two or more persons jointly, all the agents must concur in the execution of it in order to bind the principal in the absence of a provision that some alone shall form a *quorum*, yet,in the case of an authority given in the terms in which the authority was framed in this case, if all the agents concurred in the execution of it, one of the agents with the consent of the others writing the name of the principal and the others attesting the execution, the requirements of law were satisfied, it being impossible for the co-agents to sign the name of the principal jointly.

Nampd Dularey Lal v. Chand Behari Lal, 6 A L J 462=2 Ind Cas 805.

7—Articled clerks—Assignment of articles.

An attorney may, subject to the sanction of the Court, have any number of articled clerks at one and the same time. Articles, the covenants of which have been released, cannot be assigned.

Articles of Clerkship of Calanoor Soobramaneyan, 2 Ind Jur, O S, 15.

8—Attorney, change of—Refusal by attorney to prosecute suit unless money paid by client—Discharge of attorney—Attorney's liens on cause papers—Costs of application for change:—

An attorney who once undertakes the conduct of a case is bound, whether the client supplies

Attorney-*Contd.*

him with funds or not, to proceed with due diligence in prosecuting the case. Where an attorney instructed counsel who had been briefed not to appear and prosecute the case because the client had refused to supply him with funds:—*Held*, that the attorney thereby discharged himself and the client was entitled to an order for change of attorney without previous payment of his costs or an undertaking therefore and for the delivery of the cause papers to the new attorney, subject, however, to the latter undertaking to receive the same without prejudice to any lien that the former attorney might have. Where the attorney opposed the application for change under the above circumstances, he was ordered to pay the costs of the application.

Atul Chand Mookerjee v. Shoshi Bhushan Mullick, 6 C W N 215=29 Cal 63.

9—Attorney—Practice—Articled clerk, who can take assistant in a firm, if competent—Independent practitioner.

An attorney, who is working as an assistant in a firm of solicitors, is not competent to take to himself a clerk under articles of agreement.

Sarojendra Kumar Dutt, 13 C W N 402=1 Ind Cas 286.

10—Power to transfer decree.

A Vakil by his ordinary employment as Vakil enjoys no authority authorizing him to transfer a decree. **Nohur v. Jaffer Hossain, 2 N W P 195.**

11—Compromise of cases—Special powers.

Pleaders, unless specially empowered so to do have no authority to compromise cases conducted by them. **Musammat Sirdar Begam v. Musammat Izzutoolnissa, 2 N W P 149. Prem Sukh v. Perthee Ram, 2 Agra 222.**

12—Advocate—Instructions.

Held, that an advocate admitted on the roll of the High Court can take instructions directly from the client and can "act" for him.

Bakhtawar Singh v. Sant Lal, 7 W N 153.

13—Attorney, change of—Attorney employed by testator continued by executor—Change of attorney by executor—Costs incurred by testator—Liability of executor to pay:—

An executor desiring to change an attorney who had been employed by the testator and continued in such employment by him must pay not only the costs incurred since such employment by him, but the past costs incurred in the lifetime of the testator. 5 B H C R 163 distinguished.—**Girindra Coomar Dutt v. Amulyacharan Ghose, 6 C W N 306.**

Attorney and Client

See Cases under (1) Costs—Special Cases—Attorney and Client.
(2) Costs—Taxation of Costs.
(3) Evidence Act.
(4) Execution of Decree—Mode of Execution - Costs.
(5) Limitation Act. (1908) Art. 84.
(6) Right of suit
(7) Privileged Communication.
(8) Rules of High Court, Bombay—Rule No. 183.
(9) Vendor and Purchaser-Invalid Sales.

See also Cases under:—

(1) Legal Practitioner's Act.
(2) Solicitor.
(3) Pleader & Client.
(4) Advocate.
(5) Counsel.
(6) Barrister.
(7) Executor.

ATTORNEY & CLIENT 1-26,

(1) Negligence, liability for (1).
(2) Negligence (2).
(3) Power to compromise (3).
(4) Fiduciary relationship (4-8).
(5) Lien (9-13).
(6) Construction notice (14).
(7) Purchase by attorney from client (15).
(8) Attorney, Change of (16).
(9) Application to restrain attorney changing sides (17-20).
(10) Delivery of bill of costs (21-23).
(11) General cases (24-26).

ATTORNEY & CLIENT.

(1) Negligence, liability for.

1—If a client places himself in the hands of an attorney, he places himself in his hands in regard to all matters having connection with the suit, and the attorney must be held liable for any negligence, even though his client do not take prompt action in the matter.

Ally Nuckee Khan v. Anley, 1 Hyde, 134.

Attorney and client-*Contd.*

(2) Negligence.

2—Interference of Court, Ground of.

Where a mate and crew applied to an attorney to obtain for them their wages in a suit against their ship, having first obtained an order for wages from the Magistrate, which order for some reason could not be enforced, the attorney thereupon stated that their case was a good one, and he required no money; but afterwards, finding that the master was suing the ship, and that the proceeds of her sale would not be sufficient to pay the wages of all, the attorney let the proceedings on behalf of the mate and crew drop, and refused afterwards to go on without funds:—*Held*, that this was negligence and want of skill in the attorney sufficient to justify the summary interference of the Court, and to warrant it in making an order for the attorney to proceed with the suit and to deprive him of costs already incurred.

Attorney and Proctor. 1 Ind Jur, N S, 305.

(3) Power to compromise.

3—Want of client's consent.

A decree (embodying the terms of a compromise) made in open Court, upon the consent of counsel duly instructed, is binding as between the parties to the suit, although the attorney of the defendant has no authority from his client to consent to such decree, or even though he is expressly directed not to compromise, provided such want of authority is not known to the other side. *Semble*—That such decree is binding as between the attorney and his client, provided it embodies a reasonable and proper compromise, and is not made against the express directions of the client.

Jagannath Das Gurubakshdas v. Ramdas Gurubakshdas, 7 B H C R, O C 79.

Notes:—Ref: 23 Bom 22.

(4) Fiduciary relationship.

4—Agreement to pay pleader remuneration including property in suit.

Suit by a pleader against his client to enforce a contract which provided for the payment to the former of a large remuneration for his services, including a portion of the property in suit. *Held* that such a contract stands on a different footing from one between private persons, and that the Court, before enforcing it, should require the plaintiff clearly to show its fairness, and that no undue advantage has been taken of the client. It is necessary in such a case to look to the whole of the circumstances and the substance of the transaction, and not merely to the language of the agreement. **Nuthoo Lall v Budree Pershad. 1 N W 1.**

4A—Fiduciary relationship—Client-Solicitor—Managing clerk—Principal and Agent—Agent making profit in his agency.

The relationship existing between a client and the managing clerk of a Solicitor, who introduces and conducts his business is a fiduciary one.

Hari Valabhdas Haridas v Bhai Jivanjee. 4 Bom L R 469=26 Bom 689.

4B—Profit made by a person standing in fiduciary relationship to another—Solicitor's clerk making a profit as against client—Legality of—Ignorance of client.

Where unknown to the client, a solicitor's clerk stipulates for a profit in respect of the client's business, over and above the usual fees, such stipulation is unenforceable in a Court of law.

Harivalab Das v Bhai Jivanjee. 4 Bom L R 469=26 Bom 689.

Attorney and Client—Agreement by pleader with client.

See also cases under: Legal Practitioner's Act S. 28.

5—Intervention of third party—Muktear.

The interposition of a third party does not necessarily affect the fiduciary relation between the legal adviser and his client. **Tayler v Asmerdh Koonwar. 4 W R 86.**

Notes:—Ref: 7 W R 98.

6—Attorney and client—Taxation of bill of costs—Rate of interest on costs.

The plaintiff, an attorney of the High Court, advanced certain sums of money to the defendant a banker and merchant, for whom he was there retained as an attorney in a case in High Court. In 1869, when the first loan was given the defendant was greatly indebted, and a creditor had issued execution against his property, and he was also indebted to the plaintiff for costs, though no bills had been delivered. Before the first loan the plaintiff delivered bills for all his costs then due, of which some were incurred in completed and others in pending suits, and offered to have

Attorney and client-*Contd.*

them taxed; but the defendant then said there was no need for taxation, which would only increase his expenses The defendant had executed mortgages as a security for the advances. The first was executed in August 1869,and the principal was repayable in February 1871. Interest was to be payable at 12 per c. per annum, and comopund interest at the same rate was also to be charged on all interest in arrear. In September 1870 a further advance on the same terms was made and a further mortgage executed,which included the original sum, with the interest then due,and the further advance In October 1871 and March 1876, further advances were also made in the same way. In all these dealings the deeds though not charged for, were prepared in the plaintiff's office and the defendant had no other independant advice. In a suit to recover the sum due on the mortgages by sale of mortgaged property, the plaintiff abandoned any accumulation of interest since the date of the third mortgage. *Held* that the defendant notwithstanding he had declined the offer of the plaintiff in 1869 to tax the bills, and notwithstanding the delay that had taken place, was entitled (having regard to the relation of the parties and to the fact that a portion of the costs was incurred in suits then pending) to have the bills taxed and to reopen the account. Under the circumstances, the Court would not infer acquiescence from the delay on the part of the defendant, nor did the plaintiff's offer to tax, and the defendant's refusal of that offer, debar the defendant of his right to have the bills taxed in the usual way. There is no rule which prevents an attorney from taking security or otherwise arranging with his client for the payment of costs which have actually become due,and that the plaintiff was entitled to the sale of the property,to accumulations of interest prior to the date of the third mortgage calculated by allowing annual rests, to interest at 10 per cent. as being a fair rate for the client to have undertaken to pay when the mortgages were executed. and to interest on his costs. **Monohur Doss v Romanauth Law. 3 Cal 473.**

Notes:—Dist: 12 C W N 1102=36 Cal 493.

7—Trustee—Purchase by attorney from client.

T had acted as trustee and agent for M, and F had acted in the place of T during T's temporary absence. T and F, as attorneys in partnership, did solicitors' work for M. T, as trustee and agent for M, invested money on a mortgage. The equity of redemption was put up for sale at public auction in execution of a decree obtained by a third party against the mortgagors, and a portion was purchased by T and F, as attorneys in partnership. *Held* that there was no equity compelling T and F to hold the equity of redemption for the benefit of M. *Semble*—The agentship could not be separated from the attorneyship. *Held*, also, that under the circumstances there was no equity calling for a sale in substitution of the foreclosure claimed by M. **Mackintosh v Nobinmoney Dossee. 2 Ind Jur N S 160.**

8—Trustees of insolvent retaining attorney to continue suit—Costs

The contract to be implied from the employment by the trustees of an insolvent, of an attorney to carry on a suit already commenced by the insolvent as plaintiff, and in which such attorney was retained for him, is a contract to pay all subsequent costs, but not the costs incurred prior to such employment. **Shamrav Pandurang v Trustees of Bhugvandas Purshotomdas. 5 B H C R O C 163.**

Notes—Dist: 6 C W N 306.

(5) Lien.

9—Costs—Lien on sum recovered by client—Attachment of fund by creditor.

The plaintiff obtained a decree against the defendant, but before satisfaction of the decree, the amount of the decree was attached in the hands of the defendant by a third person,who had obtained a decree in a suit against the plaintiff On an application by the attorney for the plaintiff that the defendant might be ordered to pay to him his costs of suit out of the sum which had been attached in the defendant's hands, and on which the attorney claimed to have a lien, the Court held that the attorney had a lien for his costs on the sum so attached, but that the only order it could make was an order to the defendant not to pay the sum attached to any one without notice to the attorney. **Nawab Nazim of Bengal v Heeralall Seal. 10 B L R 444.**

9A-Settled accounts, order directing re-opening of Settlement of untaxed bills, when liable

Attorney & client-*Contd.*

to be re-opened—Fiduciary relationship—Onus of showing good faith—Indian Contract Act (IX of 1872), S. 16—Evidence Act (I of 1872), S. 111—Independent advice, opportunity to obtain—Promissory note, assignment of, without endorsement

As between attorney and client, the existence of fiduciary relationship alone, or the fact that certain bills of costs were not taxed but were settled out of Court by execution of a deed, will not justify a Court in re-opening accounts settled on which the bond is based, unless sufficient grounds of suspicion exist, or the bills are *prima facie* shown to be extortionate.

S 16 of the Contract Act only presumes undue influence by a person in a position to dominate the will of another. when the contract appears on the face of it to be unconscionable.

To prove "good faith" of a transaction in which one party stands in a fiduciary relationship to the other. it is certainly not necessary to prove that all the accounts on which the contract is based are correct.

Under the parties obtaining in the original side of the High Court, taxation of bills of solicitors is deemed to be optional with the client and bills of costs are not infrequently adjusted without taxation.
3 Cal (473) was decided on the special circumstances of that case and does not lay down any general rule of law.

An attorney may be bound under certain circumstances to advise his client to take independent advice. It is not his business to see that the attorney selected by his client fulfills his duties to his client and is not guilty of any remissness or negligence. If he sends his client to another attorney and is ready to comply with all reasonable demands for information, he cannot be expected to do more, or to be responsible for another's omissions. **Shamuldhone Dutt v Srimutty Susila Bala Debi 12 C W N 1102= 36 Cal 493=2 Ind Cas 553.**

10.—Lien for costs—Title deeds delivered fo specific purpose—Right to re-delivery.

D, an attorney, who had a lien against C for costs on the title-deeds of certain property belonging to C for whom he had been acting in negotiations for the sale of the property delivered the deeds at the request of C to M, who was acting as attorney for J, an intending purchaser. M, on obtaining the deeds, signed a receipt for them, by which he undertook to "return them on demand without claiming any lien for costs or otherwise." D subsequently ceased to act for C in the matter of the sale of the property of which J became the purchaser. The title-deeds ramained with M. *Held* that D was entitled to have re-delivery of the deeds to him from M, even independently of the express contract to return them. He did not give up possession of them to C by delivering them to M. though that was done at C's request. **Mackertich 15 B L R, Ap 15.**

10A.—Refusal to act till costs paid-Change of attorney—Lien-Attorney, change of—Practice-Discharge of attorn y—Attorney's lien on cause-papers—Costs of application for change.

An attorney who once undertakes the conduct of a case is bound whether the client supplies him with funds or not to proceed with due diligence in prosecuting the case. Where an attorney instructed counsel who had been briefed not to appear and prosecute the case because the client had refused to supply him with funds: *Held*—That the attorney thereby discharged himself and the client was entitled to an order for change of attorney without previous payment of his costs or an undertaking therefor and for the dieivery of the cause-papers to the new attorney, subject, however to the latter undertaking to receive the same without prejudice of any lien that the former attorney might have. Where the attorney opposed the application for change under the above circumstances, he was ordered to pay the costs of the application. **Atool Chandra Mukerjee v Shoshee Bhusan Mukerjee 6 C W N 215.**

11.—Solicitor's Lien-Discharge of Attorney-Death of Client-Dissolution of firm of Solicitors.

The death of a client does not discharge his attoney and so cause his lien to arise.

The dissolution, however of a firm of attorney discharges the clients for whom they had been acting and such client or his representatives are entitled to have the papers in the hands of the late firm delivered up. **Moss. L R 2 Eq 345. Mc Corkindale 6 Cal 1=6 C L R 406.**

12.—Lien for costs—Lien on translation of documents.

Attorney & client-*Contd.*

Messrs, P and W were solicitors for the plaintiff in this suit for its commencement. When the case was about to appear in the list for hearing, Messrs. P and W wrote to the plaintiff. requesting her to send them on advance of Rs. 1,000 to enable them to deliver briefs to counsel. They received no reply from the plaintiff. who afterwards obtained leave to sue as a pauper, and appeared by other solicitors. Messrs P and W were subsequently served with a subpœna to produce at the hearing certain translations and other documents relating to the plaintiff's case which had remained in their possession, and upon which they claimed a lien in respect of costs due to them by the plaintiff. *Held* that Messrs. P and W could not be compelled to produce. A solicitor who is discharged by his client holds the papers entrusted to him subject to his lien for costs, and the plaintiff by her conduct had discharged Messrs P and W from being her solicitors. A solicitor has the same lien upon translations as he has upon other documents, and the fact that they have been made by the Court's interpreters makes no difference.Having got the work done and paid for it, he need not part with such translations or produce them, except or terms which will secure him against fraud. **Bai Kesserbai v Naranji Walji 4 Bom 353.**

13.—Practice—Costs—Attorney's lien—Lien attaching creditor—Fund in Court attached.

A sum of money had been paid into Court as admittedly due to the plaintiff in a certain suit. The plaintiff not having satisfied in full his attorney applied for payment out of the fund in Court. Previously to this application, the fund had been attached by a third party. *Held* that the attorney was entitled to enforce his lien as against the attaching creditor for all costs incurred, up to the date of attachment; that the attaching credi or was then entitled to be satisfied before the attorney could claim payment out of the balance in Court of any sum remaining due to him on account of his costs. **Supramanyan Setty v Hurry Proo Mug 16 Cal 374.**

(6) Constructive notice.

14.—Fraud in transaction with client.

The Court will not presume notice to have been given to his client by an attorney where such notice would involve a confession by the attorney of a fraud practised by himself. **Hormasji Temulji v Mankuvarbai 12 B H C R 262.**

(7) Purchase by attorney from client.

15.—Benami transaction.

The principle that in transactions carried out by an attorney for a client, the attorney should derive no benefit to himself, is equally applicable to the relationship of vakil and client; and in transaction of such a nature, Courts should be careful not to allow them to be enforced in the name of a third person put forward as the real plaintiff. **Fuzelun Bibee v Omdah Bibee 11 B L R 60 note=10 W R 469.**

(8) Attorney, chang of.

16.—Discharge of attorney—Refusal to act till costs already incurred are paid—Attorney. duty of—Practice.

An attorney having undertaken to act for a client is bound to continue to act for him so long as the relationship between them of attorney and client subsists,and unless discharged by the client, it is his duty to proceed with the diligent prosecution of the business or matter for which he has been retained. No attorney has a right to insist on the payment of past costs as a condition to the further prosecution of his client's cause By declining to act further for a client until costs already incurred are paid, an attorney discharges himself, and the client is entitled to a change from him without prepayment of his costs. *Quere*:—Whether an attorney still has a lien on the papers and documents in his hands after he has discharged himself as aforesaid. **Basanta Kumar Mitter v Kusum Kumar Mitter 4 C W N 767.**

Notes:—Ref. 29 Cal 63.

(9) Application to restrain attorney changing sides.

17.—An attorney having discharged his client cannot change sides. 19 Ves 261, followed. **Ram Lall Agarwallah v Moonia Bibee 6 Cal 79.**

18—Agreement as to costs between attorney and client—Change of attorney—Right of attorney to his taxed costs.—

Where F, an attorney, agreed to conduct a suit for his client and to accept Rs. 150 for his personal services, and not in respect of out-of-

Attorney & client-*Contd.*

pocket costs and counsel's fees, and in the event of his client being successful to recover his full costs from the opposite party and to refund the Rs. 150, it was *held*, upon the client desiring to change to another attorney, that he could do so upon payment to F of his taxed costs. **Ghassee Jemadar v Nassiruddin Mistry. 26 Calc 769.**

19—Rules of Madras High Court, rule No. 320—Leave of Court for proposed change of attorney—Grounds upon which leave will be given or withheld—Payment of costs due to attorney.

Leave will not be given by the Court for a change of attorney under rule No. 320 of the Rules of the Madras High Court (which provides that leave must be obtained before such a change of attorney can be made) until the costs of the attorney are first paid or provided for **Ramasami Chetti v Subbu Chetti. 23 Mad 134.**

20—Warrant of attorney—Filing application through another attorney without discharging the former attorney—Sanction to procecute-Appearance through another attorney—Civil Procedure Code (Act XIV of 1882) s. 39—Belchambers' Rules and Orders, rule 93.

A warrant of attorney to defend, unless specially restricted in form, empowers an attorney to act for the defendant and to establish his grounds of defence in his Court, whether in its original or appellate jurisdiction. An application for sanction to prosecute under s. 195, Criminal Procedure Code, is not a proceeding in connection with the suit within the words of the original warrant to defend and the defendant is entitled to appear through a new attorney without obtaining a discharge of his original warrant or retainer in favour of the original attorney.

Cassim Mamoojee v Gopal Lall Seal. 3 C W N 579.

20A—Managing Clerk and client, relationship is fiduciary.

The relationship existing between a client and the managing clerk of a solicitor, who introduces and conducts his business, is a fiduciary one.

Harivalabhdas v Bhai Jivanjee 4 Bom L R 469=26 Bom 689.

(10) Delivery of bill of costs

21—Delivery of bill of costs—Right to maintain suit—Executor.

Attorney & client-*Contd.*

There is no law in force in India to prevent an executor of an attorney from maintaining a suit for business done by the attorney without having previously delivered a bill of costs to the defendant and left it with him for a reasonable time before bringing the action and the fact that the defendant had notice that the bill was to be referred to taxation is immaterial. **Wilkinson v. Abbas Sarkar 9 B L R O C 96.**

22—Motion for discharge of the guardians of an infant—Costs ordered to be paid out of estate—Disallowance of excessive Counsel's fees by taxing officer, whether Correct—Belchamber's Rules—Attorney.

In a motion for the discharge of the guardians of an infant, the fee paid to counsel was found by the taxing officer to have been unusually excessive The costs incurred by the guardians in opposing the application had been ordered by the Court to be taxed as between attorney and client and paid out of the estate, *Held*, the taxing officer had rightly decided that the said excessive fee paid to counsel was not *prima facie* allowable on taxation for payment either out of the estate or by clients who were the guardians of the infant because unless the taxing officer was satisfied that the client clearly understood that the payment, either wholly or in part, would not be allowed out of the estate and that he would be personally responsible for the payment of the whole fee or for so much of it as was not allowed out of the estate, the excessive charge could not be regarded as authorized by the client and could not therefore be allowed as against him. **Thakur Dassee Dassee. 33 Cal 827.**

23—Art 84——S 15——Sch II——Attorney and client—Suit for costs—Limitation—Order for taxation of costs effect of.

A suit by an attorney for the recovery of his costs falls under Art 84 of the Limitation Act; and an order of the Court for the taxation of his costs has not the effect under S 15 of the Act, of staying the institution of the suit by him against his client.

Per Harrington J—All the authorities show that the taxation of costs is not a condition which must be performed before an action on an attorney's bill may be brought. If that is so, an order for taxation cannot affect the plaintiff's right to bring his action. **Makham Lal Mukerjee v Nalin Chandra Gupta 35 Cal 171.**

Attorney & client-*Contd.*

23A—Contract—Brokers and meddlers—Extortionate claim—Litigants—Protection—Professional aid

All litigants are entitled to the protection of the Court from extortionate claims made upon them by those whose professional aid they seek.

Brokers and meddlers in litigation, who avail themselves of the weakness and ignorance of suitors to obtain from them, under a pretence of services to be rendered, engagements for the payment of money, will find that protection will be afforded by the Court against them also.

Roop Narain Misr v Kasheeram Ling Timbiram 2 N W P 67.

23B—Suit on behalf of principal.

Where an attorney sues on behalf of his principal, the suit should be brought in the name of the person for whom he professes to appear and not in his own. **Choonnee Sookul v Hur Pershad.** 1 N W P 277.

(11) General Cases.

24—When a party has seen an order of reference to arbitration and authorized his attorny to consent to it, even though he does not sign it, that writing may be regarded as a special authorization in writing to his attorney to consent to the terms referred to therein. **Bhanmal v Mathuradas** (1 Bom L R 261).

25—Attorney and client-Code of Civil Procedure (Act XIV of 1882) ss 2 and 39—Appointment of attorney—Retainer, how revoked—Continuance of authority—Taxation of costs time covered by—Cause by action—Limitation.

An attorney's authority to act for a client does not terminate until the same is revoked with the leave of the Court by a writing signed by the client and filed in Court as provided for in Sec 39 of the Code of Civil Procedure (Act XIV of 1882). The cause of action for attorney's costs arises when the work for which he was retained is completed. (1 Q B 702).

In a suit, if the decree directs that certain party thereof should pay certain costs, the authority of the attorney acting for such a party to the suit continues even after the judgment and covers the entire period taken by the taxation, of such costs, for until taxation, the amount payable by the client under the decree could not be ascertained. (L C 29 Ch D 351 referred to.). **Atul Chunder Ghose v Lakshman Chunder Sen.** 13 C W N 1172=36 Cal 609=2 Ind Cas 830.

Attorney & client-*Contd.*

26.—Counsel's costs—Practice to allowing costs of counsel—Costs of third counsel in a defended long cause—Party and party costs—Attorny and client costs—Practice governing the allowing of costs——Taxing Master's decision—Review by the Chamber Judge—High Court Rules and Forms, Rule 577.

As a general rule, the Judge in Chambers will not interfere with times of taxation which are entirely within the Taxing Master's discretion or go into details of such discretionary items, but there is nothing to prevent him from doing so if it appears to him that the interests of justice require his interference; and it would be his duty in all such cases to review and revise taxation and judge and decide for himself what would be a just order to make under the circumstances.

When a party to a suit has already briefed two counsels for hearing and a third is intructed to make an application to transfer the case from one Judge to another, the costs shall be, in the absence of any order making the costs, costs in the case, disallowed between party and party, though they may be allowed between attorney and client.

A party to a defended long cause is entitled to appear by two counsels. If both counsels attend throughout the hearing and the other party is ordered to pay costs of the suit their brief fees and full refreshers would be allowed on taxation agaist losing party. If the suit is conducted by one counsel only throughout, the full refreshers of the conducting counsel and a nominal refresher of 2 G. Ms of the other counsel would be properly allowable against the opponent if ordered to pay costs. If the absent counsel attends for portions of the time the case is at hearing, his refresher proportionate to the time he attends would also be properly allowable in addition to the full refresher allowed to the counsel who attends and conducts the case.

When a party to a defended long cause engages two counsels he has a right to the services of at least one of them. He is under no obligation whatever to engage a third counsel. If

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both counsels find that they would, owing to other engagements, be unable to go in and conduct the case when it is called, it is obviously the duty of one of them to return the brief.

A party is at liberty at any time to employ a third counsel, but this right of employing a counsel must not be allowed to work hardship on the losing opponent.

If three counsels are engaged before the hearing it will be for the Taxing Master to consider the fees and refreshers of which two he will allow between party and party which counsel-fees should go between attorney and client. A solicitor engaging three counsels is entitled in the event of his recovering costs from the opponent, to have his third counsel's costs taxed between attorney and client if he proves express authority from his client or if he proves that some peculiar contingency arose which made it necessary for him to engage a third counsel in order to safeguard his client's interest.

If a third counsel is added after the hearing of the suit has commenced such addition must be at the cost of the party doing so. **Banoo Begum v Mir Aun Ali.** **9 Bom L R 983=32 Bom 262.**

See also:—Costs.

Attorney--General.

See Advocate-General.

Attorney, improper conduct of.

See Attorney.

Attorney lien on cause.

See (1) Set off—set allowed.
(2) Pleader-Remuneration.

Attorneyship-Examination.

1.—Attorneyship examination. Board of examiners, direction of—Mandamus—Jurisdiction of the Court to interfere—Letters Patent, 1865, cls. 9 and 10—Specific Relief Act (1 of 1877) Section 45—Rules of the High Court, Nos. 111 to 118 and 122.

Semble, the Court has no jurisdiction to interfere with the discretion of the Board of Examiners and cannot, where there is a discretion imposed on any body, issue a writ of mandamus to compel that body to exercise that discretion in any particular way, but can only compel the exercise of that jurisdiction in

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a manner fair, candid and unprejudiced and not arbitrary, capricious or biassed, much less warped by resentment or personal dislike.

Per Woodroffe, J—The Court cannot dispense with the production of the certificate mentioned in rule No. 116 of the Original Side of the High Court.

The Court will not interfere with the conscientious exercise by the examiners of the discretion which the Court has confided in them.

Purna Chandra Dutt, an articled-clerk. 12 C W N 873=4 M L T 157. =35 Cal 915.

Attornment.

See (1) Landlord and Tenant—Constitution of Relation—Acknowledgment of Tenancy by Receipt of rent.
(2) Landlord and Tenant—Transfer by Landlord.
(3) Landlord & Tenant.
(4) Rent suits.
(5) Punjab Tenancy Act s. 58.

—Notice of—

See:—Registration Act s. 49.

Auction & auctioneer.

See (1) Sale by auction.
(2) Sale.

Auctioneer.

See (1) Sale by Auction.
(2) Principal & agent.

Auction-Purchaser.

See Cases under (1) Civil Procedure Code, s. 244—Parties to suit.
(2) Civil Procedure Code, s. 244-Questions in Execution of Decree.
(3) Limitation Act, (1908) s. 10.
(4) Sale for arrears of Rent—Rights and Liabilities of Purchasers.
(5) Sale for Arrears of Revenue—Purchasers, Rights and Liabilties of.
(6) Sale in Execution of Decree—Purchasers, Rights of.
(7) Sale in Execution of Decree—Purchasers, Title of.

Auction Purchaser-*Concld.*

(8) Sale in Execution of decree—Setting aside Sale—Rights of Purchasers.

Auction purchaser rights of—See Bengal Acts—Revenue Sale Law and Execution Sale.

Auction purchaser—Reversal decree on appeal—See **31 Cal 499; 27 Mad 94.**

Auction purchaser in money—decree—not a representative of judgment-debtor.
See C P C **O 21 r 89.**

—Purchaser—Right acquired by, before confirmation of sale, nature of—Pre-emption—General **10 O C 273.**

—Accretion—Right of—at revenue sale—Alluvion—General. **8 C W N 676.**

-Sale.

See Cases under—
(1) Sale by auction.
(2) Sale.
(3) Execution of decree.
(4) Execution sale.

Auditor.

See Company—Winding up—Liability of Officers. Limitation Act (1908) Art 36.

Aulad Dukhtari.

Aulad Dukhtari—Hindu Law—Miscellaneous, **6 O C 132.**

Aulad Pisari—Hindu Law—Miscellaneous, **6 O C 132.**

Author.

See Copyright.

Authorised Agent.

See (1) Principal & Agent.
(2) Letters patent High Court—N W P 1865 S. 8.

Authorities on Law-Adoption.

See Hindu Law—Adoption.

Authorities on Law of Inheritance.

See Hindu Law Inheritance.

Authority.

See cases under:—
Precedent.

Authority of Agents

See Principal and Agent.

Authority of Counsel to compromise case on behalf of his client.

See (1) Pleader and client.
(2) Compromise-Compromise of suits under C P C.

Authority of father to give girl in marriage.

See (1) Hindu Law-Marriage
(2) Mahomedan Law—Marriage.

Authority of, to Bind Client.

See Pleader.

Authority of wife to pledge husband's credit,

See Husband and wife.

Autrefois convict.

See Act XIII of 1859.

Ava, Kingdom of--

See Civil Procedure Code, (1908) O. 26. rr. 5, 7.

Average profits.

1.—Average profits—Estimate based on,—when to be accepted—Accounts between mortgagor and mortgagee.

An estimate based on average profits cannot be accurate, but if moderate and reasonable can be adopted on the ground that it is fair to draw inferences against the mortgagee in possession because he being a party who alone knows the actual facts has failed to keep the accounts in a manner in which a Court can safely accept them. **Kundanmal v Kashibai. 4 Bom L R 4 = 26 Bom 363.**

See also—Mortgage.

Average rate of rent.

See (1) Landlord & Tenant.
(2) Enhancement of rent.
(3) Abatement of rent.

Avubhavom tenure.

See Landlord & Tenant.

Award.

See (1) Act XIII of 1848.
(2) Appeal—Arbitration.
(2A) Costs.
(2B) Madras Boundary Act, ss. 21, 25, 28.

Award-*Contd.*

(2C) Right of Suit-Awards, Suits concerning.
(3) Small Cause Court. Mofussil—Jurisdiction—Arbitration.
(4) Special or Second Appeal—Small Cause Court Suits—Award.
(5) Survey Award.

—Application to file—

See (1) Certificate of Administration-Right to sue or execute Decree without Certificate.
(2) Costs—Special Cases—Award.
(3) Guardian—Duties and powers of Guardians.
(4) Interest.
(5) Jurisdiction—Suits for Land-General Cases.
(6) Limitation Act, [1908] Art. 178.

—Claim under—

See Attachment—Subjects of Attachment—Expectancy.

—Effect of—

See (1) Hindu Law, Joint Family—Nature of Joint Family and position of manager.
(2) Jurisdiction—Testamentary and Intestate Jurisdiction.
(3) Nawab Nazim's Debts Act.
(4) Panchayet
(5) Res Judicata—Adjudications.

—Loss of—

See:—Evidence—Civil Cases—Secondary Evidence-Lost or Destroyed Documents.

Award.

1.—Suit to enforce-Civil Pro. Code—Award by Ecclesiastical authority.

Even where the Code of Civil Procedure is in force it has been held that the special procedure relating to arbitration and awards is not imperative upon a plaintiff, but that he is at liberty to bring a suit to enforce an award. (see 4 M H C 119). Much more would this be so where there is no special procedure for the purpose of making awards, decree of Court. An award by Ecclesiastical authorities on a secular matter is not exempt from the usual rules regarding arbitration. **Maung Pu v U De Wainda. U B R 1892—1896, Vol. II, 11.**

Award-*Contd.*

2.—Suit to set aside an-Grounds for impugning an award.

The improper omission to take evidence vitiates an award. As stated in Russell on the Power and Duty of an arbitrator, (7th Ed,, 665): "The award may be impeached if the arbitrator make his award without having heard all the evidence, or having allowed the party reasonable opportunity of proving his whole case. There being *prima facie* ground for impeaching the award because of the rejection of evidence, it was incumbent on the other side to meet the objection and show that it was not well-founded. It is necessary in a country where arbitration is so frequently abused, to make sure that when a *prima facie* case is established against the validity of an award, it is conclusively rebutted. **Ma Than v. Maung Pyo. U B R 1892—1896. Vol. II, 13.**

Notes—Ref., U B R 1897—1901 Vol. II, 10.

3.—Arbitration—Award of arbitrators-Ground for setting aside award.

An award should not be set aside as invalid on the ground that the inquiry was somewhat perfunctory. Had there been an application to examine witnesses, and this had been refused, probably this procedure on the part of the arbitrators would have amounted to misconduct invalidating the award and making the reference voidable. The fact that the Buddhist Law as administered in our Courts was not followed is not a good ground for setting aside the award (18 I A 72, Ref.). The fact that the award does not follow strict law as to the fractions of partition is not a good ground for putting aside the award. It is often desirable that parties should resort to arbitration rather than come to Court. The arbitrators have local knowledge. The parties, their witnesses, and the arbitrators cannot fail to be usefully influenced by public opinion in their village, and such arbitration often affords a better means of getting at the truth of fact than a suit in a Court of law. It is therefore on this ground undesirable to lightly set them aside. Moreover, the agreement to refer to arbitration is a contract, and the award

Award-*Contd.*

in the absence of good cause must be treated as a part of the contract. 9 All 253, Ref. **Ma Yu v Ma Kalama. U B R 1892—1896 Vol II, 15.**

4.—Arbitration-Award of arbitrators.

Where a reference to arbitration was made to four elders and no provision was made that, in case they did not agree, the award of a minority or of a majority should be binding, the award, unless made by all four elders, could not be enforced. **Maung Kan v Ma Hmwe Chon. U B R 1892-1896, Vol. II, 18.**

Notes—[Fol: 2 L B R 105; Ref., U B R 1902-1903, Vol II, Arbitration 1; U B R 1897-1901, Vol. II, Arbitration 5]

5.—Arbitration-Award of arbitrators.

A contract was made by the parties to refer the matter in dispute to three arbitrators, who were named, and it was provided that in case there was disagreement, the decision of the majority was to be binding on the parties. One of the arbitrators refused to have anything to do with the arbitration. and the other two, acting by themselves gave a decree in favour of the plaintiff-respondent in this case It appears that the Judge considered that the clause providing that the decision of a majority of the arbitrators should be binding made it of no consequence whether one of the arbitrators refused to act or not. The District Judge before whom the case went on appeal took the same view. *Held*, that an enquiry and decision by two of those persons in the absence of the third must be invalid. The enquiries, arguments, influence, and opinion of the absent arbitrator might be most material to the cause of, at any rate, one of the parties to the reference. Although the opinion of the majority was to prevail, all were to arbitrate, that is, to take part in the enquiry and decision.

Maung Kye v Maung Tha Zi Aung. U B R 1892—1896, Vol. II, 19.

6.—Limitation.

A general reference to arbitration in Upper Burma does not necessarily include a power to throw out a claim on the preliminary point of limitation unless the matter is expressly provided for. But if the reference can be taken as including the power of determining a preliminary point of limitation, there would still be an implied understanding that the question would be decided under the law in force in the country and not under a foreign or obsolete law. Unless it is shown to be otherwise it could not be in the contemplation of parties that their rights should be adjudicated upon in accordance with the provisions of any law other than that of the land.

Ma Min Ku v Maung Tha Nyun. U B R 1892—1896, Vol. II, 9.

Notes—Ref., 2 L B R 110, U B R 1897-1901, Vol. II, 24.]

7—Remission of award to arbitrators for reconsideration—Neglect of arbitrators to comply with orders of remission.

Where an award was remitted to the arbitrators for re-consideration with an express injunction that a full inquiry was to be made and where the arbitrators took no evidence, but made their second award merely on the strength of a local inspection. *Held* that the award so made as above described must be set aside.

Sujan Rai v Jhabba A W N 1893. 45.

Notes—Ref. 18 All 122.

8—9—Suit to set aside an, made without intervention of Court—Cause of action.

There is nothing in the section of Ch. 37, Civ. Pro. Code, whether s. 325 or another, permitting a suit to set aside an award. The suit allowed by s. 325 is one to file an award, which is a different thing. The question is whether under the ordinary common law or any special enactment a suit will lie to set aside an award made without the intervention of a Court The Specific Relief Act, Chs. IV and V set out certain cases in which contracts may be rescinded or cancelled ; but nothing is apparent which would bring this award within such classes of cases. If endeavour is made to enforce the award by suit or otherwise. a cause of action may arise or the suit may be resisted.

Ma Tha Hmwe v Ma Fin Tha, L. B. R. 1893—1900, 480.

10—Judgment in accordance with award—Pronouncement of—In appellant's absence-Irregularity-Second award differing from first—Legality of.

The objection that an award was confirmed and judgment passed in appellant's absence if not urged in the lower Court cannot be allowed in second appeal as it is merely an irregularity and not a fatal error where the Court refused to ac-

Award-*Contd.*

cept the award on the ground of its incompleteness and orderd to file a second award after investigation, such second award, confirmed after the expiry of time for objections, is legal though it may differ from the first award **Kala Singh v Pohu** **50 P R 1881.**

11—Judgment—Arbitrations—Review.

A judgment passed in accordance with the award of arbitrators is open te review. **Buta v Guni Das** **111 P R 1881.**

12—Private award—Propriety of decree thereon under s 525, Civ. Pro. Code, 1877.

A private award passed in an arbitration made without the intervention of Court is too indefinite to be converted into a decree under s. 525, Civ. Pro. Code, 1877. **Dharam Das v Ajudhia Pershad** **77 P. R. 1882.**

Notes—Ref, 34 P. R. 1910=11 P. W R 1910.

13—Appeal—Award—One of the arbitrators signing blank paper—Arbitrator, absence of one, from part of hearing—Civ. Pro. Code (Act XIV of 1882), s. 516.

An appeal lies, when there is no award in fact or when there is a void award. When there was when no proper compliance with the requirements of s. 516 of the Code, the award was ineffectual and in fact void, and an appeal lay from the decree or judgment based upon the award made by the arbitrators. S. 516 of the Code contemplates an award in writing properly signed by the persons who make it. Where an award had already been made and a judicial decision arrived at, a subsequent embodiment of the decision of the arbitrators in certain papers which already bore the signature of one of them and was signed subsequently by the others, did not vitiate the judicial act of the arbitrators. The absence of one of the arbitrators from a part of the hearing vitiates the judicial character of the proceeding Where the absent arbitrator signs a blank paper on which the decision is written out by the other arbitrators, the award is void.

Benode Lal Pakrasi v Pran Chandra Pakrasi **14 C L J 143.**

14—Arbitration—Submission out of Court, if revocable—Agreement to refer to arbitration, if of personal nature—Legal representative of deceased party, if and when bound by award—Arbitrator, when can make alteration in award—Award, completion of, what constitutes—Minor, if can enter into submission—Guardian's power to submit to arbitration on behalf of his ward—Award, effect of—Verbal submission to arbitration, affecting immoveable property, if valid—Registration Act (III of 1877), s. 17—Registered agreement to refer to arbitration—Variation—Evidence Act, s 92—Pleadings, amendment of—Award vitiated, if can be waived—Waivear-Proof, necessrry—Incomplete award—Submission to arbitration, construction of—Award, unreasonableness of—Award, when cannot be set aside for not deciding a question.

The submission of an existing dispute, once validly made, is not revocable without just and sufficient cause, even in the case of a submission which has not been made a rule of Court (12 M I A 112 Ref:). Agreements to refer to arbitration cannot, therefore, be rightly deemed as essentially of a personal nature, revocable at the mere will of a party. Whether a legal representative of a deceased party is or is not bound by, or entitled to enforce, the contract to refer to arbitration, depends upon the nature of the right which forms the subject-matter of the reference; that is, upon the question, whether the right is purely personal or survives to the legal representative. If, upon the death of a party to arbitration proceedings, his representative in interest becomes a party thereto and proceeds with the investigation, the award is binding upon him. When the arbitrator has made, or made and published, his award as a completed instrument, his power is wholly at an end. If after executing the award the arbitrator exercises a fresh judgment on the case and alters the award in any particular, the alteration is merely nugatory, and his act is like a spoliation by a mere stranger. Until the arbitrators have finally published their award as their final determination, they may make alterations therein. What constitutes a completion of the award may depend upon the terms of the submission, and upon the facts and circumstances of the individual case. As an infant is unable to bind himself by contract, he cannot enter into a submission, which will render the award absolutely binding on him. In the case of a pending suit, the Court may authorise a submission to arbitration so as to

Award-*Contd.*

render the award binding on the infant. A guardian may submit to arbitration on behalf of his ward so as to bind both himself and the ward; though, where the guardian is, in his individual capacity, a party to the submission, and his interest in the controversy submitted happens to be adverse to that of his ward, he has no power to submit on behalf of his ward. An award can only bind the parties to the arbitration. A verbal submission to arbitration, as a result of which title to immoveable property is likely to be affected, is valid. The allowing an amendment of pleadings is in the discretion of the Court; but the discretion is judicial and not arbitrary; and an erroneous exercise of it is capable of correction by a Court of appeal. Leave to amend ought to be granted, unless the party applying is acting *mala fide* or by his blunder has done some injury to his opponent which cannot be compensated by award of costs; otherwise, whether the original omission arose from negligence, carelessness, or accidental error, the defect may be allowed to be remedied if no injustice is done to the other side. Though an arbitrator may have been guilty of some irregularity in the course of the reference, it will not vitiate the award, if the conduct of the parties be such as shows that they have waived any objection on account of it. The waiver must be clearly made out, and the party must be shewn to have full knowledge of the defect which he is said to waive. The arbitrator must be careful to see that his award is a final decision of all matters requiring his determination, and his failure to determine any of them may completely vitiate his award; this would be specially the result where there is such a connection and inter dependence between the various matters covered by the submission that the decision and disposition of some of them only to the exclusion of others, would operate to produce injustice between the parties. But this principle has no application, if the submission can be construed to empower the arbitrator to make several awards. An award is none the less final, though it does not execute itself or preclude all future controversies: if it leaves nothing to be done but the performance of some ministerial act, it is not faulty for want of such finality and certainty; the principle applicable is *certum est quod certum reddi potest.* (That is sufficiently certain which can be made certain). The Court is always reluctant to entertain the objection that the award, as distinguished from the submission, is unreasonable. An award will not be set aside if the question undecided was not notified to the arbitrator as a matter in difference or the parties showed by their conduct that they did not mean him to decide it. **Ramji Ram v Salig Ram. 14 C L J 188.**

Award-*Contd.*

15.—Decree in accordance with award—appeal.

Where the judgment of a Court is in accordance with the award, it is not appealable. **Jagmandhar Das v Piari Lal.**

A W N 1881, 17

16.—C P C Sch. II, r 20 (=Civ. Pro. Code, 1877, Ch. 37 and s. 525)—Filing private award-Amendment of plaint taking case out of scope of Ch. 37—Appeal.

Where, on an application to file a private award in Court under s. 525, Civ. Pro. Code, 1877, the Munsiff ordered the applicant to amend the plaint, after the first hearing, misunderstanding the provisions of s. 525, by which amendment the case was taken out of the scope of s. 37, Civ. Pro. Code. *Held* that, under the circumstances, an appeal lay from the order of the Court of first instance. **Ganesh Lal v Narayan Das.**

A W N 1881, 29.

17.—Award declaring title—Subsequent suit for possession—Period of limitation.

An award which only establishes the right of the plaintiffs to certain shares without directing that possession should be given in accordance with its provision, cannot operate or be enforced as a decree. In a subsequent suit for possession, the award can be used as the evidence of their right, but cannot extend the period of limitation. **Mohan v Mohsin Ali. A W N 1881, 70.**

18.—Arbitration—Compromise by parties before arbitrator—Award on compromise—Decree on award—Civ. Pro. Code, ss. 521, 522—Appeal.

Where an arbitrator passes an award in accordance with a compromise to which the parties to the arbitration had agreed and a decree is passed on the award by the Court under s. 522, Civ. Pro. Code, 1882, such decree is not open to appeal. **Deonarain Rai v Jaisri Rai.**

A W N 1885, 259.

Award-*Contd.*

19.—Awards, power of Courts to question legality of.

Courts of Justice, in dealing with arbitration awards, are not in the position of a Court of appeal or revision, nor are they called upon to consider whether such adjudications are consistent with their own views of the rights of the parties which became the subject of arbitration. The Court can interfere with the award only on the ground of corruption or misconduct, or other circumstances similar in nature to those mentioned in ss. 520 and 521 of the Civ Pro. Code, 1882, and well recognised as consituting sufficient reasons for setting aside arbitration awards.

Parmeshri v Lachmin, A W N 1884, 148.

20.—Civ. Pro. Code, s. 522—Award—Decree in accordance with award—Award bad in law—Appeal.

A submission to arbitration provided for the appointment of two arbitrators, one to be chosen by each party, and an umpire: and it was further provided that in case of a difference between the arbitrators "the opinion of the arbitrator with whom the umpire agrees shall be considered conclusive." At the last sitting of the arbitrators an application was made for an adjournment on the ground of the illness of one of the parties. No order was passed upon this application; it was simply recorded. The umpire thereupon requested the arbitrators to record their opinions separately or jointly, and make the same over to him the same day at or before 4 o'clock. The defendants' arbitrator left the meeting, and did not record any opinion upon the subject-matter of the arbitration; but it did not appear that there was any disagreement between the arbitrators. The plaintiffs' arbitrator recorded an opinion, and the umpire, apparently without communicating with the other arbitrator, accepted that opinion and submitted an award, upon which a decree was passed. *Held* that this was no award in law, and that an appeal would lie from a decree passed in accordance with it. **Hafiz-ullah v Rahmat-ullah. A W N 1903, 159.**

21.—Arbitration—Award—Circumstances necessary to render an award complete and effectual—Publication.

In India, as in England, it is necessary to the validity of an award that it should be not only signed and executed by the person making it, but also published. By publication is meant, generally speaking, a delivery to some of the parties to the award; and probably a holding of it by the arbitrator after notice to the parties for the purpose of delivery might be held to effectuate the award. **Fatima Kubra Bibi v Shah Wilayat Husain. A W N 1899, 30.**

22.—Suit to recover money due under an award—Suit to recover unsecured debt—Limitation—Act XV of 1877 (Indian Limitation Act), Sch. II, art. 113.

Held that an award on an arbitration for the division of the property of a deceased person amongst his heirs, by which award it was provided that certain specified persons amongst the heirs should become liable for the payment of a certain specified debt due by the deceased, did not give the creditor a fresh cause of action based on the award for the recovery of such debt, but at most a fresh starting point for limitation in respect of a suit to recover it. (5 All 263, 16 All 3, Ref & Diss.). **Gopal Lalji v Raman Lalji. A W N 1897, 144.**

23.—Mere dissatisfaction does not render an award ineffectual—Agreement to repudiate.

Held that an award has the force of a binding contract or final judgment unless there has been an agreement to repudiate it, the mere expression of dissatisfaction with it by both the parties, being insufficient to render it ineffectual.

Pokerdas v Bolumal. 1 S L R 236.

24.—Suit to enforce—Award—Suit for the enforcement of an award—Specific performance—Specific Relief Act, ss. 21, 30.

Where in suit on an award to recover a certain sum of money allowed by the arbitrator, it was contended among other things that having regard to ss. 21 and 30 of the Specific Relief Act, the plaintiff was not entitled to have the award enforced. *Held*, that the objection proceeded on the assumption that the suit was one for specific performance, which in fact it was not; but it was a suit for the recovery of money and for relief incidental thereto.

Fardunji v. Jamsetji, 5 Bom L R 705 = 28 Bom 1.

Notes.—Ref: 19 M L J 220.

25—Non-delivery of—Non-delivery of verdict—Liability to be sued—Fraud.

Defendant passed a bond, in 1889, in favour of plaintiff payable in two years. In 1893, the

Award-*Contd.*

plaintiff brought a suit on the bond; but soon withdrew it as the parties agreed to refer their disputes to the arbitration of defendants 1 to 4. The arbitrators delivered no written award; and in consequence the plaintiff brought a suit against the defendants 1 to 5, alleging that the arbitrators gave only an oral award and that acting in collusion with defendant 5, they omitted to give a written award whereby his original claim was time-barred. The lower appellate Court awarded plaintiff's claim against defendants 1 to 4, but dismissed it against defendant 5: *Held*, dismissing the claim as against defendants 1 to 4, that they could not be presumed to have acted fraudulently merely because they failed to satisfy the Court that their delay was due to the negligence of the parties. **Savalappa v. Devchand, 3 Bom L R 691=26 Bom 132.**

26—Award—Objections to it—Alleged misconduct of the arbitrator-Dismissal of objections—Decree in accordance with the award—Incompetency of appeal from such a decree.

Parties to a suit nominated a sole arbitrator whose appointment was duly confirmed by the Court. The arbitrator submitted his award, to which the appellant filed a great number of objections which were all more or less frivolous. In some the arbitrator was charged with misconduct, but, on the face of the objections, it was perfectly clear that there was no misconduct within the meaning of that expression in the Chapter on Arbitration in the Civ. Pro. Code, nor anything that could justify the Court in setting aside or remitting the award. Those objections were considered and disposed of by the Court, which passed a decree in accordance with the award. From that decree the appellants appealed to the Chief Court of the Punjab, which dismissed the appeal on the grounds that the appeal could not lie, inasmuch as it did not appear that the decree was in excess of or not in accordance with the award. *Held*, that the decision of the Chief Court was perfectly right.

Hansraj v. Sundar Lal, 10 Bom L R 581=12 C W N 585=7 C L J 520=138 P L R 1908=35 Cal 648, P C=35 I A 88=80 P R 1908=99 P W R 1908=18 M L J 266=4 M L T 25=14 Bur L R 146.

Notes:—Ref:12 O C 40; Appl: 1 Ind as C 693.

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27—Appeal from an award.—

An appeal does not lie from a decree propounded under s. 522 of the Civ. Pro Code, except in so far as the decree may be in excess of or not in accordance with the award. **Ghulam Jilani v. Muhammad, 4 Bom L R 161.**

28—Time fixed for filing—Expiry of time on a holiday—Civ. Pro. Code, 1882, S. 521.

When the time fixed by a Court for filing an award expires on a day on which the Court is closed, and it is filed on the next day, *held*, that the award must be taken to have been filed within time. **Muhammad Yusaf v. Karim Bakhsh, 9 P L R 1900.**

29—Order to file — Amendment of decree—Jurisdiction-Civ. Pro. Code, ss 206,522,525,526 —

On an application made under s. 525 of the Code of Civil Procedure that an award be filed in Court, the District Judge made an order that the award be filed and a formal order was drawn up to that effect. The applicant made an application for execution of the formal order (which she called the decree of the District Judge). Her application was rejected on the ground that there was no decree capable of execution. She then applied to the Court of the Judicial Commissioner under s. 206 of the Code of Civil Procedure to amend the so-called decree of the District Judge, so as to bring it into conformity with the judgment. *Held*, that the Court had no power to grant the application under s. 206 of the Code of Civil Procedure, the order of the District Judge having been made under s. 526 of the Code, and the formal order giving effect to it being in conformity with the same. *Held*, that, having directed the award to be filed, the District Judge should, as the next step, have pronounced judgment in accordance with the award, upon which a decree could follow under the provisions of s. 526 read with s 522 of the Code of Civil Procedure. *Held*, further that on the application of any of the parties to the suit, the District Judge could proceed to give effect to the award in the manner contemplated by s. 522 of the Code.

Gulab Kuar v. Thakur Sheo Ratan Singh, 4 O C 82.

30—Award, validity of — Private reference—Some of the plaintiff's parties—Stamp, want of, objection in second appeal.—

An award on a private reference, made by some of the plaintiffs and the defendants, is binding on

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the rights of the parties to it. The award is not invalid on the ground that all the plaintiffs were not parties to it. An objection as to want of stamp cannot be taken for the first time in second appeal. **Jadu Nath Chowdhry v. Kailasdas Chunder Battacharjee, 10 C L J 41=2 Ind Cas 414=37 Cal 63=14 C W N 75.**

31—Construction of document — Award—Term in an award granting pre-emption to the co-owners over the joint family property—Property sold through Court in execution of decree—The condition of pre-emption attaches to private and voluntary sale—Court-sale not effected by the provision.

An award, which effected partition of certain family property, provided, among other things, that, in the case of a sale by any of the co-sharers of his portion of the house of residence, he should sell it to his co-sharer for Rs. 1,800, and that he should not sell it to an outsider until the expiration of two months from the date of a notice in writing saying that they(co-sharers)were not willing to buy it. The share of one of the co-sharers was subsequeutly sold in execution of a decree against him and purchased by an outsider. The other co-sharer then sued to have it declared that the purchase at the Court-sale was not binding upon him: *Held* that the privilege which the award conferred upon the co-sharers of becoming purchasers by pre-emption attached to sales made privately and willingly, and not to sales *in invitum*. **Vithal Narayan Karandikar v Maruti Narayan Kale. 12 Bom L R 582=7 Ind Cas 663=34 Bom 567.**

32—Private award—Suit based thereon independently of the summary procedure under s.515 Civ. Pro. Code, 1882—Limitation for such suit—Decree appealable—Award affecting property out of British India.—

Held, that a suit can be brought upon a private award independently of the summary procedure authorized by s. 525, Civ. Pro. Code, 1882 (=Cls. 20 and 21 of sch. II to Act V of 1908),and the decree passed therein is appealable, although there is no appeal from a decree passed in a mere summary proceeding under Ch. XXXVII of the Code (=sch. II of Act V of 1908). The difference between the two proceedings is:—(*a*) An award can only be filed, as the result of a summary proceeding,provided that it is free from each and all of the defects under s. 520. Civ. Pro. Code (=Cls. 14 and 15 of sch. II to Act V of 1908), and it can only be so filed within six months of its being given. (*b*) A suit, however, can be well based upon a defective award — the Court having power to rectify its defects—and it can of course be brought at any period which the law for the limitation of suits permits. *Obiter*: *Held*, also, that an award affecting property in a Native State cannot be converted into a decree by a British Indian Court so far that property is concerned. (77 P R 1882, Ref:) **Wazir Ali v. Sheik Mulkyar, 11 P W R 1910=34 P R 1910=5 Ind Cas 597=183 P L R 1910.**

33—Arbitration—Award—Minor bound by the award—Grounds for setting aside award—Inequality of benefit under award—Erroneous view of law taken by arbitrators.

An award, which was open to no reproach but which affected the interests of a minor, was set aside at the minor's instance on the grounds that he (the minor) derived an inequality of benefit under it and that the arbitrators had, in making the award, taken an erroneous view of the law. On appeal:-*Held*, that neither ground was sufficient to invalidate the award: since the validity of the award must be determined in the light of the circumstances as they existed at its date, and not as they transpired some years after it had been passed by the arbitrators. (2 M I A 181, Ref:) **Sakrappa Lingappa Hebsur v. Shivappa Basappa, 12 Bom L R 984=8 Ind Cas 647.**

34—Civ. Pro. Code (Act XIV of 1882), Ch. XXXVII—Award—Finality of—Appeal—Revision.

In no case will an appeal lie from a decree passed in accordance with the terms of an award of arbitration after objections have been heard and disposed of, and no question arises under s. 522. But an application for revision will lie if the Court which passed the decree has committed an error in procedure or misused its jurisdiction. When the Court passing a decree in accordance with an award has disposed of all the objections made within the time prescribed under art. 158 of the second schedule of the Limitation Act, revision does not lie on the ground of error in procedure for the Court not having considered an application containing further objections filed

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after the prescribed time.

Panna Lal v Mussammat Soman. 120 P L R 1902 F B=89 P R 1902.

Notes:—Ref. 1 P. R. 1908=58 P W R 1907, F. B. 41 P. R. 1905=63 P. L. R. 1905; Cited. 92 P. R. 1903.

35—Civ. Pro. Code (Act XIV of 1882), Ch. XXXVII—Award—Finality of—Powers of arbitrators.

A suit for possession, by partition, was referred to arbitration, and the arbitrator nominated by the parties was agreed to be the "sole arbitrator to decide the matters in dispute in this suit, including the determination what joint property, moveable and immoveable, of every description, except the immoveable property, outside British India is to be partitioned." The arbitrator finally submitted his awasd on the 29th June, 1900. The Court disposed of objections made by the defendants and passed a decree in accordance with the award. The defendants appealed to the Chief Court and prayed that the memorandum of appeal be treated as an application for revision, if it should be held that an appeal did not lie It was contended on behalf of the appellants, (1) that they submitted to arbitration under pressure, unwillingly agreed to the appointment of the arbitrator, and the submission to arbitration was therefore bad, (2) that the Punjab Courts had not jurisdiction to entertain the suit, and the reference to arbitration was therefore void, and (3) that costs should not have been decreed against them. *Held*, (1) that the objections now taken, that the appellants submitted to arbitration under pressure; that they unwillingly agreed to the appointment of the arbitrator; and that the submission to the arbitration was bad, were not taken in the original Court and could not be taken on appeal. The object of taking these objections was to set aside the award, and to allow them to be taken for the first time on appeal would be to defeat the provisions of art. 158. sch. II of the Limitation Act, (2) That an appeal did not lie on the objections taken in the original Court. (3) That the arbitrator was seized of the whole matter in dispute between the parties, except so much as was specifically excluded, and the question whether the suit was competent was one of the issues in the suit, and was as such referred to arbitration. The fact, that the issue as to competence was framed and decided by the original Court before the submission to arbitration, did not affect the arbitrator's competence to decide it as one of the issues between the parties, and the arbitrator was not bound to give an award on each point. (4) That the Civ. Pro. Code contains no mandatory provision as to reference similar to that as to the award being made within the period allowed, and the appellants could have objected that there had been no reference to arbitration, and their failure to do so did not entitle them to appeal on the ground. (5) That the order referring the suit to arbitration provided that the costs should abide the result of the finding of the arbitrator. It had not been shown that the decree for costs was not in accordance with the award. (6) That the reasons for holding that the objection on the ground that there was no reference to arbitration could not be entertained on appeal applied equally to the application for revision, and on the finding that there was a reference to arbitration, an award and a decree in accordance with that award, which the Court below had no alternative to passing, the application to set aside the award having been refused, no revision lay. (25 P R 1902, Ref,) *Per Anderson* J—The whole case was referred to the arbitrator. He was competent to decide the question of jurisdiction which had not been finally decided before the reference to arbitration. As regards revision, *held*, that no application lay, the original Court not having failed to exercise a jurisdiction vested in it by law or having acted illegally or with material irregularity in connection with the case. *Per Kensington*, J—The original Court had found in fact that there was no misconduct, and with the decree based on this finding the Chief Court had no authority to interfere either by way of appeal or revision. **Seth Hansraj v Ganga Ram. 119 P L R 1902. F. B.**

36—Decree in terms of award, appeal from —Arbitrator, misconduct of—Award, grounds of setting aside—Civ. Pro. Code, ss. 521 and 522—Appeal.—*Held*, that a decree, which is in terms of an award, is not appealable on the ground of the misconduct of the arbitrator. The terms of s. 522, Civ. Pro. Code, seem to require that a distinction shall be drawn between an award which has no legal effect being void *ab initio*, and an award which has legal effect unless and until it is set aside on any of the grounds mentioned in cl. (*a*), (*b*), or (*c*) of s. 521, Civ. Pro. Code. The award referred to in the final words

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of s. 522, providing that there shall be no appeal from the decree, except in so far as it is in excess of, or not in accordance with, "the award," clearly includes an award which the Court which passed the decree has been asked to set aside on some one or other of the grounds mentioned in cl. (*a*), (*b*) or (*c*) of s 521 and which the Court has refused to set aside on the grounds on which it was asked to do so. The decree referred to clearly includes a decree which has followed on a judgment in accordance with such award. Where therefore the Court has refused to set aside an award on the grounds mentioned in cls. (*a*), (*b*) and (*c*) of s. 521 and has given judgment in accordance with the award, the decree which follows on the judgment so given is one from which no appeal lies, except in so for as the decree is in excess of, or not in accordance with such award. **Jagan Nath v Gajadhar. 5 O C 13.**

37—Of arbitrators—No application for filing it in Court—Whether it can be pleaded in subsequent suit—Deeds—Material alteration after execution and without privity of party to be affected by it, effect of—Deeds which have a continuing effect, and deeds taking effect at once—Distinction—Costs—Relief given to plaintiff not being that which he claimed—Practice.

An award of arbitrators can none the less be *pleaded* in a subsequent suit, and if valid must be given effect to, though no application for filing it in Court has been made, or such application has been unsuccessful, if its validity has not been actually put in issue on such application. (18 Cal 414, P C Fol). A material alteration made in a written instrument after its execution and without the privity of the party to be affected by it, prevents the party in whose custody the instrument has been, from making any use of it at all. (12 C P L R 33, Fol). But there is a distinction between those deeds or clauses of a deed which have a continuing effect, or are executory, such as a covenant to pay a sum of money, and those which produce their full effect at the instant of execution, such as a conveyance of land. For no case can be found in which a deed or clause of a latter nature has been prevented from taking effect because the deed was altered after execution, so that an altered deed may be given in evidence to prove any effect produced by it in original form at the instant of its execution, or of any right which existed aliunde, and of which it is evidence. (25 All 580 Fol). In a suit brought by the plaintiff against the defendant the relief given to the plaintiff was not that which he claimed. *Held*, each party should bear his own costs throughout. **Ganpat v Ramakrishnapuri, 6 N L R 1=5 Ind Cas 425.**

38.—Suit on award—Want of jurisdiction in arbitrators can be pleaded—Binding character of award—Award operates from its date Award directing partition effects severance at its date.

In a suit to enforce an award, it is open to the defendant to urge and show that the award is not binding upon the parties for want of jurisdiction in the arbitrators. An award is equivlent to a judgment whether it has passed into a decreee or not. It is binding upon the parties. When it directs partition to be effected, it dissolves the joint family; and from the moment of its date, it severs their joint interests. (18 Cal 414, 11 Bom L R 20 Fol.). **Bhaurao Jivaji Tivle v Radhabai Laxaman Jivaji 11 Bom L R 406= 33 Bom 401= 2 Ind'Cas 431.**

39.—Award by arbitrators—Petition for withdrawal of suit—Civ Pro Code 1882, ss 373, 520 and 521, Ch XXXVII.

The general powers, relating to withdrawal of suits conferred upon the Court by s 373, Civ Pro Code, are, when an award has been duly made by an arbitrator to whom the case is referred for arbitration limited by the particular provisions contained in ss 520 and 521 of Ch. XXXVII of the Code. Where by consent a suit was referred to arbitration and the arbitrators made the award within the time limited for making it and the plaintiff put in a petition of objection to the award under s 521, Civ Pro Code, and before any order had been made on that petition, he put in an application for permission to withdraw the suit with liberty to bring a fresh suit, and that application was granted under s 373, Civ Pro Code, *held* that the order was made without jurisdiction. **Debi Churn Manna v Bijra Prasad Jana. 7 C W N 186.**

40.—Order on application to file award-Civ Pro Code, 1882 s 525.

An order made on an application to file an award under s 525 of the Civ Pro Code, is a decree within the meaning of that expression as de-

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fined in the Civ Pro Code, and an appeal lies against such order. **Ponnusami Mudali v Mandi Sundara Mudali. 27 Mad 255 F B= 14 M L J 356.**

Notes:—Fol 29 Mad 303, 126 P R 1907=88 P W R 1907=50 P L R 1908, 4 L B R 130; 7 C L J 486; 10 C W N 601=2 C L J 153 =2 C L J 80, 9 O C 205,33 Cal 757,F B= 10 C W N 609, 3 C L J 450, 100 P R 1907 =17 P L R 1908, 58 P W R 1907 F B= 1 P R 1908, 1 S L R 86, F B, 1 S L R 149, 2 Ind Cas 92=6 M L T 137=19 M L J 394.

41.—Civ Pro Code s 506 (=sch II, s 1 New Code)—'All the parties to the suit, meaning of—Decree based on award—Appeal—Judicial determination.

The words "all the parties to the suit" in s. 506, Civ Pro Code, must refer to the succeeding words, "any mattter in difference between them in the suit." The section refers to all the parties to a suit who are interested. (1887), A W N 215 Ref. Therefore, where the decree based on an award was attempted to be set aside on the ground that all the parties to the suit did not join in the submission, *held* that as the persons who were not parties to the award, never put in any appearance in the Court, and there was no matter in difference between them and any other of the persons who submitted the matter in difference between them to arbitration, the objection was not valid. Where it was alleged that the Court passing a decree on an award refused to summon two of the arbitrators in accordance with a request made by one of the parties to the arbitration, that there was no judicial determination by the Court and that consequently an appeal lay, *held* that there was the judgment of the Court which was a judicial determination, and that, although there may have been some irregularities preceding the judgment as the decree was in accordance with and was not in excess of the award, no appeal lay therefrom. **Pitam Mal v Sadiq Ali 24 All 229=A W N 1902,19.**

Notes.—Ref: 1 S L R 209; Dist; 29 All 423 =4 A L J 347=A W N 1907 147, 17 M L J 394.

42.—Arbitraton and award—Suit for specific performance of award—Assessment of compensation impossible.

The arbitrator in a dispute between the owner and the lessee of a village made an award on the questions submitted to him to the effect that the lessee should surrender possession at a fixed time within the terms of the lease that the lessee should pay the sum of Rs 800 to the lessor, and that as to arrears of rent due from the tenants, the lessee should obtain decrees and execute a conveyance of them to the lessor who was to pay to the lessee the aggregate amount of the decrees. Certain terms of the award having been performed, the lessee sued for the specific performance of the remainder. He filed with his plaint a number of decrees obtained by him against the tenants together with a sale-deed conveying those decrees to the defendant and prayed that the defendant might be ordered to accept the conveyance and pay the amount of the decrees. *Held* that even if the award were bad, the defendant having acted on it and accepted the benefits it gave him, had precluded himself from impeaching it; also that the case was not one in which it was possible to assess compensation in money for the breach of the particular condition in the award, and that the plaintiff was entitled to specific performance of the award. (1886), 54 Law Times Reports 729, Fol.). **Brij Mohan Lal v Shiam Singh 24 All 164= A W N 1901,208**

43.—Award beyond terms of reference-Ultra vires.

An award that goes beyond the terms of the reference to arbitration made to arbitrators and deals with questions in excess of those so referred is to that extent *ultra vires*. **Muhammad Mumtaz Ali Khan v Farhat Ali Khan 23 All 394 P C=5 C W N 881= 28 I A 190=8 Sar 85.**

44.—Award prohibiting partition, when effective—Devolution of property, if alterable by award—Arbitrator, effect of entry made by in award already made.

Award prohibiting partition of an estate liable to partition cannot have any binding effect except upon parties who have agreed among themselves to abide by it. An arbitrator's award cannot have the effect of making property which is divisible by law, indivisible for ever. It is not competent to an arbitrator to alter the course of legal devolution of property in a mode at variance with the ordinary principles of law governing the parties, in the absence of special custom prevailing in the family. (Appl 33 Cal 498; Ref: 13 P R 1906). An entry made by an arbitrator in

Award-*Contd.*

the schedule of the property, after he had made his award. to the effect that a particular portion had been given to the defendant as dower and was her separate property, was *held* to be no part of the award and to confer no title on the defendant. The arbitrator, after having made his award, was *functus officio*, and had no jurisdiction to make the entry which he did.

Jafri Begam v Syed Ali Raza.
23 All 383 P C=5 C W N 585=28 I A 111 =8 Sar 27

45—Suit enforcing award—Suit for specific performance of contract.

A suit founded on an award is not a suit for the specific performance of a contract, any more than is a suit based upon a sale-deed a suit for the specific performance of the contract of sale, and the mere fact that the title of the parties to the property had been declared by the award sued on could not make any difference. (23 Mad 593, Foll.; 5 All 263, 16 All 3 Dist.).

Sheo Narain v Beni Madho
23 All 285=A W N 1901, 83

Notes.—Fol: 15 C P L R 115; 7 O C 369, 33 Cal 881=4 C L J 162; Ref, 10 O C 218, U B R 1909, Limitation 9; Dist. 26 All 497 =A W N 1904, 72.

46—S. 522, Civ Pro Code, 1882—Appeal—Arbitration—Decree in accordance with award—Legality or validity of award.

In a suit, in which there were several defendants, one of the defendants alone appeared and the others did not enter any appearance at all. The plaintiff and the defendant that appeared, applied for a reference of the case to arbitration and the suit was accordingly referred and a decree was passed in accordance with the award. *Held*, the defendants, who did not appear, could not challenge the decree by way of appeal on the ground that they were not parties to the reference and that, consequently, there was no legal and valid award. It was also decided in this case, that it was unnecessary to go into the question, whether the award was or was not valid by reason of the fact that some of the defendants did not join in the reference. (29 Cal 167=29 I A 51, P C Foll; 2 C, L J 153, 2 C L J. 142 Appr; 9 C W N 873 Diss.)

Chairman of the Purnea Municipality v Siva Sankar Ram. 33 Cal 899.

Notes.—Fol: 11 C W N 1152.

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47—Binding character of award—Award not an agreement but a judgment—Parties cannot nullify an award by non-action, but must agree mutually to treat it as nullity.

An award is not a mere agreement but is equivalent to a judgment. It is binding between the parties in all matters which it professes to decide. When once a matter has been decided between the parties, the parties ought to be concluded by an adjudication whatever it may be. In order that the parties should be remitted to their previous rights, it is not enough that the award was not enforced or that even both parties objected to it. There must be positive evidence that both parties agreed that the former state of things should be restored. 19 Mad 290 Foll.

Laldas Jibhai v Bai Lala. 11 Bom L R 20 =5 M L T 226=1 Ind Cas 105.

48—Ss. 522, 523, 525, Civ Pro Code, 1882—Punjab Courts Act (XVIII of 1884), s. 70—Arbitration—Award—Application to file—Objections to filing of award—Appeal—Revision.

An application was made under ss. 523 and 525 of the Code, before the arbitrator had made his award. At the hearing, objections were raised *inter alia*, that the award dealt with matters not referred to arbitration and that there had been a previous award. The Court, without deciding the objections, passed a decree in accordance with the award. On appeal, the application was dismissed on the ground that the reference to arbitration did not cover the matters dealt with by the award. On further appeal, it was contended that the appeal against the decree of the Original Court was not competent, that the appeal was barred by time and that the award was valid. *Held*, (1) that the proceedings being under ss 523 and 525 of the Code, an appeal lay as to the fact of reference and the award being covered by the reference. (84 P R 1901=112 P L R 1901 Foll.; 25 P R 1902, P C., Dist.); (2) that the appellant was entitled to deduct the time spent in making the review of judgment and, allowing the time so spent the appeal was within limitation; (3) that it was not necessary that the award should have been given before application was made under ss. 523 and 525, Civ Pro Code, that it was not shown that there had been any previous final award and that the agreement to refer included all the matters in dispute. The lower appellate Court held that the objections filed by the defen-

Award-*Contd.*

dant to the award were filed within time and should have been disposed of by the Original Court. *Held*, that this finding was correct but this question could not be dealt with on appeal. On revision, the Chief Court directed the original Court to receive the objections and dispose of them according to law. **Bhagwan Singh v Ram Kaur. 38 P L R 1906.**

Notes.—Dist: 80 P R 1909.

49—Arbitrator deciding by lottery, if is an —I C A s. 30—Wager—Agreement to decide suit by lottery is a wagering contract and void as opposed to public policy. Suit for possession of land.

The lower Courts dismissed the suit on the ground that there was an award by an arbitrator on reference made to him. As a fact the arbitrator only put a lottery on the parties agreeing to it and he who got the price ticket had the property. *Held*, that there was no arbitration, and that there was no *decision* by the arbitrator which can be called an award. *Held*, also, that the agreement to settle the dispute by lottery was *ab initio* void and forbidden by s 30, Indian Contract Act (22 Mad 212 Ref). **Kaluram v Ram Dayal. 5 N L R 107 = 3 Ind Cas 55.**

50—Civ Pro Code, s. 522—Award—Decree in accordance with award-Defendant not appearing to file objections—Ex-parte decree.

Where the defendant did not appear and file objections to an award, and decree was passed in accordance with the award under s. 522, Civ. Pro. Code, the decree cannot be said to have been passed *ex-parte* and the order reviewing it was held to be illegal. **Sidhu Ram v Gaman. 10 P L R 1901.**

51—Order rejecting application for filing award in Court under s. 525, Civ. Pro. Code, appeal from—Memorandum of appeal to be treated as application for revision under s. 622, Civ Pro Code. Certificate under s. 8, cl (c), Act XIV of 1891, two Judges hearing application for revision, in the absence of.

At the end of the memorandum of appeal from an order rejecting an application that an award may be filed in Court under s. 525 Civ Pro Code, the appellant stated that even if no appeal lay, the Court was justified in interfering with the order of the Court below in the exercise of its revisional powers under s. 622, Civ Pro Code. *Held*, that the Court could not deal with the case in the exercise of its revisional opwers under s. 622, Civ Pro Code. *Held*, that an appeal did not lie. *Held* further, that an application for the revision of the order of the lower Court would not be a proceeding which it was incumbent upon the two Judges, sitting together, to hear in the absence of the certificate referred to in s. 8, cl (c) of Act XIV of 1891.

Maharaj Singh v Lochan Singh. 1 0 C Sup Vol 22.

52—Ss.508, 514 and 521, Civ Pro Code, 1882 —Limitation Act, sch. II, art. 158—Award made and filed after expiry of time fixed—Appeal.

When a suit was referred to arbitration by a Court in compliance with an application of the parties, it fixed a time for the making of the award. The award, however, was made and filed in the Court after the time fixed by it. Neither party had applied for an extension of time nor had any order been made, by the Court itself, for extension, before the expiry of the time fixed. *Held*, that an award made after the expiry of the time fixed by the Court, is *ab initio* void. It cannot be validated by an acceptance thereof by the Court after the expiry of the time, nor by an order made by the Court, for extension of time, after the making of the award, because, when an award has once been completed and delivered into Court, it has no power to grant an extension of time under s. 514, Civ Pro Code. (13 All 300, 11 Mad 85, Foll.; 15 Mad 384, 14 All 343, Ref.). A decree passed on such an invalid award is appealable. (29 Bom 285, 16 Cal 482, 24 Cal 469, 17 Bom 357, 18 All 422, Ref.). Where an award is made after the expiry of the time prescribed by the Court for the making thereof, the Court ought to take judicial notice of its validity (13 All 300 Fol.) notwithstanding the fact that neither party has taken any objection thereto. Art. 151 of the Limitation Act is inapplicable to such a case. **Kewal Lodhi v Baij Nath. 2 N L R 81.**

53—Ss. 518, 522, 588, (26) Civ Pro Code, 1882—Modification of award under S. 518—Appeal—Power of appellate Court to enter into question of misconduct or corruption of arbitrator.

An appeal, under s. 588 (26) of the Civ. Pro. Code, is limited solely to the question of the correctness of the order passed under s. 518; s. 522 of the Code does not allow an appeal from a decree based upon so much of an award as disposes of the matter referred to arbitration. The word 'award' in the last sentence of s. 522 means

Award-*Contd.*

the modified award where the original award is modified. The concluding sentence of s. 522 of the Code does not empower an appellate Court to enter into the question of the corruption or misconduct of an arbitrator merely because he has delivered an award, which includes an adjudication on a matter not submitted to him.

Kalu v Khair Din. 13 P R 1906

54—Judgment—Arbitrators—Review.

A judgment passed in accordance with the award of arbitrators is open to review.

Buta v Guni Das. 111 P R 1881.

55—Ss. 521, 588—Civil Pro. Code, 1882—Award—Objection of award—Award set aside—Appeal.

Held, that no appeal lies from an order under s. 521 of the Code setting aside an award. (8 C W N 390 Fol ; 10 All 8, Overruled).

Ganga Prasad v Kura. A W N 1906, 64=3 A L J 168=28 All 408.

56—Ss. 522 and 525—Civ Pro Code, 1882—Award, order refusing to file, appeal from—Application to file an award—Appeal.

An order dismissing an application under s. 525 of the Code, to have an award filed in court is not a decree and is not appealable. In s. 522 the words "upon the judgment so given a decree should follow" refer to a judgment according to the award and not to a judgment or decision that the award is invalid and not binding on the parties. (27 Mad 255, 18 Cal 414, P C; 29 Cal 167, 26 All 205, 28 All 21, 25 Cal 757 Ref).

Ram Sewak Das v Dharm Das. 9 O C 205B.

Notes—Ref, 11 O C 116.

57—S. 522—Civ. Pro. Code 1882—Decree made in accordance with an award——Appeal against the decree depends on the validity or otherwise of the award.

As soon as an award has been made and filed in Court, the powers of the arbitrators come to an end; they become *functus officio*, and it is not open to a dissentient arbitrator to come in, afterwards, and sign the award, nor has the Court any power to allow him to so sign it. The award, if signed, subsequently, becomes illegal and invalid on that account. The question whether, under s, 522 of the Code, an appeal lies against a decree made in accordance with an award, depends upon whether the award itself is valid and legal The said section pre-supposes a valid and a legal award, and not an award, upon which no decree could be pronounced. (13 All 300=18 I A 55, 23 All 383, 25 Cal 141, 29 Cal 167=29 I A 51, Ref.) **Ramesh Chandra Dhar v Karunamoyi Dutt. 33 Cal 498.**

Award-*Contd.*

58—Civ. Pro. Code (XIV of 1882), ss. 521 and 522—Arbitration—Award—Finality of—Appeal—Revision.

The words of s. 522 of the Civ. Pro. Code, are very clear and stringent and forbid an appeal except into so far as the decree does not respond with the award. Where the determination of a matter by the award is not included in the decree, an appeal to that extent lies against the decree, but the appellant has no right to open the whole case on appeal. A revision application against a decree based on arbitration award on the ground of material irregularity is competent but it must have reference to the proceedings of the lower Court and not to those of the arbitrator. The language of s. 520 of the Civ. Pro. Code does not make the remitting of the award compulsory on the Court but leaves it to a discretion. A wrong exercise of discretion does not give any party right to apply for revision. When the parties to a dispute refer the whole case to the arbitrators, and the arbitrators erroneously decide a matter which does not actually fall within the scope of the case, their error is not one which can be corrected by the Court.

Sita Ram v Dhani Ram. 35 P L R 1904.

59—Award not filed in Court within six months, enforcement of specific performance—Joint property, suit for division of—Limitation Act, sch. II, art 113—Civ. Pro. Code (1882), s, 525.

The fact that an award has not been filed in Court does not make it invalid, the provisions of s. 525, Civ. Pro. Code, being not imperative. (20 Mad 490, 20 W R 420, Fol). *Held*, also that a suit to enforce an award cannot be treated as a suit for specific performance of contract within the meaning of art. 113 of the second schedule to the Limitation Act of 1877. (23 All 285, Fol.). *Held* also that where by an arbitration a property has been awarded jointly to some members of the family alone, a suit can be brought by any of such members against the others for the division of that property alone without including the property which jointly belonged to the whole family. 23 All 216 Foll. **Thakur Sheo Narain Singh v Thakur Bishunath Singh. 7 O C 369.**

60—Suit to set aside—Evidence recorded by umpire alone—Duty of arbitrators—Invalid award.

Award-*Contd.*

In a suit to set aside an award on the ground that from the commencement to the close of the proceedings the arbitrators did not attend a single sitting and that the umpire alone recorded the evidence in the case: *Held* that until all the arbitrators and the umpire attend every sitting, hear all the evidence, bring their minds to bear on the points at issue, and give an award according to their judgment on the merits of the evidence. there can be no award, in fact, made by them. **Harpal Singh v Amir Singh. 1 O C 181.**

61—Arbitration—Award—Ss. 508, 521, 522, Civ. Pro Code, 1882—*Appeal.*

An award passed without the submission to arbitration of all the parties interested in the subject-matter of it, and without an order of the Court as prescribed by s. 508, referring the matter in dispute to the determination of arbitration and fixing a time for the making of an award, is not an award in law. *Held*, therefore, that, where an award is made without the submission of all the parties, and without fixing a time for the making and a decree is made in accordance with it, an appeal is not thereby barred **Negi Puran v Hira Singh 6 A L J 333=1 Ind Cas 146.**

Notes.—Ref. 31 All 450=6 A L J 496=2 Ind Cas 363.

62.—Award made by financial Commissioner in dispute regarding maintenance—Rules of the British Indian Association—U. P. Act, I of 1869, s. 33.

Against S S. a Talukdar. A and S put in claims to be entitled to shares in the estate. Their claims were dismissed by the Financial Commissioner, Mr Davies, on the 27th August 1867; but he advised them to accept any maintenance awarded to them by the Committee of Talukdars. Subsequently on the 9th January, 1869, the Financial Commissioner made the following award in respect of their claims:—"The shares in compliance with Mr. Devies' order have applied to the Talukdars' Committee..... The case has now come to me for disposal, not judicially but as supervisor of the Talukdars' proceedings .....A who is childless will receive for his life a two annas share in the estate. S and his heirs will receive in perpetuity a 3 annas share in the same estate. On the death of A, his share will be divided equally, one anna will revert to S S and his heirs and successors, and one anna will go to S and his successors." A died and one anna accordingly went to S making his share up to 4 annas and one anna reverted to

Award-*Contd.*

S S. S was put in possession of land having a gross rental equivalent to the profits of a 4 annas share. The plaintiff. the son of S S, sued the defendants, the descendants of S alleging that the award of the 9th January, 1869 was in the nature of an award for maintenance and must be read subject to the rules of the British Indian Association framed in 1867 and that S having died, he was entitled under those rules to 25 per cent. of the gross rental from the first generation of his heirs as rent payable by the defendants to himself. The defence set up was that the Financial Commissioner was acting purely as an arbitrator and not as in any way connected with the British Indian Association and that the rules of British Indian Association could not be read into that award the effect of which was to confer a share in absolute proprietary right on S and his heirs. *Held*, that the Financial Commissioner, when making his award of 9th January, 1869, was acting as a private gentleman and not in any official capacity and that his award should not be treated as award made by the British Indian Association or read subject to the rules of that Association.

Ganga Bakhsh v Dalip Singh. 7 O C 218.

Notes:—Ref: 9 O C 179.

63.—Award—Provision in award to pay a certain sum——Person not a party thereto, whether can take benefit of it—Implied trust.—

Where, in an award to which the plaintiff was no party, a provision was made that defendant should pay Rs. 100 to plaintiff on the responsibility of his share of the property, and it was intended entirely for the benefit of the defendant's brother. *Held*, that there was no trust created in favour of the plaintiff, and that he acquired no interst under the award as he was no party to it. (11 I A 20=6 All 322, Ref:).

Shrinivassaya v Sitamma. 5 M L T 199.

64—Power to extend time "for making award"—Arbitration Act (IX of 1899).

The Court is competent to extend the time for "making" the award, even after the award has been made by the arbitrator. (13 All 300, 14 All 343, 9 Mad 475, Ref:). **Seth Utoomal Vasoomal v Seth Haridas Asanand. 4 S L R 26=7 Ind Cas 595.**

65.—Legality of award opposed to Hindu Law of Inheritance.

An award of arbitrators cannot be questioned on the ground that it is opposed to the Hindu

Award-*Contd.*

Law of Inheritance. 1 C L R 130, 8 C P L R 102, Ref. **Mt. Janki v Pusa *alias* Umrao. 14 C P L R 94.**

66.—Binding force as against parties to submission—Effect of signature to award—Validity of award made in excess of authority.

An award of arbitrators derives it binding force as against the parties entirely from the previous submission of the latter to the jurisdiction of the arbitrators and the subsequent signatures of the parties in token of consent does not in any way affect the character of the document. It is neither more binding upon the parties when signed by them nor less binding when they do not sign it. It is binding in the former case because it is the judgment of a tribunal to which the parties had unconditionally submitted before adjudication and not because they had subsequently acknowledged the justice of the decision. Where the arbitrators had been directed by the parties to divide certain properties and had not been directed to do anything more a decision by them as to the respective shares of the parties without making a complete division of the property is not valid. (2 Cal 386, Dist.) **Jagannath v Rambux. 6 C P L R 95.**

67.—Validity of award by majority.

An award to be valid must be the unanimous award of all the arbitrators unless the agreement of reference allows a majority to give a decision. (19 W R 47, 7 Mad 174, Fol.) **Rama v. Mana. 12 C P L R 112.**

Notes:—Cited, 4 N L R 184.

68.—Civ. Pro. Code (Act V of 1908), s. 2—Arbitration—Award—Objection against—Order disposing of objections—Apppeal-Revision-Order Decree.

The plaintiff preferred objections to an award in a case referred to arbitration through Court. The Court, by an order dated the 15th February, 1910, having considered the objections, passed an order in these terms "I refuse to set aside this award." The case was adjourned to several dates for arguments on other aspects of the dispute, but before any order was passed, the plaintiff appealed against the order refusing to set aside the award. In reply to the plea that the order was not appealable it was contended that the order was a "decree" within the meaning of s. 2 cl. 2 of the Civ. Pro. Code, and it was also urged that the appeal may be treated as a revision. *Held*, that the contention was not valid and an appeal was not competent against the order, for it could not be held to be a decree. *Held*, also that the appeal could not be treated as a revision; for where in arbitration

Award-*Contd.*

proceedings an appeal is not allowed, revision would be still more objectionable. (35 P R 1902, P C, Fol.) **Narpat Rai v Devi Das. 1 P L R 1911=9 Ind Cas 385=12 P W R 1911.**

69.—Reference under mistake of right Mistake one of law-Award not to be set aside.

Where an award was made in pursuance of an agreement to refer, the award could not be set aside on the ground that the parties to the agreement laboured under a mistake that all instead of one of them were entitled to the estate in question and the mistake was one of law and not of fact. **Manbodh v Bari Bohu. 3 C P L R 89.**

70.—*Res judicata*—Order refusing to file award—Suit to enforce it—Whether barred.

An order of a Court refusing to file an award does not appear as *res judicata* in respect of a subsequent suit brought to enforce it, inasmuch as no appeal lies from the order refusing to file it. (28 All 21, 32 All 484, Ref). **Shib Charan Das v Ramchunder Sarup. 8 A L J 315.**

71.—Setting aside award—Misconduct of arbitrators—Mere suspicion not sufficient—Express or implied fraud or corruption necessary.

To induce the Court to interfere with an award on the ground of misconduct there must be something more than suspicion. The misconduct must amount to corruption or fraud or to something from which fraud or corruption might be inferred. The mere fact that an arbitrator is indebted to one of the parties is not sufficient to set aside an award, though it may be a matter of suspicion. **Mukund Ram Sukal v Saligram Sukal. 2 C P L R 202.**

72.—Reference to arbitration without intervention of Court—Order of Assistant Collector, first class, directing award to be filed—Whether appeal from such order lies to District Judge.

Held, that no apeal lies to the District Judge from an order of an Assistant Collector, first class, directing that an award made on a matter referred to arbitration without the intervention of the Court should be filed. **Gobardhan Prasad v Gurprasad Ram. 8 A L J 1090.**

73.—Award—Special performance—Suit on an award not a suit for specific performance of a contract—Limitation—Limitation Act (IX of 1908), sch. I, arts. 113, 116, 120—Specific Relief Act (I of 1877), s. 30.

A suit for recovery of money payable to the plaintiff under the terms of an award based upon a registered agreement to refer to arbitration, and which has not been paid, is not a suit for enforcing the specific performance, but one for com-

Award-*Contd.*

pensation for non-compliance with the terms of the award, and for purposes of limitation is governed either by art. 116 or art. 120 of the Limitation Act. S. 30 of the Specific Relief Act lays down that, when the question is one of specific performance, the Court has the same powers, and should proceed upon the same principles, in the case of an award as in the case of a contract. The way to consider the question is to take the terms of the award before the Court and to see whether, if the same terms had been embodied in a contract between the parties, the suit is or is not one in which specific performance of those terms is claimed and ought to be decreed.

Kuldip Dube v Mahant Dube 8 A L J 1138.

74.—Award, grounds for setting aside of—Arbitrators, powers and duties of—Misconduct of arbitrator—Civ. Pro Code, 2nd schedule, paras 14, 15 and 20—Limitation Act, art. 158.

Subject to any limitations contained in the instrument of his appointment and to any statutory directions as to the manner in which he is to discharge his duties, an arbitrator may conduct his proceedings in any manner he thinks fit, so long as he acts in accordance with the principles of justice, equity, and good conscience. He is not fettered by rules of practice which Courts of law adopt for general convenience, nor bound by the adjective law laid down in the Code of Civil Procedure and the rules made under it, or the rules relating to evidence to be found in the Indian Evidence Act. He may also, in forming his judgment, act upon merely moral consideration of which a Court of law could not take cognizance. Where the award is good on the face of it, the parties cannot object to the arbitrator's decision either upon law or fact, and the Courts will not ordinarily review his discretion, provided he acts within his authority and behaves fairly to each party. Nor will they interfere with his judgment or any mere ground of mistake. An arbitrator called as a witnesses in an action on an award might be examined as to every matter of fact with reference to the making of the award, and whether in his estimate of the compensation he took into consideration any matters not included in the reference and therefore not within his jurisdiction, but he cannot be questioned as to the elements which he took into his consideration in determining the *quantum* of compensation, or so as to scrutinise the exercise of his discretionary power to award compensation. *Held*, further, that the principles accepted in the English law for regulating the conduct of the arbitrators are not inapplicable to arbitration-proceedings held in this country. Nor are the powers of the Courts in India to review the proceedings of arbitrators any more extensive than they are in England *Held* also that art. 158, Limitation Act, cannot apply to a written statement which a defendant is required to file in answer to an application for the purpose of having the award made a rule of Court. **Badruddin Hasan v Amir Begam. 14 O C 308.**

Award-*Cont'd.*

75.—Award, private arbitration——Partial enforcement of award by Court—Jurisdiction of Court to give a decree on portion of award—Award, rule of construction of—Liberal construction—Arbitrator, power of—Substantial and complete justice, if sufficient—Award, beyond reference, if enforceable-Objection to the award, it can be taken by the party in whose favour it is made—Civ. Pro. Code (Act XIV of 1882), s. 525.

An arbitrator is not bound by mere rules of practice which Courts have adopted for general convenience, and he has greater latitude than Courts of law to do complete justice between the parties according to equity and good conscience. In this view, Courts are never astute to entertain technical objections to awards. The Courts will not review awards upon the merits, they will not constitute themselves as Courts of appeal to examine whether or not the conclusion at which the arbitrator arrived was sound, both in point of law and in point of fact. An arbitrator cannot, however, go beyond the precise questions submitted; it will not do for him to determine any claims or demands, though existing between the parties to the submission, save only those which they have agreed that he shall decide. The submission furnishes the source and prescribes the limits of the authority of the arbitrator. The arbitrator is inflexibly limited to a decision of the particular matters submitted; he cannot take upon himself an authority which the submission does not confer. Where, the matter in controversy submitted to the arbitrator was whether the plaintiff had a right of way over a special strip of land, and not whether the plaintiff should have access to a particular part of the village across the land of the defendant, the arbitrator was bound to base his decision upon an investigation of the first question, and, he had no authority to lay out a new path on a piece of land over which neither party alleged a right of way. It is only the party prejudiced by the exercise of excessive authority by the arbitrator who is entitled to object to the award by reason of it; the party, in whose favour the erroneous action of the arbitrator operates, cannot be heard to impeach the validity of the award on this ground. *Semble*:—It is not competent to the Court, in a proceeding under s. 525 of the Code of 1882, to direct that the award be filed in part: the Court is bound to refuse an application made to it for filing the award, if in its opinion the award is open to attack in part. **Narsingh Narain Singh v Ajodhya Prasad Singh 15 C L J 110.**

76.—Award—Construction—British Indian Association, award made by—"in perpetuity," meaning of—Suit for possession after the death

Award-*Contd.*

of the grantee—Jurisdiction of Civil or Revenue Court—Oudh Rent Act (XXII of 1886), s. 108 (5-A)—Resumption of rent-free grant—Suit for ejectment against transferee.

Under an award of the British Indian Association, the appellant's predecessor-in title was granted a village rent-free 'in perpetuity." *Held*, that the award did not confer any under-proprietary right; nor did the use of expression "*in perpetuity*" imply an extension of interest beyond the life-time of the grantee [8 All 39, 12 I A 159, 23 All 194, 7 O C 90, *Rel. on*, 23 Cal 838, 23 I A 64, Dist.]. A suit for possession of the land, after the death of grantee, against the transferee of a non-transferable grant, is not a suit for resumption within the meaning of s.108 (5-A) of the Oudh Rent Act. It is merely a suit for ejectment of a trespasser, and as such is cognizable by the Civil Court. [3 O C 48, *Rel on*]. A *talukdar* is entitled to sue in ejectment against the transferee of a non-transferable grant alone, without at the same time or previously suing for resumption of the rent-free grant as against the grantee or his heir. **Shambhu Nath v Rudra Pratab Narain Singh. 12 Ind Cas 324.**

77—Misconduct—Failure to hear evidence.—Whether the arbitrators should or should not hear evidence and the parties by counsel or otherwise must depend on the particular circumstances of every case, the arbitrators exercising, in a judicial manner, their discretion in the matter. The refusal to hear evidence in a case where the arbitrators cannot decide a matter in dispute without hearing evidence would amount to a misconduct on the part of the arbitrators. It is improper for the arbitrators not to hear evidence to ascertain as to who are the persons liable on a contract entered into in the name of a firm. An award made against a firm, without ascertaining who are the persons who constitute it, is, on the face of it, bad, and no Court can make a decree, in such circumstances, upon the award against a firm **Hurdwary Mull v. Ahmed Musaji Selaji, 13 C W N 63=1 Ind Cas 371.**

Notes:—Ref: 36 Cal 388=13 C W N 297.

78—The Second Schedule r. 15 (1882 S. 521) Arbitration—Award making and delivery of—Code of Civil Procedure (XIV of 1882) sections 508, 514, 516, 521.

The validity of an award made under the order of a Court depends upon the making of it within the period allowed, and it is immaterial on what date it is filed. (22 Mad 22=13 Bom 119 follo=8 All 513 not follo.=13 All 300 P.C,ref.to).

An award cannot be "made" till the mind of the arbitrator has been declared, and such declaration requires, authentication by signature. But in S 516 Civil Procedure Code the word "made" is used in the untechnical sense. **Asadullah v. Mahammad Nur, 2 A L J 201= 1905 A W N 47=27 All 459.**

79—O. 23 r. 3 (1882 S. 375)—Oral submission—Arbitration Act (IX of 1899)-Necessity for submission in writing—Award on oral submission—Validity—Civil Procedure Code (Act XIV of 1882), S. 375—Adjustment of suit—Award on oral submission not an adjustment.

The parties to an administration suit, consented (at the hearing), to its being referred to the Commissioner, to take the usual accounts and to determine their respective shares.

Accounts and objections were filed before the Assistant Commissioner, and the parties appeared before him, when it was orally agreed, to save the costs of a lengthy inquiry, that the Assistant Commissioner should deal summarily with all matters in dispute and draft terms by which the parties were to be finally bound, and the Assistant Commissioner personally explained to defendants 1 and 6 that they would be bound by his decision even if he decided to give them one rupee. To this they agreed. The Assistant Commissioner, in due course, arrived at a decision, but defendants 1 and 6 considered that it awarded them an insufficient amount and declined to be bound by it. Upon application being made by plaintiff that an adjustment of the suit might be recorded under S. 375 of the Civil Procedure Code, on the basis of the Assistant Commissioner's decision.

Held, that there had been no adjustment of the suit. There had been no written submission to arbitration as provided by S. 4 of the Indian Arbitration Act, and, consequently, there had been no legal and valid reference to arbitration, and the Assistant Commissioner's award (for it really was an award and nothing else) had no legal foundation, and could have no legal consequence. As there had been no reference to arbitration and no award, there had been no adjustment.

Semble, that the Indian Arbitration Act applies to such an arbitration.

Where a special procedure is provided for extraordinary extra-judicial methods of setting disputed claims, *semble*, that it was the intention of the Legislature, that that procedure and no other was to be followed. (20 Bom 304 and 26 Bom 76, commented on and distinguished). **Rukhanbai v. Adamji Shaik Rajbhai, 10 Bom L R 366=33 Bom 69=1 Ind Cas 622.**

80—S. 25 (2)- Jurisdiction—Compensation—Award. Where no claim pursuant to a notice under sec. 9 of the Land Acquisition Act was made by a party interested to make a claim, *Held*,—That the Land Acquistion Judge under sec. 25, sub- sec. (2) had no power to make an award for an amount exceeding that awarded by the Collector, unless the claimant satisfied him that he had sufficient reason for refraining from making his claim in due time. The Judge should state his reasons for allowing such a person to prefer his claim. **The Secretary of State for India in Council v Govind Lal Bysak. 12 C W N 263.**

81—S.2 Cl.15 Art 45 (c)-Instrument of partition—Award directing a partition-Stamp:- An award whereby the arbitrators indicate the division of property among the rival litigants is an instru-

Award-*Concld.*

ment of partition within the meaning of S. 2 Cl. 15. **Kalidas v Tribhuvandas. 8 Bom L R 869=31 Bom 68.**

82—An award was made by arbitrators in England directing Defendant to pay Plaintiff's a certain sum. The award was by an order of the 1st. March 1902 of High Court, Q B D: England, directed to be enforced in the same manner as a judgment. Defendant left England and left the sum unpaid. Plaintiffs instituted suit in the Original Side of the High Court of Calcutta to recover the said sum but at the time of the institution of the suit. Defendant neither dwelt nor carried on business nor personally worked for gain within the limits of its original jurisdiction. Plaintiff's Solicitor, however, at an interview in Calcutta with Defendant had given an undertaking to Defendant not to sue him until he heard from Plaintiffs in consideration of Defendant's undertaking to pay £500 immediately in part payment.

Held,—That, that the Defendant's undertaking on consideration of Plaintiff's attorney forbearing to sue was not a "cause of action" within the meaning of cl 12 of the Chapter and the High Court had not jurisdiction to entertain the suit (22 Q B D 128; L R 8 C P 107) referred to.

Obiter per Maclean C J—An order under S. 12 of the Arbitration Act (52 & 53 Vic. C 49) enforcing an award made in England is not such a judgment that a suit in this country can be instituted on it as on a foreign judgment.

Deep Narain Singh v Minni Dietert 8 C W N 207=31 Cal 274.

83—Sch. II r. 16 (1882—Ss. 522, 506)—Appeal from award-Objections-Alleged misconduct of the arbitrator—Dismissal of objections—Decree in accordance with the award—Incompetency of appeal from such a decree. No appeal lies against a decree passed in terms of the award made on a reference to an arbitration under S. 506, C. P C. on the ground of misconduct on the part of the arbitrator, except in so far as the decree is in excess of, or not in accordance with, the award. Objections such as those filed by the appellants are more or less frivolous and are not misconduct within the meaning of that expression in the Chapter on Arbitration in the C P C. **Hansraj v Sundar Lal and Dwarka Das 7 C L J 620=12 C W N 585 =18 M L J 266=10 Bom L R 581= 35 Cal 648=35 I A 88 P C=138 P L R 1908=99 P W R 1908=14 Bur L R 146 =4 M L T 25=80 P R 1908.**

Award, appeal against decree interms of.

See Appeal—Arbitration.

Award by arbitrators.

See (1) Madras boundary Marks Act.
(2) Arbitration.

Award by one arbitrator only, effect of.

See Arbitration-Award.

Award made but not filed within the time specified by order of Court.

See Arbitrations.

Award, making and filling of

See Arbitration.

Award not disposing of all the matters referred

See Arbitration.

Award of Arbitrators.

See Arbitration.

Award of arbitrators for division of family property.

See (1) Stamp Act.
(2) Arbitration.

Award of commissioners conclusive.

See Nawab Nizam of Bengal debts Act.

Award of Compensation

See Land Acquisition Act.

Award set aside on the ground of misconduct of arbitrator

See Arbitration-Awards.

Awards, suits concerning

See Right of suit.

Ayautaka Stridhan.

See Hindu Law—Stridhan.

Ayautaka Stridhan Descent.

1—Hindu Law, Inheritance— Ante-nuptial settlement—Absolute interest—Mitakshara—Mayukha—Construction—Co-widow—Husband's brother's son—Brihaspati—Dayabhaga—Stridhana.

By an ante-nuptial settlement the property now in dispute was conveyed by her husband to K, her heirs, executors, administrators, assigns for ever, and it was provided "if the said K shall die after the said intended marriage had been celebrated and completed without leaving issue of the said intended marriage, who shall succeed to a vested interest in the said property, then the said property shall be dealt with as she may direct or declare by Will or Deed or failing any Will or Deed, then the same shall vest in her legal heirs according to Hindu Law of the Bombay School".

Held, whether the deed is to be construed according to English Law or by Indian Law. K took under it not a limited interest only, but an absolute estate of inheritance. **Bai Kesserbai v. Hunsraj Morarji, 4 C L J 9= 16 M L J 446=30 Bom 431=33 I A 176 P C.**

End of Vol. 1.